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ARTICLES

BOOK REVIEWS

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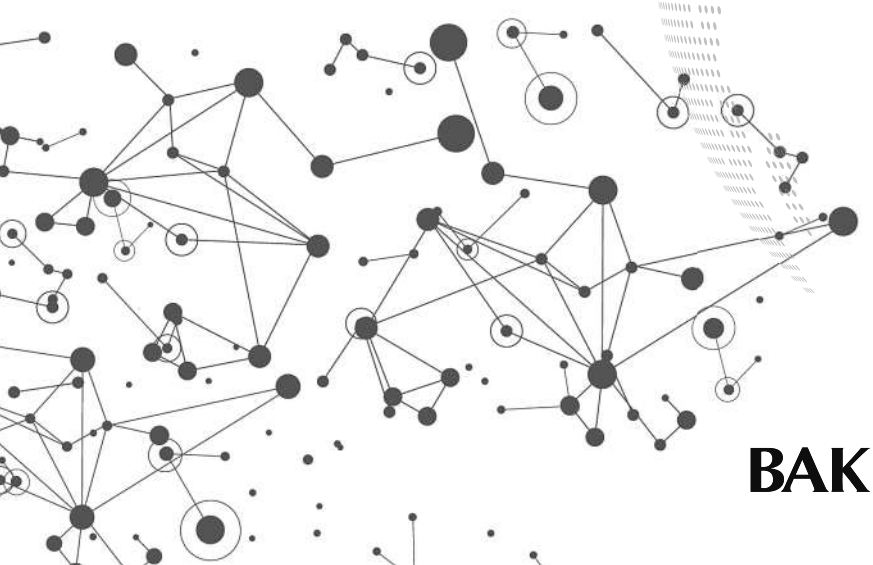

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COMMITTEE REPORTS

Neither the reports of the Energy Bar Association Committees nor the annual review of the Canadian energy law developments are included in the print version of the Journal. Rather they are published online on the EBA's website at www.felj.org. Persons citing to the reports should use the following format: [Title of Report], 44 Energy L.J. [page number] Online (2023), [link to report]. Included in the full electronic version of the Energy Law Journal, Volume 44, No. 2, are the following reports:

Natural Gas

Practices Steering

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2023 Serena A. Rwejuna

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Paul E. Nordstrom Service Award

This Award was created in memory of Paul Nordstrom, a past President of the Energy Bar Association (EBA) and motivating force in the organization of the Charitable Foundation of the EBA (CFEBA). The first award was given to Paul posthumously. It is an award to honor and to recognize exemplary long-term service or a particularly significant example of public service by a current or past member to the community through the EBA, the CFEBA, or the Foundation of the Energy Law Journal. Exemplary community service outside of these organizations may also be considered as a criterion for the Award.

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2023	Kelli Cole
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ENERGY LAW JOURNAL

The Energy Bar Association is an international, non-profit association. Founded in 1946 as the Federal Power Bar Association, the Association currently has approximately 2000 members. The Association's voluntary membership is comprised of government, corporate, and private attorneys, as well as energy professionals from across the globe, and includes law students interested in energy law. The mission of the Association is to promote the professional excellence and ethical integrity of its members in the practice, administration, and development of energy laws, regulations, and policies. In addition to publishing the *Energy Law Journal*, the Association organizes and sponsors a number of activities, including two national conferences a year, and numerous continuing legal education (CLE) programs each year. The Association also sponsors eight formal chapters in the United States and Canada and committees that monitor and report to the membership on developments of interest. Complete membership and subscription information can be obtained from the Association at 2000 M Street, NW, Suite 715, Washington, DC 20036, or by contacting us at (202) 223-5625 or by visiting EBA-Net.org.

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DIVERSITY AND INCLUSION POLICY

The Energy Bar Association (EBA), the Charitable Foundation of the Energy Bar Association (CFEBA), and the Foundation of the Energy Law Journal (FELJ) are committed to the goals of fostering an inclusive and diverse membership and increasing diversity across all levels of the Associations. Attorneys, energy professionals and students with varied and diverse characteristics practicing in the energy field are welcome to join our ranks, regardless of race, creed, color, ethnicity, Native American, Alaska, or Hawaiian Native tribal membership or descendance, gender (including gender identity or expression), sexual orientation, family and marital status (including pregnancy), family responsibilities, religion, national origin, age, personal appearance, political affiliation, veterans status, disability, source of income (government, solo, corporate, firm practice), or place of residence or business (geographic diversity) and are encouraged to become active participants in the Associations' activities.

PRESIDENT'S MESSAGE

Since taking office as President of the Energy Bar Association (EBA) in May, one of my primary areas of focus has been to foster and expand the excellent educational opportunities that EBA provides its membership. EBA's role in keeping its members abreast of current developments in the industry is core to fulfilling its mission of advancing the professional excellence of those engaged in energy law, regulation, and policy, especially against the backdrop of a constantly evolving energy landscape. In this era of transformation, shared scholarship and thought leadership are essential tools in navigating often murky waters. As in years past, the pinnacle of EBA's educational efforts is the publication of the Energy Law Journal (Journal).

This edition of the Journal focuses in on three areas of significant change. Hugh Hilliard and Caileen Gamache's article, "FERC, May I *Now*?," updates a Journal article from ten years ago examining the Federal Energy Regulatory Commission's jurisdiction under section 203 of the Federal Power Act in light of modern transaction structures and recent statutory and interpretive changes. Erblina Sejdu's article, "Decarbonizing the World: Can the EU CBAM Provide the Incentive We Need?," provides a searching and multifaceted look at the implications of the European Union's Carbon Border Adjustment Mechanism, which recently entered its transitional phase of application. Finally, Doug Roe's piece, "Musings from Behind-the-Meter," asks whether demand charges are still relevant and adaptable to the realities of today's electric system and explores potential alternatives.

In addition to the scholarship and thought leadership in this edition of the Journal, I am also excited about the concurrent issuance of an additional volume of the Journal focusing on Regional Transmission Organization governance. Michael Dworkin, Professor of Law Emeritus at Vermont Law and Graduate School, and Seth Blumsack, Professor of Energy Policy and Economics and Co-Director of the Center for Energy Law and Policy at the Pennsylvania State University, have worked tirelessly in shepherding this additional volume and deserve our gratitude for assembling this unique and informative publication.

The past six months have been full of exciting, thought-provoking, and timely EBA programming and initiatives, and I look forward to many more in the months ahead. I thank all who contributed to these editions of the Journal and am particularly grateful to the Board of Directors and Officers of the Foundation of the Energy Law Journal and to Harvey L. Reiter, Editor in Chief, Caileen N. Gamache, Executive Editor, and Nicholas Cicale, Administrative Editor for their work in continuing to make the Journal the national standard of excellence.

Sincerely,
David Martin Connelly
President, Energy Bar Association

EDITOR IN CHIEF'S PAGE

September 21st, two days before the official end of summer, was also the date the Detroit Tigers were officially eliminated from playoff contention. Their elimination was never really in doubt, as they had hovered all season below .500 – avoiding elimination only because of the weak nature of the American League's Central Division. But their elimination also ensured that during calendar year 2023, like the three prior years,[1] neither the Tigers, Redwings, Lions nor Pistons would participate in, much less win, a playoff game.[2]

This prolonged period of futility has not kept me from spending inordinate amounts of time following them in the Detroit Free Press or on TV. But it may well have heightened my desire to focus my reading on more than stories about the Pistons' prospects, Miguel Cabrera's retirement, or developments in energy law. And it may account for my self-imposed decision to chronical some of the significant events of the six months since our last edition of the Journal as part of the badly misnamed Editor-in-Chief's *Page*. With that explanation, my semi-annual recap follows.

Energy Policy Developments

- **FERC Order No. 2023 – Interconnection Reform**

On July 28th, Federal Energy Regulatory Commission (FERC) issued its long anticipated rule on interconnection reform, Order No. 2023.[3] The rule requires all public utilities to file revised pro forma interconnection procedures and agreements consistent with the new rule. The rule's goal, as described by the Commission, is to facilitate timely and efficient interconnection and to reduce the backlog of interconnection requests by moving to a first-ready, first-served process, imposing firm deadlines, establishing penalties for transmission providers that do not complete required studies, and requiring would-be interconnecting generators to make financial deposits and establish site control, among other provisions.[4]

- **Fracking for Geothermal**

This past summer, two companies with grants from the Department of Energy, FERVO, and Forge announced successful tests in Utah of fracking technology applied, not to release natural gas from shale formations, but to release heat from hot granite deposits found, well, virtually everywhere on earth. FERVO is

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1. While the Pistons made the playoffs in 2019, they were swept in four games. It has been more than *seven* years since any of the four teams won a single playoff game.

2. It is possible as of the date of this publication – dare I even say likely – that the Detroit Lions will *qualify* for the playoffs in 2023, but the playoffs for the current NFL season will not start until calendar year 2024.

3. Order No. 2023, *Improvements to Generator Interconnection Procedures and Agreements*, 184 FERC ¶ 61,054 (2023).

4. *Fact Sheet | Improvements to Generator Interconnection Procedures and Agreements*, FERC, https://www.ferc.gov/news-events/news/fact-sheet-improvements-generator-interconnection-procedures-and-agreements (last visited Oct. 30, 2023).

already drilling wells to supply a 400 MW geothermal plant. A possible downside of fracking-based geothermal is that fracking can create seismic disturbances.[5] Still another technology, recounts New York Times reporter Brad Plumer in a fascinating article, "is a 'closed loop' system, which involves drilling sealed pipes into hot, dry rocks and then circulating fluid through the pipes, creating a giant radiator."[6] This, Plumer reports, "avoids the unpredictability of water flowing through underground rock and doesn't involve fracking, which is banned in some areas. The disadvantage: more complicated drilling."[7] But there's already a 65 MW "closed loop" system under construction in Germany.[8] And other geothermal technologies are on the near horizon, too. "The most audacious vision for geothermal, notes Plumer, "is to drill six miles or more underground where temperatures exceed 750 degrees Fahrenheit. At that point, water goes supercritical and can hold five to 10 times as much energy as normal steam."[9] But while this technology requires "futuristic tools" suitable in ultra-high temperatures, there are companies investing in this, too. All of these geothermal technologies have the advantage – like nuclear units and battery storage – of providing base load capacity needed to supplement wind and solar energy sources.[10]

- **Montana Court Win for Young Climate Activists**

A Montana trial court struck down a section of Montana's Environmental Policy Act precluding the state from considering climate impacts when evaluating energy project permit applications, finding that the provision was inconsistent with the state constitution's guarantee of a right to a "clean and healthful environment."[11] The suit was brought by sixteen plaintiffs aged five to twenty-two who based their standing on the contention that "climate change has put their recreation, traditions, mental health and physical health at risk and that the state's promotion of fossil fuels was a causative factor."[12] Lawsuits invoking similar language in other state constitutions are pending in four other states. [13]

New COVID Strain – BA.2.86 Variant

Not yet widely spread, the Centers for Disease Control warned of the emergence of a new COVID variant, BA.2.86, with three dozen mutations compared to the next most common COVID strain. "[E]arly data suggest that this strain may be more likely to infect people who have been vaccinated or have had previous

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5. *Id.*

6. Brad Plumer, *There's a Vast Source of Clean Energy Beneath Our Feet. And a Race to Tap It.*, N.Y. TIMES (Aug. 28, 2023), https://www.nytimes.com/2023/08/28/climate/geothermal-energy-projects.html.

7. *Id.*

8. *Id.*

9. *Id.*

10. Plumer, *supra* note 6.

11. Kate Selig, *Youths sued Montana over climate change and won. Here's why it matters*, WASH. POST (Aug. 16, 2023), https://www.washingtonpost.com/climate-environment/2023/08/17/montana-climate-lawsuit-impact/.

12. Held v. Mont., Cause No. CDV-2020-307 (Mont. First Jud. Dist. Ct. Aug. 14, 2023).

13. Selig, *supra* note 11.

infections than previous strains."[14] But antiviral drugs and vaccines still appear to be effective in preventing serious illness. A new vaccine booster was made available this fall.[15]

Organized Labor Fights Back

- **UPS Strike.** Avoiding the potentially crippling effect of a nationwide strike to the economy, United Parcel Service and the Teamsters, representing 300,000 employers, reached agreement on a contract that will see substantial pay increases for both full time and part time workers and the installation of air conditioning units in new trucks.[16]
- **UAW Strike**. In mid-September the United Autoworkers (UAW) began its strike against the three main unionized motor vehicle manufacturers – Ford, Stellantis (formerly Chrysler), and General Motors. Among the biggest issues was the union's objection to the two-tiered wage structure – a concession made by UAW during the economic downturn in 2007-2008 – that pays newer workers a substantially lower wage than older employees. The simultaneous strike against the "Big Three" was the first in the UAW's history.[17] President Biden's decision to join the UAW picket line was also a first for a sitting president.[18] As of this writing the UAW and the three auto companies have reached a tentative settlement.
- **Actors and Writers' Strikes.** As a long-time fan of the various Star Trek series, I have been awaiting the start of the final season of Star Trek Discovery. I will have to wait longer. The dangers of AI have been a staple of Star Trek episodes. But its impact on the future finances and careers of actors and writers is at the heart of the strikes by the unions representing them, the Writers Guild of America and the Screen Actors Guild.[19] It is one thing to write or act in

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14. Alice Park, *Will the New COVID-19 Vaccine Work Against the BA.2.86 Variant?*, TIME (Aug. 25, 2023), https://time.com/6308418/ba-2-86-covid-19-variant-vaccine/.

15. Florida governor and presidential aspirant Ron DeSantis, contradicting CDC advice, has urged Florida residents under 65 *not* to take the booster. Florida now reports the highest incident of COVID hospitalizations in the U.S. Arek Sarkissian, *DeSantis delivered Covid booster warning as Florida led the nation in hospitalizations,* POLITICO (Sept. 21, 2023), https://www.politico.com/news/2023/09/21/desantis-delivered-covid-booster-warning-as-florida-led-the-nation-in-hospitalizations-00117284.

16. Noam Scheiber, *UPS Employees Approve New Contract, Averting Strike*, N.Y. TIMES (Aug. 22, 2023), https://www.nytimes.com/2023/08/22/business/economy/ups-contract-vote-teamsters.html.

17. Nora Eckert & Ryan Felton, *UAW Goes on Strike Against GM, Ford and Stellantis,* WALL ST. J. (Sept. 15, 2023), https://www.wsj.com/business/autos/uaw-strikes-gm-ford-stellantis-plants-69b04c95.

18. Christina Wilkie & Spencer Kimball, *Biden will travel to Michigan to 'join the picket line' with UAW workers on strike*, CNBC (Sept. 2, 2023), https://www.cnbc.com/2023/09/22/biden-to-travel-to-michigan-to-support-uaw-strikes.html.

19. Ali Rogin & Andrew Corkery, *Why artificial intelligence is a central dispute in the Hollywood strikes*, PBS (Sept. 2, 2023), https://www.pbs.org/newshour/show/why-artificial-intelligence-is-a-central-dispute-in-the-hollywood-strikes. As of the publication date, the writers had reached an agreement with the movie and television studios and the actors had reached a tentative agreement with the studios.

movies and television shows about artificial intelligence replacing human beings; it is quite another to face the risk that such stories will actually be written and performed by computer programs.

- **Health Care Workers' Strike.** The largest health care worker strike in U.S. history began on October 4th. Unions representing 75,000 nurses, pharmacists, health technicians, and other health care workers started their three-day strike against Kaiser Permanente. Wages are a key issue, but so too is the burden of understaffing falling on existing employees.[20]

Supreme Court Developments

Shortly after the last edition of the Journal went online, the Supreme Court handed down several significant opinions involving the major questions doctrine, the independent state legislature theory, the scope of the Voting Rights Act, and the constitutionality of affirmative action programs in college admissions.

The first of these, *Biden v. Nebraska*,[21] involved successful challenges to the government's student loan forgiveness rule, and was probably of very direct personal interest to EBA members with outstanding student loans. But, as a further application of the expansive "major questions doctrine," it has implications for practice before FERC as well. There, the Court struck down the government's program, concluding that the agency's authority to "modify or waive" student loan obligations did not include the authority to waive those obligations completely when the consequences were so large. Citing its major questions doctrine ruling in *West Virginia v. EPA*, the Court said that such a large waiver would have required "clear congressional authorization."[22] Writing in concurrence, Justice Barrett argued that the ruling is not really a big deal, just application of a common sense reading of the law. "[C]lear congressional authorization," she stated, "does not equate to an "'unequivocal declaration' from Congress."[23] But she simultaneously acknowledged that "one could walk away from our major questions cases with this impression."[24] The problem with the Justice's rose-colored glasses view of those cases is that while *she* "do[es] not read them this way,"[25] the majority of her colleagues on the court apparently do. And so, apparently do at least some

20. Samantha Delouya, *75,000 Kaiser Permanente workers are on strike*, CNN (Oct. 4, 2023), https://www.cnn.com/business/live-news/kaiser-strike-100423/index.html.

21. 143 S. Ct. 2,355 (2023).

22. *Id.* at 2,361.

23. *Id.* at 2,378.

24. *Id.*

25. 143 S. Ct. at 2,378.

lower court judges.[26] I have previously written about the uncertainty and instability this standard creates for administrative agencies.[27]

In *Moore v. Harper*,[28] the Supreme Court rejected an argument that the Elections Clause of the U.S. Constitution, which gives to "the Legislature" of each state the authority to set federal election rules, also bars the states' judiciaries from overturning legislatively-set federal election rules even if those rules violated the state's own constitution. The case was prompted by the North Carolina Supreme Court's ruling that the state's legislature had unlawfully gerrymandered congressional district boundaries to favor the state's Republican party. By the time of the Supreme Court's decision, however, the case no longer had practical import in North Carolina. Following the election of a Republican majority on the state's Supreme Court, that court reversed its only months-old prior ruling.[29]

Ruling that the 14th Amendment's equal protection clause bars colleges from considering race, the Supreme Court reversed its holding in *Grutter v. Bollinger* that promoting student diversity was a compelling state interest justifying consideration of race in admissions. The Court's ruling in *Students for Fair Admissions, Inc. v. Harvard*,[30] invalidating the admissions processes at Harvard and the University of North Carolina, has already had repercussions beyond college admissions as law firms and businesses offering minority scholarships or even diversity training have been the subject of threatened and actual lawsuits.[31]

Finally, *Allen v. Milligan*[32] and its aftermath underscored the persistent influence of racial discrimination on voting rights. There, the Supreme Court struck down as a violation of the Voting Rights Act the Alabama legislature's congressional districting map as racially gerrymandered. Instructed to devise new maps, the legislature displayed a recalcitrance reminiscent of George Wallace's stand in front of the schoolhouse door, when he attempted to block two black students from

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26. *See, e.g.*, N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston, LLC, 76 F.4th 291 (4th Cir. Aug. 7, 2023). That case involved a *private* lawsuit claiming that the Clean Water Act barred commercial fishers from throwing "bycatch" – fish the company does not want – back into the water. In rejecting the claim, the Fourth Circuit noted, "that the EPA has never sought the authority to regulate bycatch in the fifty years since the Clean Water Act was passed. Indeed, the EPA does not even seek it now." But then it went on to rule that the Act's interpretation by the private party – not the agency – violates the major question doctrine.

27. Harvey Reiter, *Would FERC's Landmark Decisions Have Survived Review Under the Supreme Court's Expanding "Major Questions Doctrine" And Could The Doctrine Stifle New Regulatory Initiatives*?, 3 EBA BRIEF 1 (2022), https://www.eba-net.org/wp-content/uploads/2023/01/EBA_Brief_V3-1.pdf.

28. 143 S. Ct. 2,065 (2023).

29. *Id.* at 2,070.

30. 143 S. Ct. 2,141 (2023).

31. *See, e.g.*, Bryan Mena, *Conservative activist who took down affirmative action is now going after law firms' diversity programs*, CNN (Aug. 23, 2023), https://www.cnn.com/2023/08/23/economy/lawsuit-law-firms-diversity-fellowships/index.html; Taylor Telford, *They invest in Black women. A lawsuit claims it's discrimination.*, WASH. POST (Aug. 26, 2023), https://www.washingtonpost.com/business/2023/08/26/dei-lawsuit-black-businesses-fearless-fund-edward-blum/; Theo Francis & Lauren Weber, *The Legal Assault on Corporate Diversity Efforts Has Begun*, WALL ST. J. (Aug. 8, 2023), https://www.wsj.com/articles/diversity-equity-dei-companies-blum-2040b173.

32. 143 S. Ct. 1,487 (2023)

enrolling at the University of Alabama in 1963.[33] Alabama's redrawn, but flagrantly non-compliant maps, were rejected by the federal district court, the 11th Circuit, and finally, the Supreme Court.[34]

In recent months, the Court has agreed to consider the constitutionality of the longstanding for-cause protections accorded administrative law judges[35] as well as whether it should rescind or narrow the *Chevron* doctrine[36] or rule unconstitutional administrative agencies that are not funded by annual Congressional appropriations.[37] These cases could have a major impact on how FERC operates.[38]

Antitrust

My last Editor's Page quoted Senator Klobuchar's wish to "make antitrust sexy again."[39] I'm not sure she can take credit for developments already underway at the time of her remark, but antitrust is certainly in the news.

One of the biggest antitrust trials of this century began in a federal district court in DC in mid-September. The thrust of the case is the government's contention that Google has monopoly power in the search engine market and that it has used that dominance to stifle competition from other search engine providers. The case was first brought by then Attorney General Barr during the Trump administration and has been continued by Attorney General Garland during the Biden administration.[40]

Only a couple of weeks later, the Federal Trade Commission, joined by the attorneys general from seventeen states, filed a monopolization case against

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33. *Governor George Wallace Attempting to Block Integration at the University of Alabama, June 11, 1963*, STATE HIST. SOC'Y IOWA, https://history.iowa.gov/history/education/educator-resources/primary-source-sets/school-desegregation/governor-george (last visited Oct. 30, 2023).

34. *Allan v. Milligan – Aftermath*, WIKIPEDIA, https://en.wikipedia.org/wiki/Allen_v._Milligan (last visited Oct. 30, 2023).

35. SEC v. Jarkesy, 803 F.3d 9 (D.C. Cir. 2015) (U.S. granted cert. June 30, 2023) ("[W]hether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection.").

36. Loper Bright Enters. v. Raimondo, 45 4th 359 (D.C. Cir. Aug. 12, 2022) (U.S. granted cert May 1, 2023) ("[W]hether the court should overrule Chevron v. Nat'l Resources Def. Council, or at least clarify that statutory silence concerning controversial powers expressly, but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.").

37. Nina Totenberg, *Supreme Court to consider abortion pills, guns, social media in its new term*, NPR (Sept. 2, 2023), https://www.npr.org/2023/10/02/1201601347/supreme-court-new-term (discussing Court's decision to review Fifth Circuit ruling that Consumer Financial Protection Board's funding from fees paid to Federal Reserve Board rather than annual Congressional appropriations was unconstitutional).

38. It is unfortunately behind a paywall, but a Law360 article contains an interesting discussion about the potential impact of upcoming Supreme Court cases on administrative law. *See* Jeff Overley, *'Administrative State' Attacks Soar To High Court Crescendo*, LAW360 (Sept. 29, 2023), https://www.law360.com/articles/1724574?e_id=19542222-3968-4935-80b4-5987be7a46ed&utm_source=engagement-alerts&utm_medium=email&utm_campaign=case_updates.

39. *Editor in Chief's Page*, 44 ENERGY L.J. xxii (2023).

40. Dana Kerr, *United States takes on Google in biggest tech monopoly trial of 21st century*, NPR (Sept. 12 2023), https://www.npr.org/2023/09/12/1198558372/doj-google-monopoly-antitrust-trial-search-engine.

Google's fellow tech giant, Amazon.[41] "This complaint, said Federal Trade Commission (FTC) Chair Lina Khan, "reflects the cutting edge and best thinking on how competition occurs in digital markets and, similarly, the tactics that Amazon has used to suffocate rivals, deprive them of oxygen, and really leave a stunted landscape in its wake."[42]

And earlier this summer, Department of Justice's (DOJ's) antitrust division and the FTC jointly released a draft update of the Merger Guidelines.[43] While FERC declined to apply the previous update to the Merger Guidelines to its own merger review framework,[44] if the DOJ/FTC proposed guideline revisions become final, FERC may well be asked to consider whether it too should utilize those guidelines.

Political Corruption Cases

- **Menendez indictment.** New Jersey Senator Bob Menendez, indicted only a few years ago on bribery charges in a case that ended with a hung jury, was indicted on different bribery charges on September 22, 2023. The sensational charges allege that gold bars, wads of cash stuffed in envelopes and in the lining of the Senator's sport coat, as well as a brand new Mercedez-Benz convertible found at his home – collectively worth hundreds of thousands of dollars – were payoffs from co-defendants for his interference in ongoing prosecutions and to secure military funding for Egypt.[45] At a press conference called shortly after his indictment, the Senator offered the dubious explanation that for the last thirty years he'd been taking large amounts of cash from his saving account "for emergency purposes" and because, as the son of Cuban immigrants, he worried about government confiscation of his property.[46] The latter explanation seemed a little curious. His parents had emigrated from Cuba in the early 1950s,[47] nearly a decade before Fidel Castro came

41. FERC v. Amazon.com, Inc., Case No. 2:23-cv-01495 (W.D. Wash. filed Sept. 26, 2023).

42. Brian Fung, *US government and 17 states sue Amazon in landmark monopoly case*, CNN BUS., (Sept. 26, 2023), https://www.cnn.com/2023/09/26/tech/ftc-sues-amazon-antitrust-monopoly-case/index.html. The states joining the FTC are Connecticut, Delaware, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Hampshire, New Mexico, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, and Wisconsin. *Id.*

43. *Merger Guidelines*, US DEPT. JUSTICE & FED. TRADE COMM'N (Draft, for public comment, July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

44. Mark J. Niefer, *Explaining the Divide Between DOJ and FERC on Electric Power Merger Policy*, 32 ENERGY L.J. 505, 506 n.2 (2011) (noting that when DOJ last revised its merger guidelines in 2010, FERC chose to continue to apply DOJ's 1992 merger guidelines).

45. Corky Siemaszko, *Bob Menendez's indictment highlights: Gold bars and wads of cash*, NBC NEWS (Sept. 22, 2023), https://www.nbcnews.com/politics/justice-department/bob-menendezs-indictment-highlights-gold-bars-wads-cash-rcna116935.

46. Daniel Han, *Defiant Menendez doubles down against resignation calls*, POLITICO (Sept. 25, 2023), https://www.politico.com/news/2023/09/25/defiant-menendez-doubles-down-against-resignation-calls-00117955#:~:text=Defiant%20Menendez%20doubles%20down%20against%20resignation%20calls.

47. *Bob Menendez*, WIKIPEDIA, https://en.wikipedia.org/wiki/Bob_Menendez#:~:text=10%20External%20links-,Early%20life,%2C%20Evangelina%2C%20was%20a%20seamstress (last visited Oct. 30, 2023).

to power. And his claimed thirty year-long distrust of the safety of his savings in financial institutions (apparently starting in his late thirties, as he is sixty-nine) is also a little difficult to square with his position, until after the indictment, as a member of the Senate's banking committee.[48]

- **Paxton Impeachment.** The Menendez indictment followed only a week after a party-line vote in the Texas Senate rejected the bipartisan impeachment charges – also for bribery and abuse of office – brought by the Texas house against the state's Attorney General, Kenneth Paxton. Immediately after the state Senate vote, the State's Lieutenant Governor, Dan Patrick, who had presided over the trial, decried it as a waste of taxpayer dollars.[49] These remarks were in stark contrast to the comments of New Jersey's Governor Phil Murphy, who had called for the resignation of his fellow Democrat immediately following the announcement of Menendez's indictment.[50] Paxton's troubles, however, may not be over. He still faces a trial on securities fraud as well as a federal investigation "on the same allegations of corruption and abuse of office" that were the focus of the impeachment trial.[51]
- **George Santos indictment.** The serial fibber, already under federal indictment, was slapped with twenty-three additional political corruption charges, including charges for filing fraudulent fundraising reports with the Federal Election Commission and "repeatedly" charging the credit cards of campaign contributors without their authorization.[52]

Musk's Twitter (Now X) – The Free Speech Paragon?

A study conducted by the Washington Post found that X, formerly known as Twitter, had been throttling – or slowing down – its users' access to websites that have been critical of X's owner, the self-proclaimed free speech advocate, Elon

48. *Id.*

49. Patrick Svitek, *Dan Patrick, Dade Phelan trade potshots after impeachment trial ends*, TEX. TRIBUNE (Sept. 16, 2023), https://www.texastribune.org/2023/09/16/ken-paxton-impeachment-dan-patrick/#:~:text=Dan%20Patrick%2C%20Dade%20Phelan%20trade%20potshots%20after%20impeachment%20trial%20ends.

50. Christina Wilkie & Rebecca Picciotto, *Sen. John Fetterman is first Democratic senator to tell Sen. Bob Menendez to resign after bribery indictment*, CNBC (Sept. 22, 2023), https://www.cnbc.com/2023/09/22/new-jersey-gov-phil-murphy-calls-on-sen-bob-menendez-to-resign-after-bribery-indictment.html.

51. Svitek, *supra* note 49.

52. Dept. of Just. Press Release, Congressman George Santos Charged With Conspiracy, Wire Fraud, False Statements, Falsification of Records, Aggravated Identity Theft, and Credit Card Fraud (Oct. 10, 2023), https://www.justice.gov/usao-edny/pr/congressman-george-santos-charged-conspiracy-wire-fraud-false-statements-0.

Musk. The affected sites, the Post reported, included the New York Times, Facebook, Instagram, Threads (the last three owned by Musk rival Mark Zuckerberg), Bluesky, and Mastadon.[53]

Submersible Catastrophe

A widely publicized expedition on the Titan submersible to view the wreckage of the Titanic proved fatal for Stockton Rush, the owner-operator of the vessel, and the Titan's four passengers, a combination of "wealthy tourists and curious scientists."[54] The fate of the Titan and its passengers, unknown for several days, drew worldwide attention.

Deaths of the Famous and Infamous

- **Tony Bennett.** Winner of twenty Grammy awards in a singing career that spanned eight decades, Tony Bennett passed away at age ninety-six. Probably best known for "I Left My Heart in San Francisco," Bennett was also an accomplished painter who sold his paintings under his given name, Anthony Benedetto. After being diagnosed with Alzheimer's in 2016, he continued to perform, including a last joint concert at Radio City Music Hall in 2021 with Lady Gaga.[55]
- **Diane Feinstein.** Frail, experiencing memory difficulties and missing votes, ninety-year-old Senator Feinstein had vowed in recent months to serve out her term amid calls from some of her colleagues in Congress to step down. But her health problems ultimately took their toll and she passed away on September 28th. Her recent health and cognitive difficulties had overshadowed a remarkable career as the first female mayor of San Francisco, California's first woman senator, and the first woman to chair the Senate's Judiciary and Intelligence committees. An outspoken proponent of gun control and women's rights, she "disappointed liberals with her law-and-order approach toward governance and her long-standing support for the death penalty" while defying President Obama to release the intelligence committee's "torture report" detailing the CIA's use of "waterboarding, sleep deprivation, physical abuse, confinement in a coffin-size box and threats against suspects' families" as interrogation techniques.[56]

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53. Jeremy B. Merrill & Drew Harwell, *Elon Musk's X is throttling traffic to websites he dislikes*, WASH. POST (Aug. 16, 2023), https://www.washingtonpost.com/technology/2023/08/15/twitter-x-links-delayed/.

54. John Branch & Christina Goldbaum, *A Rubik's Cube, Thick Socks and Giddy Anticipation: The Last Hours of the Titan*, N.Y. TIMES (July 6, 2023), https://www.nytimes.com/2023/07/02/us/titan-submersible-passengers.html.

55. Bill Trott, *Tony Bennet, Legendary American singer, dies at age 96*, REUTERS (July 21, 2023), https://www.reuters.com/world/us/legendary-american-singer-tony-bennett-dies-age-96-ap-2023-07-21/#:~:text=July%2021%20(Reuters)%20%2D%20Tony,Bennett%20was%2096.

56. Emily Langer, *Dianne Feinstein, centrist stalwart of the Senate, dies at 90*, WASH. POST (Oct. 4, 2023), https://www.washingtonpost.com/obituaries/2023/09/29/dianne-feinstein-california-senator-dead/.

- **Frank Howard.** A towering 6'7 and over 250 pounds, he made a thirty-eight ounce bat look like a matchstick. Known affectionately by adoring Washington Senator fans as the "gentle giant," Frank Howard passed away at the age of 87 on October 30th. Howard, who knocked in over 100 runs in ten different seasons, hit some of the longest homeruns in major league history, including one of only two homeruns to clear the left field roof at Detroit's Tiger Stadium. He enjoyed his greatest success as a Dodger and Senator, but finished his playing career winning the American League Eastern Division title with the Tigers in 1972 and then sharing DH duties with Gates Brown in 1973, the first year of the designated hitter.
- **Ted Kaczynski.** Held for decades in a "supermax" prison in Colorado for the sixteen bombings he committed as the "Unibomber" from 1978 to 1985, Kaczynski, suffering from late-stage cancer, was transferred in 2012 to a medical center in North Carolina. But he died by suicide on June 10th at age 81. Kaczinski gained his most notoriety, when, several years before his eventual capture, "he used the threat of continued violence to convince The New York Times and The Washington Post to publish his manifesto, a 35,000 word screed against modern life and technology, as well as man-made damages to the environment."[57]
- **Sinead O'Connor.** The Irish singer-songwriter passed away in July, 2023. Named Rolling Stone's 1991 artist of the year, O'Connor was nominated for four Grammy awards. A critic of the Roman Catholic church in which she was raised, she condemned Pope Benedict's 2010 apology for the church's role in sexual abuse for "not going far enough."[58]
- **Bill Richardson.** Bill Richardson, who died on September 1, 2023 at the age of seventy-five, served two terms as New Mexico's governor, seven terms as a congressman from that state, and also served as the Secretary of Energy and later as UN Ambassador under President Clinton. But he is best remembered for his role as a hostage negotiator who helped free numerous Americans held by foreign governments, including most recently WNBA star Britney Griner from a Russian prison.[59]
- **Brooks Robinson.** Hall of fame third baseman Brooks Robinson, an eighteen-time all-star who played his entire twenty-three year career with the Baltimore Orioles, passed away at the age of eighty-

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57. Michael R. Sisak et al., *'Unabomber' Ted Kaczynski died by suicide in prison medical center, AP sources say*, AP (June 11, 2023), https://apnews.com/article/ted-kaczynski-unabomber-1197f597364b36e56bdbcaca9837bdc4.

58. David Morgan, *Notable Deaths in 2023*, CBS NEWS (Oct. 30, 2023), https://www.cbsnews.com/pictures/notable-deaths-in-2023/.

59. Jason Rezaian, *Bill Richardson understood what mattered most about U.S. hostages*, WASH. POST (Sept. 2, 2023), https://www.washingtonpost.com/opinions/2023/09/02/bill-richardson-death-legacy-hostage-diplomacy/.

six. The modest Robinson, who won sixteen consecutive Gold Glove awards, was widely regarded as the best fielding third baseman in baseball history.[60] So beloved was he in Baltimore, wrote a Baltimore sports writer in 1977, that "we name our children for him."[61] Bob Kinnear, a deaf baseball fan, recalled watching Robinson use sign language on TV. When Kinnear saw Robinson in person and asked about Robinson's use of sign language, Robinson responded that he grew up near a school for the deaf and learned sign language playing with kids from that school. "He became my idol after that," said Kinnear.[62]

Tina Turner. A pop and rock star for half a century, Tina Turner died at age eighty-three in late May, 2023. She starred with her abusive husband, Ike Turner, throughout the 1960s and into the 70s until their divorce. But she earned her greatest fame as a solo artist in the 1980s, in a career that lasted for several more decades.[63]

They really said that?

"*They call them that. I call them Americans*."
Response of Senator Tommy Tubberville to question whether he believed white nationalists should be allowed in the military.[64]

"So I would say you be judgmental of the issue, of the action, of the content, of the character of the individual, absolutely. But let's not tie it to the skin color and say that the skin color determined it."

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60. Paul White, *Brooks Robinson, Baseball Hall of Famer and 'Mr. Oriole', dies at 86*, USA TODAY (Sept. 26, 2023), https://www.usatoday.com/story/sports/mlb/2023/09/26/brooks-robinson-dies-orioles-legend-hall-of-famer-gold-glove/10246280002/.

61. Dave Sheinin, *Baltimore adored Brooks Robinson for his talent and loved him for his heart,* WASH. POST (Sept. 26, 2023), https://www.washingtonpost.com/sports/2023/09/26/brooks-robinson-legacy-baltimore/.

62. *Hall of Fame Orioles third baseman, Brooks Robinson, dies at 86*, NPR MORNING EDITION (Sept. 27, 2023), https://www.npr.org/2023/09/27/1201956922/hall-of-fame-orioles-third-baseman-brooks-robinson-dies-at-86#:~:text=Hall%20of%20Fame%20Orioles%20third,Robinson%2C%20dies%20at%2086%20%3A%20NPR&text=Hourly%20News-,Hall%20of%20Fame%20Orioles%20third%20baseman%2C%20Brooks%20Robinson%2C%20dies%20at,of%20the%201970%20World%20Series.

63. Laura Snapes, *Tina Turner: legendary rock'n'roll singer dies aged 83*, GUARDIAN (May 24, 2023), https://www.theguardian.com/music/2023/may/24/tina-turner-legendary-rocknroll-singer-dies-aged-83.

64. Zoë Richards, *Alabama senator on white nationalists in the military: 'I call them Americans'*, NBC NEWS (May 10, 2023), https://www.nbcnews.com/politics/congress/tommy-tuberville-appears-defend-white-nationalists-military-rcna83874; Meg Kinnard, *GOP Sen. Tuberville says white supremacists in military aren't racist, they're 'Americans'*, PEOPLE'S WORLD (May 12, 2023), https://www.peoplesworld.org/article/gop-sen-tuberville-says-white-supremacists-in-military-arent-racist-theyre-americans/. Tubberville has subsequently drawn the ire of many of his fellow Senators for blocking the confirmation and promotion of hundreds of military officers.

Oklahoma Superintendent of Schools, Ryan Walters, explaining how teachers should cover the 1921 Tulsa *race* massacre, what the state-run Oklahoma Historical Society says is, "believed to be the single worst incident of racial violence in American history."[65]

Trying to explain his remark, Walters later stated: "The Tulsa race massacre [which took place only a few miles from where the law school that helps produce the Journal is located] is a terrible mark on our history. The events on that day were racist, evil, and it is inexcusable. *Individuals* are responsible for their actions and should be held accountable."[66] So apparently it would be inappropriate under Oklahoma law banning instruction about systemic racism to teach, as the contemporaneous report of the Red Cross found, that "[t]hirty-five city blocks were looted *systematically*, then burned to a cinder."[67] Rather, public school children should only learn that the black owners of 1,000 destroyed homes and the black residents killed or injured by white rioters were the victims of thousands of simultaneous acts of *individual* racism.

> *"[S]laves developed skills which, in some instances, could be applied for their personal benefit*."

Standard for instructing middle schoolers unanimously approved by the Florida Board of Education. [68]

The Florida Education Association, a statewide teachers' union representing about 150,000 teachers, called the new standards "a disservice to Florida's students and are a big step backward for a state that has required teaching African American history since 1994."[69] Pressed about criticism of his hand-picked Board of Education's policy to instruct students that slavery had job-training benefits, Florida's governor stated: "I didn't do it and I wasn't involved in it."[70] "Governor DeSantis started this fire with the bill that he signed," responded Chris Christie, one of his opponents for the Republican presidential nomination.[71] "And now," Christie added, "he doesn't want to take responsibility for whatever is done in the aftermath of it."[72] Bad enough that Florida's educators are being told to instruct

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65. Adam Gabbatt, *Outrage as Republican says 1921 Tulsa massacre not motivated by race*, GUARDIAN (July 8, 2023), https://www.theguardian.com/us-news/2023/jul/08/oklahoma-republican-tulsa-race-massacre.

66. *Id.* (emphasis added)

67. *Id.*

68. Olivia Land, *New Florida black history curriculum says slavery had 'personal benefits'*, N.Y. POST (July 20, 2023), https://www.msn.com/en-us/news/other/new-florida-black-history-curriculum-says-slavery-had-personal-benefits/ar-AA1e8iFP.

69. Antonio Planas, *New Florida standards teach students that some Black people benefited from slavery because it taught useful skills*, NBC News (July 20, 2023), https://www.nbcnews.com/news/us-news/new-florida-standards-teach-black-people-benefited-slavery-taught-usef-rcna95418.

70. Ken Tran, *Chris Christie criticizes Ron DeSantis for Florida curriculum on slavery: 'Not the words of leadership'*, USA TODAY (July 24, 2023), https://www.usatoday.com/story/news/politics/2023/07/23/chris-christie-florida-slavery-black-history-ron-desantis/70453430007/?utm_source=flipboard&utm_content=user%2FUSAToday.

71. *Id.*

72. *Id.*

that forced labor was free skills training, but the state's examples named slavery "beneficiaries" who, it turns out, weren't even slaves.[73]

> *"COVID-19 is targeted to attack Caucasians and Black people. The people who are most immune are Ashkenazi Jews and Chinese*."

Recorded remarks of Robert F. Kennedy, Jr., Democratic, then Independent candidate for president and noted conspiracy theorist speaking at a fundraiser in New York.[74] The COVID virus, he claimed, "was engineered to spare Ashkenazi Jews and Chinese people."[75] That certainly came as news to me, my fellow Ashkenazi Jewish wife, sons, daughters-in-law, grandsons, granddaughter, a nephew and niece, each of whom contracted the virus, my niece three times.

> *"Someone asked me today in the media, they said, 'It's curious, people are curious. What does Mike Johnson think about any issue under the sun?' I said, 'Well, go pick up a Bible off your shelf and read it.' That's my worldview."*

Newly-elected Speaker of the House Michael Johnson explaining in an October 26 interview how to predict his policy positions.[76] This apparently explains his positions tying aid to Israel to cuts to IRS funding and opposing universal background checks for gun purchases.

Turkey drops opposition to Sweden Joining NATO

On the eve of the NATO summit in Vilnius, Lithuania, Turkey's President Erdogan announced that Turkey was dropping its long-standing opposition to Sweden's membership in NATO, bringing all the nations on the Baltic Sea – save Russia – into the defense organization. [77]

Unfathomable Tragedies for North Africa

A magnitude 6.8 earthquake stuck Morroco this summer with damage stretching from "Marrakech south to villages in the Atlas Mountains, where the

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73. Jeffrey S. Solochek, *Benefited from slavery? Critics say some of the state's examples were never even slaves.*, TAMPA BAY TIMES (July 20, 2023), https://www.tampabay.com/news/education/2023/07/21/benefited-slavery-critics-say-some-states-examples-were-never-even-slaves/

74. Jonathan Weisman, *Robert F. Kennedy Jr. Airs Bigoted New Covid Conspiracy Theory About Jews and Chinese*, N.Y. TIMES (July 15, 2023), https://www.nytimes.com/2023/07/15/us/politics/rfk-jr-remarks-covid.html.

75. *Id.*

76. Luke Broadwater, *9 Takeaways From Mike Johnson's First Interview as Speaker*, N.Y. TIMES (Oct. 27, 2023), https://www.nytimes.com/2023/10/27/us/politics/mike-johnson-interview-hannity-takeaways.html.

77. Emily Rauhala et al., *Turkey drops opposition to Sweden's NATO bid on eve of summit*, WASH. POST (July 10, 2023), https://www.washingtonpost.com/world/2023/07/10/turkey-nato-summit-eu-sweden/.

epicenter of the quake was located."[78] The Moroccan government reported that the quake had killed 2,900 persons and injured another 5,500.[79] Not long afterward, "Mediterranean storm Daniel caused two dams to collapse, sending waves more than 20 feet high through the heart of Derna," a port city in eastern Libya.[80] The flooding killed at least 11,000 persons and destroyed much of the city. City officials "said the death toll could reach 20,000."[81]

Aborted Mutiny, Suspicious Death

In late June, Yevgeny Prigozhin, head of the Wagner Group mercenaries, called off his march on Moscow during which his troops shot down several Russian helicopters, and in an agreement claimed to have been brokered by Belarus president Lukashenko, agreed to move his soldiers to Belarus in exchange for charges of mutiny being dropped by Russian president Putin. Days later, the Belarusian president declared that Prigozhin had returned to St. Petersburg and that Prigozhin's troops were still stationed in Russian-occupied Ukraine.[82] Months later, Prigozhin was presumed to have died in a suspicious plane crash northwest of Moscow.[83] Meanwhile Russia continues its indiscriminate shelling of civilians and other war crimes against Ukraine.

The Continuing Appeal of Nationalist Autocrats, but Some Pushback, too

What New York Times reporter Andrew Higgins described as a "Russia-friendly populist party" headed by former Prime Minister Robert Fico, garnered the largest share of votes in EU and NATO member Slovakia's nationwide parliamentary election. Whether his party, which favors cutting aid to Ukraine, will be able to form a government, and if so, how much that government could affect the policies of the EU and NATO, remains unknown.[84] In contrast, parliamentary elections and a record turnout in Poland saw the right wing Law and Justice Party lose its majority. [85]

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78. Alex Sundby, *Morocco earthquake death toll, map and more key details following 6.8 magnitude disaster*, CBS NEWS (Sept. 12, 2023), https://www.cbsnews.com/news/morocco-earthquake-2023-marrakech-map-death-toll-magnitude-when/.

79. *Id.*

80. Patrick Smith, *Death toll hits 11,300 in Libyan city destroyed by floods*, NBC NEWS (Sept. 14, 2023), https://www.nbcnews.com/news/world/libya-floods-death-toll-derna-rcna105001.

81. *Id.*

82. Pjotr Sauer, *Wagner boss Prigozhin has returned to Russia, Lukashenko says*, GUARDIAN (July 6, 2023), https://www.theguardian.com/world/2023/jul/06/wagner-boss-yevgeny-prigozhin-russia-alexander-lukashenko-belarus#:~:text=The%20Russian%20mercenary%20chief%20Yevgeny,Alexander%20Lukashenko%20said%20on%20Thursday.

83. Brian Murphy, *Yevgeniy Prigozhin, Russian mercenary leader who became Putin foe*, WASH. POST (Aug. 27, 2023), https://www.washingtonpost.com/obituaries/2023/08/26/yevgeniy-prigozhin-putin-wagner-dies/.

84. Andrew Higgins, *What Does a Russia-Leaning Party Win in an E.U. Nation Mean for Ukraine?*, N.Y. TIMES (Sept. 30, 2023), https://www.nytimes.com/2023/09/30/world/europe/slovakia-election-ukraine.html.

85. Rob Picheta, *Poland's pro-European opposition seems set to oust populists, but tense days lie ahead*, CNN (October 17, 2023), https://www.cnn.com/2023/10/17/europe/poland-election-final-results-intl/index.html.

More Misery for Ethnic Armenians

In September, Azerbiajan took control of the self-declared independent Republic of Nagorno-Krabakh, a predominantly ethnic Armenian region of about 120,000 persons. While the residents have been promised their religious and cultural freedom by the Azerbiajan government, "more than 76,000 people," fearing genocide, have fled to neighboring Armenia.[86] "Some officials fear that the entire population will leave."[87]

Claiming False Credit

"I'm always happy to support this type of funding in Congress."

Alabama Congressman Robert Aderholt praising funding for a bridge in Courtland, Alabama authorized under Infrastructure Act he had opposed.[88]

Climate Change

The hottest July in the recorded history of the planet. Wildfires across Canada[89] that brought some of the worst air quality on earth for days at a time to New York City, Philadelphia, Washington, DC, Pittsburgh, Detroit, and Chicago.[90] The first tropical storm to hit southern California in over eighty years. One of the deadliest wildfires in American history in Maui. Nothing to see here, says Presidential aspirant, Vivek Ramaswamy. Climate change is "a hoax."[91]

Tell that to the residents of Lahaina, southern California, New York City, most of Canada, homeowners flooded in Vermont or the farmers in Pakistan who saw flooding of a third of the country during the summer of 2022. Tell that to Hawaii Electric Company, now facing a number of lawsuits for failing to adequately prepare for the increased risks of wildfire attributable to climate change and now considering bankruptcy.[92] On August 15th, S&P Global downgraded the

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86. Francesca Ebel, *For three decades, Nagorno-Karabakh sought statehood. That quest is dead.*, WASH. POST (Sept. 28, 2023), https://www.washingtonpost.com/world/2023/09/28/nagorno-karabakh-dissolved-azerbaijan-armenia/.

87. *Id.*

88. Tony Romm, *They opposed the infrastructure law. Now, some in the GOP court its cash,* WASH. POST (July 9, 2023), https://www.washingtonpost.com/business/2023/07/09/gop-spending-infrastructure-ira-biden/.

89. May, June and early July saw a rash of wildfires across eastern Canada (May and June also being Canada's hottest May and June on record). Scott Dance, *Why a sudden surge of broken heat records is scaring scientists*, WASH. POST (July 6, 2023), https://www.washingtonpost.com/weather/2023/07/06/earth-record-heat-climate-extremes/.

90. Emma Newburger, *New York City tops world's worst air pollution list from Canadian wildfire smoke*, CNBC (June 7, 2023), https://www.cnbc.com/2023/06/07/canadian-wildfire-smoke-nyc-residents-urged-to-stay-inside.html.

91. Nick Robertson, *Vivek Ramaswamy says US 'climate change agenda' is a 'hoax',* HILL (Aug. 12, 2023), https://thehill.com/homenews/campaign/4150183-ramaswamy-calls-climate-change-agenda-a-hoax/.

92. Ethan Howland, *Hawaiian Electric eyes bankruptcy after Maui wildfires in 'prudent scenario planning'*, UTIL. DIVE (Aug. 21, 2023), https://www.utilitydive.com/news/hawaiian-electric-eyes-bankruptcy-after-maui-wildfires/691333/?utm_source=Sailthru&utm_medium=email&utm_campaign=Issue:%202023-08-21%20Utility%20Dive%20Newsletter%20%5Bissue:53763%5D&utm_term=Utility%20Dive.

debt of the utility's parent company, Hawaiian Electric Industries, to junk status and that same week, filed a negligence lawsuit against the utility's parent company.[93] It alleges that the defendants had prior warnings about the wildfires but either "left their powerlines energized or, after deenergizing them, re-energized them too soon."[94] And tell that to the risk averse insurance companies that have dropped coverage of homeowners and businesses in regions those insurance companies believe pose a too risky bet given *their* expectations of a changing climate.[95]

"Unprecedented heat" has become a cliché. I did a word search on the Washington Post website, and the term appears in the title or text of forty-nine articles going back only six years.[96] Had I looked for other similar terms, I would undoubtedly have gotten even more results. The same July 6, 2023 edition of the Post featuring a front page article entitled~~,~~ *Why a sudden surge of broken heat records is scaring scientists*[97] also announced *Record-crushing heat blasts Florida, with no end in sight*.[98] The former article reported that Monday, July 3, 2023, was "Earth's hottest day in at least 125,000 years. Tuesday was hotter."[99] The latter article recounted that Miami set *fourteen* heat records in by the end of June.[100] A third article in that day's Post warned that rapid acceleration of glacier melts in Norway – "one of the world's fastest-warming places" – are resulting in the release of high concentrations of "ancient methane gas."[101] This phenomenon presents a double whammy – sea level rises and more greenhouse gases entering the atmosphere.

Also writing for the Washington Post, meteorologist Dan Stillman recounted the impact and likely causes of "prolific flooding that inundated portions of New York's Hudson Valley and Vermont" in early July – two months' worth of rain that fell in two days. "Rainfall that saturated the ground ahead of the storm, double

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93. Kavya Balaraman*, Hawaiian Electric faces financial, cost recovery risks from Maui wildfires: Moody's*, UTIL. DIVE (Aug. 16, 2023), https://www.utilitydive.com/news/hawaiian-electric-maui-wildfire-lawsuit-financial-risk-moody-rating/690984/?utm_source=Sailthru&utm_medium=email&utm_campaign=Issue:%202023-08-16%20Utility%20Dive%20Newsletter%20%5Bissue:53620%5D&utm_term=Utility%20Dive.

94. *First Individual Maui Wildfire Lawsuit Against Utilities filed by Singleton Schreiber*, SINGLETON SCHREIBER (Aug. 14, 2023), https://singletonschreiber.com/first-individual-maui-wildfire-lawsuit-against-utilities-filed-by-singleton-schreiber/.

95. Justine McDaniel, *Citing climate change risks, Farmers is latest insurer to exit Florida*, WASH. POST (July 12, 2023), https://www.washingtonpost.com/climate-environment/2023/07/12/farmers-insurance-leaves-florida/.

96. *Search – "unprecedented heat"*, WASH. POST, https://www.washingtonpost.com/search/?query=%22unprecedented+heat%22&time=all&sort=relevancy (last visited Oct. 31, 2023).

97. Dance, *supra* note 89.

98. Ian Livingston, *Record-crushing heat is blasting Florida, with no clear end*, WASH. POST (July 6, 2023), https://www.washingtonpost.com/weather/2023/07/06/florida-hottest-year-miami-tampa-tallahassee-drought/.

99. Dance, *supra* note 89.

100. Livingston, *supra* note 98.

101. Chris Mooney, *Reeling Arctic glaciers are leaving bubbling methane in their wake, scientists warn*, WASH. POST (July 6, 2023), https://www.washingtonpost.com/climate-environment/2023/07/06/arctic-glacier-melt-methane-global-temperatures/.

the normal amount of moisture, an atmospheric traffic jam and Vermont's flood-prone terrain," coupled with "human-caused climate change," he concluded, had "boosted the intensity of the rainfall."[102] The very warm Atlantic Ocean that "may have contributed to the intense rainfall," he added, had seen "water temperatures near Florida simmering in the 90s."[103] And, he ominously noted, "[t]he Intergovernmental Panel on Climate Change projects that heavy precipitation will increase by 7 percent for every 1.8 degrees Fahrenheit (1 degree Celsius) of warming."[104]

- **Climate Patterns run AMOC**

Have you heard of the Atlantic Meridional Overturing Circulation (AMOC)? As Washington Post climate reporter Sarah Kaplan notes, it refers to an "aquatic conveyor belt" that "transports warm, salty water from the tropics to the North Atlantic, and then sends colder water back south along the ocean floor."[105] And it is what keeps Northern Europe more temperate in the winter months and temperatures in the tropics more moderate. There is general consensus among climate scientists that warming ocean temperatures will eventually push AMOC over the tipping point, *i.e.*, "shut it down entirely" and that "[t]he shift would be as abrupt and irreversible as turning off a light bulb."[106] But there is considerable debate about whether such changes are imminent. The results of the most alarming study "suggest that the AMOC could collapse at any time between now and 2095, and as early as 2025."[107]

- **The climate alarm bells keep ringing**

The record temperatures recorded across the southern and southwestern United States, southern Europe, Asia and northern Africa during July – and particularly their protracted nature – "would have been virtually impossible" to explain as other than the product of climate change. This was the conclusion of a July 24 study by the World Weather Attribution Network, what Washington Post reporter Bradly Dennis describes as "a coalition of scientists that conducts rapid analyses to determine how the warming atmosphere influences extreme weather

102. Dan Stillman, *Five key factors that spurred the historic floods in Vermont, New York*, WASH. POST (July 11, 2023), https://www.washingtonpost.com/weather/2023/07/11/vermont-flooding-cause/.

103. *Id.*

104. *Id.*; *see also* Peter Ditlevsen & Susann Ditlevsen, *Warning of forthcoming collapse of the Atlantic meridional overturning circulation*, NATURE COMMC'NS (July 25, 2023), https://www.nature.com/articles/s41467-023-39810-w.

105. Sarah Kaplan, *Scientists detect sign that a crucial ocean current is near collapse*, WASH. POST (July 25, 2023), https://www.washingtonpost.com/climate-environment/2023/07/25/atlantic-ocean-amoc-climate-change/.

106. *Id.*

107. *Id.*

events."[108] While the study has not yet been peer-reviewed, Dennis notes, its conclusion matches the findings of the UN's Intergovernmental Panel on Climate Change.[109] Put another way, this is not the new normal. It will get worse.

More Anti-Immigrant Animus

Texas Governor Abbott faced a lawsuit by the federal government over his decision to install floating barriers and barbed wire in the middle of the Rio Grande to discourage migrants from crossing the river.[110] The lawsuit was prompted by an internal complaint by a Texas State trooper who said that these measures had "put migrants, including young children, at risk of drowning and serious injury. The trooper also claimed Texas officials had been directed to withhold water and push them back into the river. In one instance, the trooper said he and his team rescued a woman who was stuck in the razor wire and having a miscarriage."[111] This prompted Republican congressman Tony Gonzalez, whose district includes a substantial portion of that border, to label the governor's measures as "unacceptable." [112]

Backfired

When polling showed that a ballot initiative to add abortion rights to Ohio's state constitution had 58% support, the Ohio legislature, which had only recently banned August special elections, changed the law and scheduled an August special election. Its ostensible purpose: a referendum to amend Ohio's constitution to require a 60% threshold for future referenda to become part of the state's constitution. But its sponsors made no secret of its central purpose, to apply the 60% threshold to the abortion rights referendum scheduled for only months later. The August referendum failed badly and on November 7th Ohioans voted to add abortion and contraception rights to the state's constitution.[113]

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108. Bradly Dennis, *Heat waves in US and Europe would have been 'virtually impossible' without climate change, new report finds*, WASH. POST (July 25, 2023), https://www.washingtonpost.com/climate-environment/2023/07/25/heat-wave-us-europe-climate-change/.

109. *Id.*

110. Kierra Frazer & Josh Gerstein*, DOJ sues Texas and Gov. Greg Abbott over Rio Grande barrier*, POLITICO (July 24, 2023), https://www.politico.com/news/2023/07/24/doj-sues-texas-and-gov-greg-abbott-over-rio-grande-barrier-00107896; *see also* US v. Greg Abbott, Civil Action No. 1:23-cv-00853 (W.D. Tex. July 24, 2023), https://www.documentcloud.org/documents/23885825-usvabbottborderbuoyscomp072423#:~:text=infrastructure.-,1%3A23%2Dcv%2D00853,-USvAbbottBorderBuoysComp072423.

111. Caitlin Yilek, *Rep. Tony Gonzales, who represents 800 miles of U.S.-Mexico border, calls border tactics "not acceptable"*, CBS NEWS (July 23, 2023), https://www.cbsnews.com/news/tony-gonzales-texas-rio-grande-buoys-razor-wire-greg-abbott-face-the-nation/.

112. *Id.*

113. Melissa Quinn, *Ohio votes against Issue 1 in special election. Here's what that could mean for abortion rights.,* CBS NEWS (Aug. 9, 2023), https://www.cbsnews.com/news/ohio-issue-1-fails-to-pass-2023-results/; Laura Hancock & Andrew J. Tobias, *Ohio voters guarantee abortion rights 16 months after U.S. Supreme Court strikes Roe*, CLEVELAND.COM (Nov. 8, 2023), https://www.cleveland.com/open/2023/11/ohio-voters-guarantee-abortion-rights-16-months-after-us-supreme-court-strikes-roe.html.

Trump in the news

- **Ninety-one**

Ninety-one – that's the current number of felony charges facing the former President after three additional indictments – two federal indictments in Florida and in the District of Columbia, and a state indictment in Georgia led to three additional arraignments. (My spring 2023 Editor-in Chief Page noted that Trump had been indicted and arraigned on other felony charges in state court in New York earlier in the year). That's on top of the civil liability rulings and two gag orders[114] against him and his company. There was the September summary judgement against the company he leads – the Trump Organization (previously convicted of fifteen felony counts of tax evasion) on extensive fraud charges and the consequent order stripping the company of the authority to do business in New York State.[115] Add to that another summary judgment in the second civil suit by E. Jean Carroll for *further* defamation (regarding Trump's statements following a jury verdict finding him liable for sexual abuse and defamation). Still at issue in those cases is how much he owes in damages.

114. Following Trump's "personal attacks" directed to the prosecutor, the trial judge in the civil case and the trial judge's clerk, Trump was slapped with a gag order barring him from attacking or even referencing the court staff on email, social media or in public remarks. Jonah E. Bromwich, *Trump Ordered Not to Comment on Judge's Staff in Fraud Case*, N.Y. TIMES (Oct. 3, 2023), https://www.nytimes.com/2023/10/03/nyregion/trump-gag-order-fraud-trial.html. Attacks on the prosecutors in the election interference case led federal district court Judge Chutkin to issue a similar gag order weeks later. Kyle Cheney & Josh Gerstein, *Judge imposes gag order on Donald Trump in D.C. trial*, POLITICO (Oct. 16, 2023), https://www.politico.com/news/2023/10/16/judge-imposes-gag-order-on-donald-trump-in-d-c-trial-00121743#:~:text=A%20fed-eral%20judge%20has%20barred,status%20as%20a%20criminal%20defendant.

115. Shayna Jacobs, *N.Y. judge finds Trump committed fraud and sanctions his attorneys*, WASH. POST (Sept. 26, 2023), https://www.washingtonpost.com/national-security/2023/09/26/ny-judge-finds-trump-committed-fraud-sanctions-his-attorneys/.

- **Mug shots and guilty pleas**

(From top left) Mug shots from the arrest of Kenneth Chesebro (plead guilty), Donald Trump, Sydney Powell (plead guilty), Rudolph Giuliani, Mark Meadows (accepted immunity deal from federal special prosecutor Jack Smith) and John Eastman by Fulton County Sheriff.[116]

116. Kenneth Chesebro (top row, left) charged with seven felony counts (plead guilty to conspiring with Trump); Donald Trump (top middle), charged with thirteen felony counts; Sydney Powell (top right) charged with seven felony counts (plead to misdemeanors); Rudolph Giuliani (bottom left), charged with thirteen felony counts; and Mark Meadows (bottom center), charged with two felony counts; and John Eastman, charged with nine felony counts. *See the mug shots in Trump's Georgia case: Meadows, Giuliani, Powell, Ellis, Chesebro and others*, NBC NEWS (Aug. 24, 2023), https://www.nbcnews.com/politics/donald-trump/mugshot-rudy-giuliani-jenna-ellis-trump-georgia-surrender-rcna101670.

- **Lying about his weight, too?**[117]

The booking information from Fulton County following his arrest lists indicted former President Trump as 6'3" and 215 pounds, numbers he was apparently allowed to fill out himself during booking.[118] The dubious weight claim drew derisive comparisons to several quarterbacks with similar listed height and weight.[119] You decide:

Donald Trump

NFL Quarterback Lamar Jackson

> *"We are unique among the world's militaries. We don't take an oath to a country. We don't take an oath to a tribe. We don't take an oath to a religion. We don't take an oath to a king, or a queen, or to a tyrant or a dictator. And we don't take an oath to a wannabe dictator."*

Remarks of General Mark Milley, outgoing chairman of the Joint Chiefs of Staff, during his retirement speech widely seen as a rebuke to former President Trump, who a week earlier had "called Millie a traitor who might deserve the death penalty for his communications with China near the end of the Trump administration."[120]

> *What can I add that has not already been said? A person that thinks those who defend their country in uniform, or are shot down or seriously wounded in combat, or spend years being tortured as POWs are all 'suckers' because 'there is nothing in it for them.' A person that did not want to be seen in the presence of military amputees because 'it doesn't look good for me.' A person who demonstrated open contempt for a Gold Star family – for all Gold Star families – on TV during the 2016 campaign, and rants that our most precious heroes who gave their lives*

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117. The "too" refers to the finding by Judge Engoron that Trump and his company had "inflated Trump's net worth in business transactions," Jacobs, *supra* note 114, and Judge Engoron's subsequent finding that Trump "is not credible" in support of a $10,000 fine for Trump's second violation of the judge's gag order. Jeremy Herb & Lauren del Valle, *Judge fines Trump $10,000 for violating gag order*, CNN (Oct. 25, 2023), https://www.cnn.com/politics/live-news/trump-civil-fraud-trial-10-25-23/index.html.

118. Matt Hladik, *Everyone Said The Same Thing After Donald Trump's Height, Weight Were Released*, SPUN (Aug. 24, 2023), https://thespun.com/nfl/everyone-said-the-same-thing-after-donald-trumps-height-weight-were-released.

119. *Id.*

120. Maureen Groppe & Tom Vanden Brook, *Gen. Milley says military doesn't answer to 'wannabe dictator' in apparent rebuke of Trump*, USA TODAY (Sept. 29, 2023), https://www.usatoday.com/story/news/politics/2023/09/29/mark-milley-trump-dictator/70964776007/#:~:text=Maureen%20Groppe,USA%20TODAY.

> *in America's defense are 'losers' and wouldn't visit their graves in France.*
>
> ***
>
> *A person that has no idea what America stands for and has no idea what America is all about. A person who cavalierly suggests that a selfless warrior who has served his country for forty years in peacetime and war should lose his life for treason – in expectation that someone will take action. A person who admires autocrats and murderous dictators. A person that has nothing but contempt for our democratic institutions, our Constitution, and the rule of law. There is nothing more that can be said. God help us.*

Remarks of John Kelly, former chief of staff to Donald Trump, about his former boss. [121]

Nine Month Speakership

Kevin McCarthy was elected Speaker of the House after fifteen contentious rounds of votes and a series of promises he later couldn't or wouldn't keep – in the first instance promises to the far right members of his caucus to slash spending and in the latter case reneging on his agreement with Democrats on future spending levels as part of a bipartisan deal to raise the debt ceiling and avoid default on the nation's debt. Nine months later he became the first Speaker of the House to be removed from that office in the nation's history. His removal came only days after he had reached an eleventh hour bipartisan forty-five day deal to avoid a government shutdown that prompted the far right members of his party to move for his ouster for cooperating with Democrats. Going on national television the next day to blame Democrats, all but one of whom supported the deal, for the near shutdown apparently earned him no goodwill from the opposition party, who chose not to bail him out.[122] Jim Jordan subsequently sought the speakership, but what members of his party called bullying tactics and that one member described as including "threatening tactics and pressure campaigns," as well as "death threats" to the member and his family, led to his defeat.[123] The speakership remained vacant for three weeks until 2020 election denier Mike Johnson was elected.[124]

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121. Jake Tapper, *Exclusive: John Kelly goes on the record to confirm several disturbing stories about Trump*, CNN POLITICS (Oct. 3, 2023), https://www.cnn.com/2023/10/02/politics/john-kelly-donald-trump-us-service-members-veterans/index.html.

122. Lisa Mascaro & Farnoush Amiri, *Speaker McCarthy ousted in historic House vote, as scramble begins for a Republican leader*, AP (Oct. 3, 2023), https://apnews.com/article/mccarthy-gaetz-speaker-motion-to-vacate-congress-327e294a39f8de079ef5e4abfb1fa555.

123. @JakeSherman, X (Oct. 19, 2023, 10:38 AM), https://twitter.com/JakeSherman/status/1715029541414990221.

124. Melissa Quinn et al., *Mike Johnson elected House speaker with unanimous GOP support, ending weeks of chaos*, CBS NEWS (Oct. 25, 2023), https://www.cbsnews.com/live-updates/house-speaker-vote-live-updates-10-25-2023/.

Florida – The Nation's Book-banning Capital

Florida's combative governor famously remarked that Florida is the place where "woke goes to die."[125] Its public schools are also apparently where books go to die. A report from the non-profit PEN America recounted that from July 2022 to June 2023 there were "3,362 instances of bans in public school classrooms and libraries" in the United States. And "1,400 — or 40% of the national total — took place in Florida."[126] Texas, Missouri and Utah round out the top four, but the national trend is equally alarming. Book banning, already at disturbingly high levels as I have written in a previous Editor-in-Chief's Page, increased by a third just in the last year. As the Miami Herald story on the PEN America report notes, Florida law "allows a parent or community member to object to instructional material or library books and requires a school to remove the book or books within five days of a challenge and remain off library shelves until the review is completed."[127] This, it says, amounts to a "guilty until proven innocent policy" being replicated in other states.[128]

Hamas Terrorists Strike Israel

> *You know, there are moments in this life — and I mean this literally — when the pure, unadulterated evil is unleashed on this world. The people of Israel lived through one such moment this weekend. The bloody hands of the terrorist organization Hamas — a group whose stated purpose for being is to kill Jews.*
>
> *This was an act of sheer evil.*
>
> *More than 1,000 civilians slaughtered — not just killed, slaughtered — in Israel. Among them, at least 14 American citizens killed. Parents butchered using their bodies to try to protect their children. Stomach-turning reports of being — babies being killed.*
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> ***
>
> *Hamas does not stand for the Palestinian people's right to dignity and self-determination. Its stated purpose is the annihilation of the State of Israel and the murder of Jewish people.*

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125. Matt Dixon & Gary Fineout, *'Where woke goes to die': DeSantis, with eye toward 2024, launches second term*, POLITICO (Jan. 3, 2023), https://www.politico.com/news/2023/01/03/desantis-2024-second-term-00076160. Not satisfied with limiting curricula, DeSantis has stated his intention to strip universities of their accreditation if they have DEI programs. Ja'han Jones, *DeSantis: I'll take accreditation from schools with DEI programs*, MSNBC NEWS (Oct. 5, 2023), https://www.msnbc.com/the-reidout/reidout-blog/desantis-dei-college-accreditation-diversity-rcna119051.

126. Amanda Geduld, *Florida now leads the country in book bans, new PEN report says. How did that happen?*, MIAMI HERALD (Sept. 22, 2023), https://www.miamiherald.com/news/local/education/article279568719.html#storylink=cpy.

127. *Id.*

128. *Id.*

They use Palestinian civilians as human shields.

Hamas offers nothing but terror and bloodshed with no regard to who pays the price.

President Biden's October 10, 2023 speech to the nation in the aftermath of Hamas terrorist attacks on Israeli civilians.[129]

Almost fifty years to the day from the start of the Yom Kippur war, Hamas terrorists,[130] opposed to the very existence of the state of Israel and in control of Gaza for nearly twenty years,[131] staged a surprise, multi-pronged, monstrous attack on Israel. They slaughtered hundreds of civilians attending an outdoor music festival, fired thousands of indiscriminate missiles at civilian populations, and captured more than two hundred Israeli women, children, whole families and the elderly as well as soldiers.[132] At least fourteen Americans are among the thousand persons killed by Hamas; other Americans are also known to be among the hostages.[133] It is almost certain that, as they have repeatedly done with members of their own population,[134] Hamas's brutal leadership is likely to use those captured as human shields or bargaining chips for the release of Hamas terrorists now in Israeli prisons. And for weeks it blocked Americans visiting family in Gaza from leaving despite the wartime dangers to civilians there.[135] A likely errant Islamic Jijad missile claimed several hundred lives outside a Gaza hospital,[136] but before

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129. *Remarks by President Biden on the Terrorist Attacks in Israel*, WHITE HOUSE (Oct. 10, 2023), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/10/10/remarks-by-president-biden-on-the-terrorist-attacks-in-israel-2/#:~:text=The%20brutality%20of%20Hamas%20%E2%80%94%20this,genocide%20of%20the%20Jewish%20people.

130. *Counter Terrorism Guide – Terrorist Groups: Hamas*, DIR. NAT'L INTEL., https://www.dni.gov/nctc/groups/hamas.html.

131. *Id.*

132. Inderdeep Bains & Natalie Lisbona in Tel Aviv, *Hamas war: The horrifying stories of Israelis taken as hostages by gunmen*, DAILY MAIL (Oct. 9, 2023), https://www.dailymail.co.uk/news/article-12608609/Pawns-merciless-terrorists-horrifying-stories-just-100-hostages-stolen-murderous-Hamas-invaders.html.

133. Ron Kampeas, *US reports at least 9 Americans dead in Hamas invasion of Israel*, JTA (Oct. 9, 2023), https://www.jta.org/2023/10/09/united-states/us-reports-at-least-nine-americans-dead-in-hamas-invasion-of-israel.

134. Denouncing the Use of Civilians as Human Shields by Hamas and Other Terrorist Organizations in Violation of International Humanitarian Law, H.R. 107, 113th Cong. (2nd Sess. 2014); and Condemning the Murder of Israeli and Palestinian Children in Israel and the Ongoing and Escalating Violence in that Country, H.R.J. Res. 665, 113th Cong. (2nd Sess. 2014), https://www.govinfo.gov/content/pkg/CHRG-113hhrg88835/html/CHRG-113hhrg88835.htm.

135. Peter Wade, *Blinken: Hamas Is Blocking Americans From Leaving Gaza*, ROLLING STONE (Oct. 22, 2023), https://www.rollingstone.com/politics/politics-news/blinken-hamas-american-hostages-gaza-1234859913/ ("We've had people come to Rafah, the crossing with Egypt. And to date, at least, Hamas has blocked them from leaving, showing once again, its total disregard for civilians of any kind who are stuck in Gaza.").

136. Alexander Smith et al., *Gaza hospital blast likely a Palestinian Islamic Jihad rocket misfire, U.S. officials say*, NBC NEWS (Oct. 19, 2023), https://www.nbcnews.com/news/world/live-blog/israel-hamas-war-live-updates-rcna120978. For its part, Hamas "has yet to produce or describe any evidence linking Israel to the strike, says it cannot find the munition that hit the site and has declined to provide detail to support its count of

the evidence was in, many media outlets reported the deaths as a bombing by the Israeli government.[137] Recordings of Hamas commanders confirmed their knowledge that Israel was not at fault,[138] but the misinformation suited Hamas terrorists well: the erroneous first media reports sparked protests around the world and sharp increases in antisemitism, particularly on college campuses here[139] and in cities in Europe.[140] The Hamas brutality has also sparked an uptick in Islamophobia, including the shocking killing of a young Muslim child in Chicago,[141] and the revenge killing by West Bank settlers of scores of Palestinians, including a father and son on their way to a funeral.[142] Hamas's continued use of its civilian population as human shields while it withholds stockpiles of fuel and food has led to many civilian deaths and untold misery for the residents of Gaza.[143] The thousands of deaths of civilians in Gaza, as well as uncertainty about plans for the day after, and the failure of Netanyahu's government to reign in right wing extremist

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the casualties." Patrick Kingsley & Aaron Boxerman, *Hamas Fails to Make Case That Israel Struck Hospital*, N.Y. TIMES (Oct. 23, 2023), https://www.nytimes.com/2023/10/22/world/middleeast/israel-gaza-hospital-evidence.html?smid=url-share.

137. Alexandra Steigrad, *Dan Abrams slams media for 'rush to judgment' about Gaza hospital strike,* N.Y. POST (Oct. 18, 2023), https://nypost.com/2023/10/18/dan-abrams-slams-media-for-rush-to-judgment-over-gaza-hospital-strike/.

138. The Editorial Board, *Hamas's Hospital Lie and the Laws of War*, WALL ST. J. (Oct. 18, 2023), https://www.wsj.com/articles/gaza-hospital-hamas-israel-palestine-president-biden-91892b9c?mod=WTRN_pos3&cx_testId=3&cx_testVariant=cx_171&cx_artPos=2 ("I am telling you this is the first time we see a missile like this falling, and so that's why we are saying it belongs to Palestinian Islamic Jihad," one Hamas member began. "It's from us?" the other answered. "It looks like it. They are saying that the shrapnel from the missile is local shrapnel and not like Israeli shrapnel."); Yaniv Kubovich, et al., *Israeli Army Presents Video, Audio to Show Islamic Jihad Responsible for Gaza Hospital Blast*, HAARETZ (Oct. 18, 2023), https://www.haaretz.com/israel-news/2023-10-18/ty-article/israeli-army-presents-video-audio-to-show-islamic-jihad-behind-gaza-hospital-blast/0000018b-41f1-d242-abef-53f7d6570000.

139. Nick Anderson, *War in Mideast inflames college campuses and raises fears of antisemitism*, WASH. POST (Oct. 18, 2023), https://www.washingtonpost.com/education/2023/10/18/university-israel-hamas-college-tensions/; Ron Kampeas, *White House convenes meeting to address spike in campus antisemitism during Israel-Hamas war*, JTA (Oct. 30, 2023), https://www.jta.org/2023/10/30/politics/white-house-convenes-summit-to-address-spike-in-campus-antisemitism-during-israel-hamas-war?utm_source=JTA_Maropost&utm_campaign=JTA_DB&utm_medium=email&mpweb=1161-63867-25046.

140. Niamh Kennedy et al., *France, UK and Germany step up security measures amid fears of attacks against Jewish community*, CNN (Oct. 8, 2023), https://www.cnn.com/2023/10/08/europe/france-uk-germany-security-measures-hamas-attack-intl/index.html#:~:text=The%20UK%2C%20France%2C%20and%20Germany,attacks%20launched%20by%20Hamas%20militants; Melissa Bell, *Hate crimes on the rise in western Europe after Hamas attacks*, CNN (Oct. 19, 2023), https://www.cnn.com/videos/world/2023/10/19/exp-protests-antisemitic-europe-bell-pkg-101912aseg2-cnni-world.cnn.

141. Sophia Tareen, *Muslim boy killed and woman wounded in Illinois hate crime motivated by Israel-Hamas war, police say*, AP (Oct. 16, 2023), https://apnews.com/article/muslim-boy-killed-chicago-landlord-will-county-5135dea218326d6e639a996564d9369e.

142. Zeena Saifi et al., *Gaza conflict spills into the West Bank as settler attacks and clashes leave dozens of Palestinians dead*, CNN (Oct. 19, 2023), https://www.cnn.com/2023/10/19/middleeast/west-bank-settler-attacks-israel-cmd-intl/index.html

143. Matthew Rosenberg & Maria Abi-Habib, *As Gazans Scrounge for Food and Water, Hamas Sits on a Rich Trove of Supplies*, New York Times (Oct. 27, 2023), https://www.nytimes.com/2023/10/27/world/middleeast/palestine-gazans-hamas-food.html.

settlers in the West Bank have also sparked debate within Israel and criticism from other nations.

More Mass Shootings

In a nation awash in firearms and averaging nearly two mass shootings a day,[144] the October 25, 2023, mass shooting in Lewiston, Maine still managed to shock. The killer's rampage, which took eighteen lives and injured more than a dozen others, was the largest mass shooting this year.

Concluding thoughts

As always, I owe a deep debt of gratitude to the authors, peer review editors and student editors who devote long hours to make the Journal possible. Our newest Student Editor-in-Chief, Madison Plumhoff, has had an especially daunting challenge in her first months on the job. She's had to manage the production of our fall edition and a simultaneously issued special edition devoted to RTO governance issues, all while holding down a full student caseload and grieving over the loss of two family members. Finally, I want to congratulate our talented Executive Editor, Kat Gamache, on the publication of her first article for this Journal, a timely piece updating practitioners on the ins and outs of merger regulation under FPA section 203. Happy Thanksgiving.

Harvey Reiter
Washington DC November 2023

144. *Mass Shootings in 2023*, GUN VIOLENCE ARCHIVE, https://www.gunviolencearchive.org/reports/mass-shooting?page=22 (last visited Nov. 9, 2023).

FERC, MAY I *NOW*? UPDATE ON WHEN FERC AUTHORIZATION IS NEEDED FOR TRANSFERS OF PUBLIC UTILITY ASSETS AND EQUITY INTERESTS IN PUBLIC UTILITIES

Hugh E. Hilliard and Caileen Kateri Gamache [*]

Synopsis: Section 203 of the Federal Power Act (FPA) requires parties engaging in certain transactions involving public utilities and holding companies to obtain prior authorization from the Federal Energy Regulatory Commission (FERC).[1] This requirement generally applies to transfers of public utility assets, such as electric transmission lines, as well as "paper facilities," such as tariffs and contracts for sale of electric energy at wholesale or for interstate electric transmission service, and to certain acquisitions of electric generating facilities by public utilities. It also applies to many change-in-control transactions and acquisitions of securities in public utilities and by holding companies. This article updates an article from ten years ago that examined the scope of FERC jurisdiction under FPA section 203.[2] During this ten-year period, transaction structures have evolved, FERC has clarified some issues regarding its jurisdiction, and Congress amended FPA section 203 to narrow the scope of FERC jurisdiction for one category of transactions. This article discusses these changes and examines both old and new issues about the breadth of FERC's jurisdiction. The purposes of the article are twofold: (1) to help practitioners navigate the current FPA section 203 landscape in the context of modern transactions, and (2) make recommendations that would reduce the industry burden and streamline FERC's workload by culling out FPA section 203 applications where there arguably is little or no public interest in review of the underlying transactions.

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[*] Hugh Hilliard wrote the original version of this article in the ELJ published in 2013. He recently retired as senior counsel in the Washington, D.C. office of O'Melveny & Myers LLP but continued to work with Kat to update this article. Caileen ("Kat") Gamache is a partner in the Projects Group of Norton Rose Fulbright, LLP. The views expressed in this article are those of the authors and do not necessarily represent the views of their firms or clients. This article does not contain or constitute legal advice. The authors would like to thank all those who provided important critiques, insights, and edits.

1. References to "FERC" and the "Commission" in this article mean the Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission.

2. Hugh E. Hilliard, *FERC May I? When is FERC Authorization Needed for Transfers of Public Utility Assets and Equity Interests in Public Utilities?*, 34 ENERGY L.J. 151, 151 (2013) [hereinafter *FERC May I?*]. Some passages in this article are drawn from the original version. For ease of reading, they are not individually noted.

I. INTRODUCTION

Parties to transactions involving the transfer of ownership or control of energy industry assets or entities should always ask an important question: do they need advance authorization from FERC under section 203 of the Federal Power

Act?[3] The answer can affect the timing and validity of a transaction. FERC authorization requires preparing and filing a comprehensive application that describes affiliates and assets in detail.[4] The application must be accompanied by a copy of the agreement documenting the transaction (or at least a draft agreement or term sheet that accurately reflects the material provisions), which means the parties must be in advanced negotiations before the application may be submitted.[5] FERC then has up to 180 days to process the application and issue an order, and FERC may re-start the clock by requesting additional information.[6] There is also

3. Unless otherwise indicated, "FPA section 203" refers to section 203 of the Federal Power Act, codified at 16 U.S.C. § 824b (2012).

4. For example, the applicant must include "[a] description of jurisdictional facilities owned, operated, or controlled by the applicant or its parent companies, subsidiaries, affiliates, and associate companies" and (with limited exceptions) include an organizational chart "indicating all parent companies, energy subsidiaries and energy affiliates." 18 C.F.R. § 33.2(c)-(d) (2022). In the authors' experience, obtaining all the necessary information may require several discussions with upstream owners and affiliates unfamiliar with FERC who may be reluctant to cooperate because they feel it is an unnecessary governmental intrusion into confidential business affairs.

5. 18 C.F.R. § 33.2(f) (stating the application must include "[a]ll contracts related to the proposed transaction together with copies of all other written instruments entered into or proposed to be entered into by the parties to the transaction."); *see also* Order No. 642, a Final Rule revising the filing requirements in Part 33 of the Commission's regulations for applications, including public utility mergers, under section 203 of the Federal Power Act. *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, 65 Fed. Reg. 70,984 (2000) ("[W]e take this opportunity to clarify that all section 203 filings must include a copy of all contracts pertaining to the proposed disposition and/or such other agreements (in final or, if not available, in draft form) and must identify: (1) all relevant parties to the transaction and their roles in the transaction (e.g., as seller, purchaser, lessor, lessee, operator); (2) the jurisdictional facilities that are being disposed of and/or acquired, directly or indirectly; and (3) all terms and conditions of the proposed disposition that pertain to the ownership, leasing, control of, or operation of jurisdictional facilities. If contracts pertaining to the section 203 disposition have not been finalized at the time of filing, or, in the case of intra-corporate transactions, if applicants claim there will be no contracts associated with the disposition, applicants may submit a draft contract, a term sheet, a letter of intent or a memorandum of understanding to satisfy the § 33.2(f) filing requirement. However, in such instances, we will require that in the transmittal letter accompanying the application, counsel for applicants certify that, to the best of their knowledge, the final agreements will reflect the terms and conditions contained in the draft agreements in all material respects."); *see also* note 301 for further discussion about the practicality of finalizing commercial terms before filing for FPA section 203 status.

6. 16 U.S.C. § 824b(a)(5); 18 C.F.R. § 33.11 (FERC staff will typically try to expedite review upon request when the application is uncontested, does not involve a merger, and is consistent with precedent. FERC's regulations list the following examples: "(1) A disposition of only transmission facilities, including, but not limited to, those that both before and after the transaction remain under the functional control of a Commission-approved regional transmission organization or independent system operator; (2) Transactions that do not require an Appendix A analysis; and (3) Internal corporate reorganizations that result in the reorganization of a traditional public utility that has captive customers or owns or provides transmission service over jurisdictional transmission facilities, but do not present cross-subsidization issues."); *see, e.g., Horus West Virginia I, LLC*, 184 FERC ¶ 62,130 (2023) (delegated order issued Sept. 7, 2023) (granting authorization in 57 days from the date the application was filed where no Appendix A analysis was required). FERC can also toll the deadline to extend the review period when – in rare circumstances – it determines it needs more time to fully review an application. *See, e.g*., *Energy Harbor Corp., et al.*, 185 FERC ¶ 61,024 (issued Oct. 13, 2023) (Order tolling the time for action on an FPA section 203 application filed April 17, 2023, as supplemented May 15, 2023 and Sept. 18, 2023).

always a possibility that FERC may not grant an application for section 203 approval (or may grant it with unacceptable conditions), which increases transaction risks.[7]

FERC has provided guidance in its orders, regulations, and policy statements, but questions remain about whether authorization is (or was!) required in many circumstances.[8] When faced with uncertainty about FPA section 203 obligations, parties and practitioners either (1) proceed without obtaining authorization if they are sufficiently convinced that authorization is not required or (2) seek FERC approval to ensure their transaction is compliant, despite knowing it might not be required. One factor that weighs on the side of filing is that parties typically will not proceed with a transaction that potentially implicates FPA section 203 without a clean opinion of counsel that all necessary regulatory authorizations have been obtained. The fact-specific nature of FPA section 203 precedent means there frequently is not anything directly on point in precedent or prior guidance to enable a clean opinion, and the parties may not accept—or counsel may be unable to provide—a reasoned opinion. Parties therefore often file an application with FERC "out of an abundance of caution" when there is any uncertainty.[9]

Unnecessary FPA section 203 applications increase transactional costs and delays for public utilities, their owners, and investors. They also increase FERC's workload, consuming valuable government resources. The practice is self-perpetuating: if parties previously filed an application "out of an abundance of caution" when faced with a particular set of circumstances, then other parties facing similar

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7. *See, e.g., GridLiance High Plains LLC*, 166 FERC ¶ 61,171 (2019) (denying GridLiance's application to acquire jurisdictional facilities from an electric cooperative because it failed to show the transaction would result in sufficient benefits to offset rate increases that the transaction would cause). FERC does not frequently deny FPA section 203 applications; instead, in cases where FERC has concerns it is generally more likely to approve a transaction with conditions to mitigate these concerns. *See, e.g*., *Duke Energy Corp.*, 137 FERC ¶ 61,210 at PP 91-92 (2011) (rejecting divestiture and directing mitigation measures); *Ohio Power Co.*, 143 FERC ¶ 61,075 at P 61 (2013) (requiring divestiture of certain debt from one party to the other as a condition of sale); *Entegra Power Group LLC*, 125 FERC ¶ 61,143 (2008) (authorizing an investment conditioned on several measures to ensure the investor would not have control); *Exelon Corporation, et al*., 138 FERC ¶ 61,167 (2012) (conditionally authorizing merger between Exelon Corporation and Constellation Energy Group, Inc.).

8. In addition to considering whether FPA section 203 approval is required for a proposed transaction, occasionally in conducting diligence for a new transaction it turns out FPA section 203 should have been obtained for prior transactions. *See, e.g., Phoenix Energy Group, LLC*, Docket No. EC23-51-000 (Jan. 9, 2023) (requesting prospective approval of a prior transaction and requesting expedited treatment due to a new, pending transaction). The consequence of not obtaining FPA section 203 approval when required is discussed further in Section VII.

9. *See, e.g., Wapsipinicon Wind Project, LLC*, 143 FERC ¶ 62,196 (2023) (explaining that the applicant sought authorization for a transfer of upstream Class A and Class B ownership interests out of an abundance of caution without a determination of jurisdiction); *see also*, *Imperial Valley Solar, LLC*, FERC Docket No. EC19-65-000 (March 4, 2019); *Tropico, LLC, et al*., FERC Docket No. EC20-36-000 (Feb. 11, 2020); *Energy Harbor Corp*., Docket No. EC23-83-000 (Apr. 28, 2023). A search by the authors in FERC's online records information system indicates that more than 900 FPA section 203 applications filed over the past ten years since *FERC, May I?* was published were filed (at least partially) out of an abundance of caution in the face of uncertainty regarding the scope of FERC's jurisdiction. This is only a rough estimate; a more definitive number would require an examination of each of the FPA section 203 applications filed during this period. *eLibrary*, FERC, http://elibrary.ferc.gov/idmws/search/fercgensearch.asp (last visited Oct. 29, 2023).

circumstances in the future are more likely to also file an application.[10] When asked to approve a transaction under FPA section 203, FERC reviews the transaction without addressing whether it has jurisdiction.[11] It rarely independently disclaims jurisdiction.[12] A request for FERC to disclaim jurisdiction falls under the requirements for a request for declaratory order.[13] Declaratory order requests require a filing fee, and there is no deadline by which FERC must rule.[14] The path of least resistance is therefore to file a request under FPA section 203 out of "an abundance of caution."[15] No filing fee is required for an FPA section 203 application, and as mentioned above, FERC often issues an order approving the transaction well before the end of the statutory 180-day deadline.

Filing in the face of uncertainty is understandable, because deciding *not* to file a FPA section 203 application creates regulatory and commercial risk. First, it may not be possible to close a deal over such uncertainty. To even get to closing, the parties will likely require relevant legal opinions and – under current popular practice – potentially representation and warranty insurance, both of which require high confidence that no FPA section 203 is required to forego filing. Second, FERC has asserted that, if a transaction proceeds without approval, any interested party may challenge the transaction in court as invalid (although the authors are not aware of any precedent for this).[16] Third, the parties could face significant problems if FERC later learns of the transaction and determines that FPA section

10. *See, e.g.*, *BigBeau Solar, LLC*, FERC Docket No. EC22-121-000 (Sept. 16, 2022) (citing *Southern Company et al.*, 92 FERC ¶ 62,260 (2000); *Solar Star Colorado III, LLC,* 154 FERC ¶ 62,057 at P 1 (2016)) (stating FPA section 203 authorization may not be required but requesting approval out of an abundance of caution) (explaining the applicant sought authorization out of an abundance of caution without making a determination as to FERC's jurisdiction to facilitate tax equity financing); *Breckinridge Wind Project, LLC*, 153 FERC ¶ 62,012 at P 1 (2015) (explaining applicant sought approval for the disposition of 100% of "passive, non-managing Class B Membership Interests" out of an abundance of caution).

11. *See, e.g.,* 92 FERC ¶ 62,260, at 64,380 n.2; *National Electric Associates,* 80 FERC ¶ 62,116, at p. 64,191 n.2 (1997) (citing *Ocean State Power*, 47 FERC ¶ 61,321 (1989)) (Order assuming jurisdiction without making a jurisdictional interpretation for expediency).

12. One notable exception is *Boston Edison Company, et al.*, 109 FERC ¶ 61,309 at P 8 (2004) (disclaiming jurisdiction over the assignment of a power purchase agreement from one power purchaser to another, explaining: "because a right to purchase power under a contract is not a facility used for the transmission of electric energy or for the sale of electric energy at wholesale, the transfer (disposition) of such a purchase right is not subject to section 203 authorization." (citing *New England Power Company et al.*, 83 FERC ¶ 61,275, at p. 62,147 (1998)). This order was a categorical clarification rather than a fact-specific analysis of an individual transaction.

13. A request for a declaratory order falls under Rule 207 of FERC's Rules of Practice and Procedure. 18 C.F.R. § 385.207. As of publication, the filing fee for a Request for Declaratory Order (other than pursuant to Part I of the FPA) is $33,690, but it is subject to annual adjustment. 18 C.F.R. § 381.302; *see*, *e.g.*, *Conowingo Power Company, et al.*, FERC Docket Nos. EC95-7-000, EL95-14-000 (Dec. 6, 1994) (converting a request for disclaimer of jurisdiction to a petition for Declaratory Order "as instructed by the filing office" and paying the filing fee).

14. 18 C.F.R. § 381.302.

15. *See generally,* FERC Docket No. EC22-121-000.

16. *PDI Stoneman, Inc.*, 104 FERC ¶ 61,270 at P 25 (2003).

203 approval should have been obtained.[17] If that occurs, FERC has the authority to assess civil penalties for violating the FPA for each day approval was not obtained.[18] Moreover, FPA section 203 only contemplates *prior* approval, and FERC only grants late applications under FPA section 203 on a prospective basis from the date of filing.[19] This creates a panoply of commercial issues. At a minimum, a late-filed application means there was likely a breach of customary representations and warranties in the underlying transaction documents that all necessary governmental approvals for the transaction were obtained.[20] If the closing was conditioned on compliance with law, then it arguably means the closing was void and calls into question the validity of all corporate actions since closing.[21] It could also jeopardize a subsequent transaction if it is unclear whether the transferee ac-

17. *See, e.g., American Transmission Company, LLC*, 160 FERC ¶ 61,030 (2017) (Order Approving Stipulation and Consent Agreement stemming from enforcement action triggered by a failure to obtain required approvals under FPA section 203); *International Transmission Company*, 139 FERC ¶ 61,003 at n.18 (2012) (stating the matter was referred to the Office of Enforcement due to "the lateness and the volume of late filings.").

18. *See, e.g.*, *id.* (historically, however, FERC has only rarely assessed civil penalties for an inadvertent failure to timely file for authorization under FPA section 203 – FERC is much more likely to approve the transaction on a prospective basis and admonish the applicants for filing late); 160 FERC ¶ 61,030, at PP 5-6 (*American Transmission Company, LLC* is one of the few cases in which FERC assessed civil penalties, but the circumstances were unique because the case involved 21 violations of FPA section 203 and various other violations of the FPA); *Mesquite Investors LLC, et al*., 111 FERC ¶ 61,162 at P 3 (2005) (admonishing applicants for failing to timely obtain prior approval under FPA section 203 for a transaction and stating "we take such violations seriously, and we expect public utilities that are planning transmissions that may be jurisdictional to come to the Commission for guidance before consummating the transaction."). Note that guidance of the Commission's staff is not binding, so if there is sufficient uncertainty to seek guidance, it may be just as expedient and prudent to file an application. *See, e.g*., 18 C.F.R. § 388.104(a) ("Opinions expressed by the staff do not represent the official views of the Commission, but are designed to aid the public and facilitate the accomplishment of the Commission's functions.").

19. *See, e.g*., *Phoenix Energy Group, LLC*, 182 FERC ¶ 62,137 (2023); *TransAlta Energy Marketing (U.S.) Inc., et al.*, 181 FERC ¶ 61,055 (2022); *Powervine Energy, LLC*, 175 FERC ¶ 62,033 (2021); *Cleveland-Cliffs Inc. & AK Electric Supply, LLC*, 174 FERC ¶ 62,115 (2021); *HIKO Energy, LLC*, 163 FERC ¶ 62,127 (2018); 139 FERC ¶ 61,003; *see also* 16 U.S.C. § 824b(a)(4) (FPA section 203 states "the Commission shall approve the proposed disposition, consolidation, acquisition, or change in control, if it finds that the proposed transaction will be consistent with the public interest, and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest." Arguably, this does not leave any room for FERC to deny an application for such transaction for the period of time before the filing, but some readers may more heavily weight the term "proposed" in the statute and claim that a transaction is not proposed if already consummated).

20. For example, following are example representations and warranties from closed Membership Interest Purchase Agreements (MIPA): "all necessary Governmental Approvals for the Transaction have been obtained;" "[a]ll Seller Entities have materially complied and are in material compliance with all applicable Laws;" and "[n]o consent or approval of, permit, license, authorization, or waiver from, registration, declaration, or application with, or notice to any Governmental Authority is required to be obtained or made by the Seller Companies in connection with the execution, delivery and performance of this Agreement or the other Transaction Documents by Seller Companies."

21. In the authors' experience, under current practice it is more likely that each party will represent that the transaction is in compliance with all laws applicable to that party – thereby leaving room open to go after one another for breaches of reps and warranties – than to include a provision that would have the effect of invalidating the closing if contrary to applicable law.

tually has sufficient interest in the jurisdictional entity or asset to permit the transfer. Or it could potentially result in a need to unwind the prior transaction (although the authors are not aware of any cases where this has occurred). The more guidance that the Commission can provide regarding the extent of its FPA section 203 jurisdiction, the more certainty the industry will have regarding whether approval is required in particular circumstances, and the fewer unnecessary filings will be made to avoid this array of risks.

In the ten years since *FERC May I?* was published, Congress and FERC have acted to resolve some of the issues with FPA section 203 that were discussed in that article. FERC has also applied its FPA section 203 regulations to new types of transaction structures that have emerged as the market continues to evolve.[22] This updated article discusses the current state of the law on FERC's jurisdiction to review public utility transactions under FPA section 203 and examines some of the remaining sources of uncertainty. It also discusses areas in which FERC could resolve questions about its jurisdiction, or disclaim jurisdiction, thereby reducing the burden of unnecessary filings on both FERC staff and stakeholders.[23]

II. OVERVIEW OF FPA SECTION 203

FERC jurisdiction under FPA section 203 has two separate bases—one for transactions by public utilities (FPA section 203(a)(**1**), or "Part 1")[24] and one for transactions by holding companies (FPA section 203(a)(**2**), or "Part 2").[25] FERC asks applicants to expressly state in their application the section(s) of FPA section 203 for which approval is requested.[26] FERC generally limits approval to the scope of the request; so getting the request right is important to ensuring appropriate authorization.[27] The sections are briefly covered in this section for convenience. They are discussed in more depth in the sections below.

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22. *Id.*

23. The standards applied by FERC to approve or deny applications under FPA section 203 are beyond the scope of this article. For a discussion of the substantive standards applied by FERC in considering merger applications, *see, e.g.*, Scott Hempling, *Inconsistent with the Public Interest: FERC's Three Decades of Deference to Electricity Consolidation*, 39 ENERGY L. J. 233 (2018); Mark J. Niefer, *Explaining the Divide Between DOJ and FERC on Electric Power Merger Policy*, 32 ENERGY L. J. 505 (2012) (discussing the substantive standards applied by FERC in considering merger applications); *see also* notes 107-108 (Notably, FERC still applies standards for assessing effects on competition set forth in the 1992 Department of Justice (DOJ) and Federal Trade Commission (FTC) Horizontal Merger Policy Guidelines, even though those guidelines were subsequently amended in 2010).

24. 16 U.S.C. § 824b(a)(1).

25. 16 U.S.C. § 824b(a)(2).

26. *But see Alloy Power LLC*, 117 FERC ¶ 62,008 at P 3 n.4 (2006) (granting authorization under FPA section 203(a)(1)(D) "[a]lthough not requested in the application" for approval of a disposition of a hydroelectric generating facility).

27. It is also common practice to explain why part of a transaction is not subject to FPA section 203, if applicable. For example, if a public utility requires approval to dispose of jurisdictional assets under FPA section 203(a)(1), but the entity acquiring the jurisdictional assets does not require prior approval, the applicant will typical explain why the acquiring entity is not an applicant. *See, e.g.*, *SR Millington, LLC*, FERC Docket No. EC23-129-000, at P 1 n.3 (Sept. 1, 2023); 184 FERC ¶ 62,130, at P 1 n.3; *Carroll County Energy LLC*, FERC

A. Public Utility Transactions (Part 1 of FPA section 203)

FPA section 203(a)(1) requires prior authorization from FERC before a *public utility*[28] may:

> (A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $10,000,000;
>
> (B) merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with the facilities of any other person, or any part thereof, that are subject to the jurisdiction of the Commission and have a value in excess of $10,000,000, by any means whatsoever;
>
> (C) purchase, acquire, or take any security with a value in excess of $10,000,000 of any other public utility;
>
> (D) purchase, lease, or otherwise acquire an existing generation facility — (i) that has a value in excess of $10,000,000; and (ii) that is used for interstate wholesale sales over which the Commission has jurisdiction for ratemaking purposes.[29]

B. Holding Company Transactions (Part 2 of FPA section 203)

FPA section 203(a)(2) requires prior authorization from FERC before a *holding company*[30] in a holding company system that includes a transmitting utility or an electric utility[31] may:

> purchase, acquire, or take any security with a value in excess of $10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with,

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Docket No. EC23-123-000, at P 3 n.3 (Aug. 25, 2023); 153 FERC ¶ 62,012, at P 1 n.2 (stating the application said investors were eligible for a blanket authorization to the extent FPA section 203(a)(2) applied).

28. A "public utility" is any person who owns or operates facilities used for the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce but does not include the United States, a state or any agency, authority, or instrumentality of, or any corporation that is wholly owned by, the United States or any state. 16 U.S.C. § 824(e). *See also* Jersey Cent. Power & Light Co. v. Fed. Power Comm'n, 319 U.S. 61, 81-82 (1943); Hartford Elec. Light Co. v. Fed. Power Comm'n, 131 F.2d 953, 955 (1942). Transactions are sometimes strategically timed to close before an entity becomes a public utility.

29. 16 U.S.C. § 824b(a)(1)(A)-(D).

30. A "holding company" generally is "any company that directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the outstanding voting securities of a public-utility company or of a holding company of any public-utility company" that owns or operates facilities used for (a) "the generation, transmission, or distribution of electric energy for sale" (i.e., an "electric utility company") or (b) "the distribution at retail . . . of natural gas for heat, light, or power" (i.e., a "gas utility company"). 16 U.S.C. § 824b(a)(6); 42 U.S.C. § 16451(5), (7), (8), (14) (2012); *see also* 18 C.F.R § 33.1(b)(4); Order No. 669, *Transactions Subject to FPA Section 203*, FERC Stats. & Regs. ¶ 31,200 at PP 69-73 (2005) (codified at 18 C.F.R. pts. 2 and 33), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214 (2006), *order on reh'g*, Order No. 669-B, *Transactions Subject to FPA Section 203*, 71 Fed. Reg. 42,579 (2006) (to be codified at 18 C.F.R. pts. 2, 33). "Holding company" does not include financial institutions that own securities for certain banking purposes, 42 U.S.C. § 16451(8)(B), nor does it include a state (or a political subdivision, agency, authority, or instrumentality of a state) or an electric power cooperative. 18 C.F.R. § 33.1(b)(4).

31. A "holding company system" is "a holding company, together with its subsidiary companies."); 42 U.S.C. § 16451(9) (A "transmitting utility" is "an entity (including an entity described in section 824(f) of this title) that owns, operates, or controls facilities used for the transmission of electric energy – (A) in interstate commerce; (B) for the sale of electric energy at wholesale."). *Id.* at n.11; 16 U.S.C. § 796(23) (2012). An "electric utility" is "a person or Federal or State agency (including an entity described in section 824(f) of this title) that sells electric energy" and "includes the Tennessee Valley Authority and each Federal power marketing administration."); 16 U.S.C. § 796(22) (Notably, section 203(a)(2) does not apply to a "holding company" if the only public-utility company it owns or operates is a "gas utility company."). *Id.*

a transmitting utility, an electric utility company,[32] or a holding company in a holding company system that includes a transmitting utility, or an electric utility company.[33]

C. Exemptions for Qualifying Facilities

Three categories of "qualifying facilities" (QFs) are exempt from FPA section 203: (i) qualifying small power production facilities that have a capacity of 30 MW or less, (ii) geothermal QFs, (regardless of size), and (iii) all qualifying cogeneration facilities.[34] QF status attaches to facilities, but the public utility that owns or operates the QF benefits from the FPA section 203 exemption. The exemption applies even if the public utility has a market-based rate tariff for sales of electric energy at wholesale.[35] This largely affects owners of qualifying small power production facilities with a capacity between 20 MW and 30 MW, since in most cases these entities are subject to FERC's market-based rate jurisdiction under FPA section 205.[36]

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32. An "electric utility company" is a company that "owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale."); 42 U.S.C. § 16451(5); *see also* Order No. 669, *supra* note 30, at P 51; Order No. 669-A, *supra* note 30, at PP 41-54, 59-60; *id.* at n.12. Note that this definition includes exempt wholesale generators, qualifying facilities, and foreign utility companies, as well as utilities operating in Hawaii, Alaska, and areas of Texas that are not engaged in interstate commerce, but it does not include power marketers that do not own or operate any facilities used for generation, transmission, or distribution of electric energy for sale. Order No. 669, *supra* note 30, at PP 51, 71; Order No. 669-A, *supra* note 30, at PP 29, 54.

33. 16 U.S.C. § 824b(a)(2).

34. 18 C.F.R. §§ 292.601 (Qualifying small power production facilities generally are renewable energy facilities with a capacity of 80 MW or less that file for QF status (unless exempt); qualifying cogeneration facilities generally are facilities that sequentially use thermal energy for generation of electric energy and for industrial, commercial, heating, or cooling purposes and file for QF status); 18 C.F.R. §§ 292.202(c), 292.203 (QFs that meet the requirements of FPA section 3(17)(E), 16 U.S.C. 796(17)(E)—covering small power production facilities that filed for QF status earlier than 1995 and commenced construction before 2000 or met certain diligence requirements—also are exempt); 18 C.F.R. § 292.601(a). FERC authorization is required for dispositions of QFs that do not benefit from the exemption. *See, e.g.*, *Baltimore Refuse Energy Systems Co.*, 40 FERC ¶ 61,366, at p. 62,118 (1987).

35. *Chevron U.S.A., Inc.*, 153 FERC ¶ 61,192 (2015). The order also clarifies that ownership of generator interconnection facilities and FERC-jurisdictional books and records does not nullify the exemption from FPA section 203 otherwise provided under FERC's regulations.

36. Public utilities that own or control QFs with a capacity of 20 MW or less (or that make sales under a contract executed on or before March 17, 2006, or pursuant to state regulations requiring utilities to purchase energy from QFs) are exempt from FERC's jurisdiction under FPA section 205 with respect to their sales of electric energy at wholesale. 18 C.F.R. § 292.601(c)(1). But those QFs that do not benefit from this exemption need to file a market-based rate tariff at FERC if they engage in wholesale electric sales in interstate commerce. There was a long-standing debate in the industry about whether the mere fact a public utility had market-based rate authority eviscerated the QF exemption from FPA section 203. FERC resolved the issue in its 2015 *Chevron* declaratory order. 153 FERC ¶ 61,192, at P 13. The order also clarifies that ownership of generator interconnection facilities and FERC-jurisdictional books and records does not nullify the exemption from FPA section 203 otherwise provided under FERC's regulations. This order helped to reduce the number of FPA section 203 applications filed with FERC "out of an abundance of caution" by QF owners. FERC emphasized that owners of QFs undergoing such transactions still are subject to applicable requirements to file a new "Form 556" to notify FERC of changes in the ownership of the QF and that QFs with market-based rate authority may be required to file a notice under FPA section 205 to notify FERC of any changes in status from the characteristics relied upon by FERC in granting market-based rate authority. *Id.*

An important issue in assessing whether a QF exemption applies under FPA section 203 is the size of the QF. For a single facility, the relevant size is the "send-out" capacity, which is the amount of capacity that the facility can actually deliver to the point of interconnection.[37] Calculating the size of affiliated QFs became a bigger issue in 2020 thanks to Order No. 872.[38] The order eliminated a "bright-line" established over 40 years of FERC precedent that a "qualifying small power production facility would be deemed separate from an affiliated generating facility located more than one mile away."[39] Instead, the capacity of any affiliated QFs using the same resource (with exceptions for certain hydroelectric and geothermal resources) with electrical generation equipment located within ten miles of each other may be aggregated to determine whether the 30 MW exemption from FPA section 203(a)(1) applies.[40] Order No. 872 and its progeny provides fodder for a whole separate article, but it is notable here because of its impact on determining whether a particular QF qualifies for the exemption from FPA section 203 for QFs that are below the 30 MW threshold.[41]

III. APPLICATION OF FPA SECTION 203(A)(1)(A) TO DISPOSITIONS OF PUBLIC UTILITY ASSETS AND CHANGES IN PUBLIC UTILITY OWNERSHIP/CONTROL

The majority of applications filed at FERC for authorization under FPA section 203 are for dispositions of facilities by public utilities pursuant to FPA section 203(a)(1)(A).[42] This is likely due to the broad interpretation of the meaning of the statutory term "dispose." Jurisdictional dispositions include transfers of physical assets and paper facilities, as well as upstream changes in control of public utilities that indirectly result in such dispositions. It is also likely in part because it is fairly simple to structure transactions to avoid section 203(a)(1)(B) and the availability of a myriad of "blanket authorizations" that apply to holding companies, as discussed in Section V, below.

37. *Broadview Solar, LLC*, 174 FERC ¶ 61,199 at P 26 (2021); *aff'd*, Solar Energy Indus. Ass'n v. FERC, 59 F.4th 1287 (DC Cir., 2023) (confirming that a 160 MW direct current (dc) solar facility combined with a 50 MWdc battery storage system qualified for QF status because the inverters used to convert the facility's power to grid-usable alternating current (ac) limited the maximum send-out capacity to 80 MWac).

38. Order No. 872, *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 85 Fed. Reg. 54,638 (2020), 172 FERC ¶ 61,041 (2020); *aff'd* Order No. 872-A, *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 173 FERC ¶ 61,158 (2020).

39. *See, e.g.*, *Northern Laramie Range Alliance, et al.*, 138 FERC ¶ 61,171 at PP 14, 15 n.25 (2012) (finding two affiliated wind facilities located 2.5 miles apart are QFs and stating "[c]ontrary to Petitioner's characterization of our regulations, the Commission does not consider the one-mile rule to be a rebuttable presumption.").

40. *Id.*

41. *See generally* 172 FERC ¶ 61,041.

42. 16 U.S.C. § 824b(a)(1)(A).

A. Dispositions of Physical Assets

The most straightforward application of FPA section 203 occurs when a public utility sells (or otherwise transfers) a physical asset subject to FERC's jurisdiction under Part II of the FPA,[43] such as electric transmission facilities used in interstate commerce.[44] Generator interconnection facilities are transmission facilities,[45] and they often provide FERC a jurisdictional hook over dispositions of otherwise non-jurisdictional electric-generating plants.[46] Even if FERC-jurisdictional assets account for only a small portion of the total assets being transferred – as in the case of modest interconnection facilities interconnecting an expensive generating plant – FERC evaluates the overall effects of a transaction.[47]

Dispositions of interests in shared interconnection facilities may also be implicated.[48] Often one electric generation project constructs and energizes interconnection facilities well before a subsequent, co-located project is ready to use the line. If the parties did not enter into a co-tenancy and shared facilities agreement (or similar agreement) that grants joint ownership before the line is energized, then transferring interests in the facilities is a disposition of jurisdictional assets that may trigger FPA section 203(a)(1)(A).[49] For this reason, many co-tenancy and shared facility agreements for shared interconnection facilities are exe-

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43. FERC's jurisdiction over such physical facilities commences once they are used for wholesale sales or transmission of electric energy in interstate commerce. *See, e.g.*, *Resources Recovery (Dade County), Inc.*, 20 FERC ¶ 61,138 at, p. 61,303 n.11 (1982). This typically occurs when the facilities are first connected to the transmission grid and energized, including for testing purposes. Note that such facilities typically become jurisdictional before the "commercial operation date" as defined in relevant revenue and interconnection contracts.

44. *See, e.g.*, *Public Service Company* of *New Mexico*, 29 FERC ¶ 61,282, at p. 61,576 (1984) (holding that FPA section 203 applies only to facilities that are jurisdictional under Part II of the FPA and not to other facilities that are subject to FERC's jurisdiction, such as facilities that are jurisdictional under the Natural Gas Act).

45. *See Standardization of Generator Interconnection Agreements and Procedures*, 106 FERC ¶ 61,220 at P 804 (2003) (stating that discrete interconnection facilities are transmission facilities).

46. Section 201 of the FPA provides that FERC "shall not have jurisdiction, except as specifically provided in [Parts II and III of the FPA], over facilities used for the generation of electric energy." 16 U.S.C. § 824 (2012). A sale of electric generating facilities without interconnection facilities is not subject to section 203(a)(1)(A). *See, e.g.*, *Perryville Energy Partners, LLC*, 109 FERC ¶ 61,019 at P 14 (2004); *Western Kentucky Energy Corp*., 83 FERC ¶ 61,336, at, p. 62,361 (1998); *Green Mountain Power Corp.*, 53 FERC ¶ 61,035, at p. 61,138 n.15 (1990); *KGen Enter. LLC & Navasota Wharton Energy Partners, LP*, 115 ¶ FERC 62,055 at, p. 64,407 (2006). Note that a public utility's *acquisition* of a generating facilities may be subject to FERC's prior approval under FPA section 203(a)(1)(D), discussed further below.

47. *Ameren Energy Generating Co.*, 108 FERC ¶ 61,081 at P 25 n.19 (2004).

48. FERC recently ordered transmission providers to allow multiple generating facilities to share a single point of interconnection. *See Improvements to Generator Interconnection Procedures and Agreements*, 184 FERC ¶ 61,054 at P 7 (2023); *Reform of Generator Interconnection Procedures and Agreements,* 163 FERC ¶ 61,043 at P 275 (2018), *order on reh'g*, Order No. 845-A, 166 FERC ¶ 61,137 (2019), *order on reh'g*, Order No. 845-B, 168 FERC ¶ 61,092 (2019) (modifying the definition of "Generating Facility" in the pro forma LGIP and pro forma LGIA to include "and/or storage for later injection."). This was already common practice in many regions, but Order No. 2023 may increase use of the shared facilities arrangement in regions that previously did not have a clear policy on shared interconnection.

49. *PSI Energy, Inc.*, 63 FERC ¶ 61,107, at p. 8 (1993).

cuted well before a project is scheduled to commence testing, with each "co-tenant" having an undivided interest in the facilities, but later projects have no use rights until they are ready to energize.[50]

An increasingly common transfer of jurisdictional assets occurs when a public utility transfers interconnection facilities constructed under the "option-to-build" provisions of standard generator interconnection agreements.[51] Transmission owners typically require that the facilities the interconnection customer elected to build be energized to demonstrate they work before the transmission owner will accept ownership. Once the facilities are energized, FPA section 203 is implicated.[52] The facilities may be exempt from filing an application under FPA section 203 for other reasons (e.g., the value of the facilities is less than $10 million), but the transaction requires analysis.[53] Given that the interconnection customer usually has zero intention (or ability) to ever provide transmission service over such transmission facilities, it would make a lot of sense for FERC to create

50. *Id.* In *PSI Energy*, PSI Energy unsuccessfully argued that various agreements associated with shared transmission infrastructure did not provide for jurisdictional service. *See id*. The agreements provided for jurisdictional service because the use of the system by some owners exceeded their ownership rights, and thus they had to be filed under Section 205 of the FPA. *See id.* at 13; *see also Int'l Transmission Co.*, 152 FERC ¶ 61,043 at P 26 (2015) ("if an owner's utilization of the joint transmission system exceeds its ownership, thereby resulting in the use of another owner's share of the system, any charge for such use must be filed under section 205."). *PSI Energy* raises a related relevant issue regarding when the shared interconnection owners become public utilities subject to FPA section 203. If, as in *PSI Energy*, a joint owner must file the shared facilities agreement pursuant to FPA section 205 because it is providing transmission service, then arguably the co-owners are mere customers of the transmission service and are not public utilities based on the receipt of service alone. It is common practice (often required by project finance lenders' counsel) for a shared facilities agreement to be filed with FERC even if each party's use of the shared facilities is limited to its ownership and there is no jurisdictional service. One party will file, and the co-owners file notices of concurrence. If the first co-owner to have a project come online files the shared facilities agreement, then it begs the question of whether all the co-tenants become public utilities because they have a "rate" on file with the Commission. A better interpretation – and one that is consistent with the Filed Rate Doctrine (discussed below) – is that a co-tenant will not be deemed to have a rate on file with FERC as a result of entering into a shared facilities agreement until it files a Certificate of Concurrence. This uncertainty is a good reason not to file the shared facilities agreement too early (or possibly at all if the joint owners are sufficiently comfortable that they are not providing one another jurisdictional service). *Id.*

51. Order No. 2003, *Standardization of Generator Interconnection Agreements and Procedures*, 104 FERC ¶ 61,103 at P 353 (2003), *order on reh'g*, Order No. 2003-A, 106 FERC ¶ 61,220 (2004), *order on reh'g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *order on reh'g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff'd sub nom.*, National Ass'n of Regul. Util. Comm'rs v. FERC, 475 F.3d 1277, 1279-81 (D.C. Cir. 2007). The "option to build" has become more common in recent years in an effort to overcome prevalent transmission owner construction delays and following FERC Order No. 845, which expanded an interconnection customer's right to opt to build certain interconnection facilities. 163 FERC ¶ 61,043.

52. Final Rule, *Transactions Subject to FPA Section 203*, 71 Fed. Reg. 1348, 1356 (2006) (to be codified at 18 C.F.R. pts. 2, 33).

53. *See, e.g., Oxbow Solar Farm 1,* 184 FERC ¶ 61,005 at PP 9, 19 (2023) (order granting requested open access waivers, and stating that the applicant asserted that FPA section 203 approval was not required because the facilities were less than $10 million). Several other forms of build-transfer arrangements exist for the construction of generating and transmission facilities that sometimes raise similar jurisdictional issues when the builder is a public utility.

a blanket authorization under FPA section 203 for transfers of facilities from interconnection customers to transmission owners pursuant to the election of an option-to-build under interconnection agreements.[54]

B. Dispositions of "Paper Facilities"

Section 203(a)(1)(A) requires FERC authorization for dispositions by public utilities of paper facilities, such as tariffs, contracts, and other books and records.[55] A power marketer that has no physical facilities may nonetheless require prior FERC authorization for the transfer of its FERC tariff, its contracts for sale of power at wholesale, and its related books and records (or any part of these with a value in excess of $10 million). Under FPA section 205, a public utility must have a rate schedule or tariff on file with FERC before it is authorized to engage in sales of electric energy at wholesale in interstate commerce or transmission of electric energy in interstate commerce.[56] Such a tariff or rate schedule becomes a paper facility subject to the requirements of FPA section 203 upon FERC's acceptance of the tariff or rate "schedule for filing."[57]

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54. In 2016 FERC issued a Notice of Inquiry in which it sought comments on whether blanket authorization would be appropriate for transfers of transmission assets that will be integrated into a public utility's existing transmission network, but the proceeding has not resulted in rulemaking. *See* Notice of Inquiry, *Modifications to Commission Requirements for Review of Transactions under Section 203 of the Federal Power Act and Market-Based Rate Applications under Section 205 of the Federal Power Act,* 156 FERC ¶ 61,214 at P 3 (2016) [hereinafter 2016 NOI]. While beyond the scope of this article, it would also save the industry a lot of headaches if FERC would grant a blanket waiver of any transmission owner/operator requirements to interconnection customers electing the option-to-build.

55. *Citizens Energy Corp.*, 35 FERC ¶ 61,198, at p. 61,457 (1986) (holding that a wholesale power marketer with no physical facilities is subject to jurisdiction under section 203 but that revenues derived from wholesale power sales are not subject to jurisdiction under section 203); Hartford Elec. Light Co. v. Fed. Power Comm'n, 131 F.2d 953, 961 (2d Cir. 1942); *see also Enova Corp.*, 79 FERC ¶ 61,107, at p. 61,488-89, nn.17-20 (1997).

56. 16 U.S.C. § 824(d).

57. *See, e.g.*, *Long Lake Energy Corp.*, 51 FERC ¶ 61,262, at p. 7 (1990) (stating the petitioner will be a "public utility" under the FPA "when the Commission accepts [petitioner's] rates for filing.") (citing *Ocean State Power*, 38 FERC ¶ 61,140, at p. 61,378 n.4 (1987)); *see also* Town of Norwood v. New Eng. Power Co., 202 F.3d 408, 419 (1st Cir. 2000) ("[i]t is the filing of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine") (citing Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 417 (1986); Miss. Power Light Co. v. Mississippi, 487 U.S. 354, 374 (1988)). It would make sense that jurisdiction should attach upon the *effective date* of the tariff or rate schedule, which could be earlier or later than the date of FERC's acceptance. *See BP Wind Energy N. Am. Inc.*, 134 FERC ¶ 62,223 at P 64,399 (2011) (FERC staff order issued under delegated authority stating that an applicant will become subject to FERC jurisdiction upon the effective date of its tariff filed with FERC); *see also* 104 FERC ¶ 61,270, at P 15 (stating a tariff became jurisdictional on the effective date that FERC granted in its order conditionally accepting the tariff). Notably, the earlier precedent suggesting FERC's acceptance of a tariff for filing triggers public utility status came before FERC's adoption of mandatory electronic filing through the eTariff system. FERC's eTariff systems makes FERC's acceptance of tariffs or filing more automatic. *See* Order No. 714, *Electronic Tariff Filings*, 124 FERC ¶ 61,270 P 115 (2008) (requiring electronic filing of all tariffs, tariff revisions, and rate changes, and stating electronic filing will "provide[] automatic e-mail notification to an applicant of receipt of the filing and whether or not it has been accepted."). It would be helpful if FERC clarified the moment a market-based rate tariff becomes a "jurisdictional facility" so the industry understands the precise point at which the applicant becomes a public utility for FPA section 203 (and other FPA) purposes. This should include further guidance of the meaning of "accept" in this context – whether it really does mean the moment when an applicant receives the

FERC's treatment of paper facilities such as tariffs is inconsistent with its treatment of physical facilities.[58] FERC has found that it lacks jurisdiction for purposes of FPA section 203 when transmission facilities are not in use, even if they once were energized – as in the case of spare transmission parts.[59] In contrast, entities that have paper facilities such as a market-based rate tariff on file with FERC are generally considered to be subject to FPA section 203, even if no sales have been made (or are even possible given the state of project construction) pursuant to such tariff. In fact, it is often ill-advised to overzealously apply for market-based rate authority too far in advance of making jurisdictional sales pursuant to the tariff because it triggers FERC's regulation – and possibly results in the need for an FPA section 203 application for the transfer of early stage development assets that would normally be exempt.[60]

In addition to tariffs, public utilities typically have contracts, such as power purchase agreements or transmission service agreements, setting out the terms and conditions of specific sales of electric energy[61] and transmission services.[62] Both

"Notification of Acceptance for Filing" email from FERC (which typically arrives within hours or at most a day after submitting a tariff), or the issuance of an order by FERC accepting the tariff for filing (or acceptance by operation of law under section 205 of the FPA). The FERC Notification of Acceptance for Filing emails state: "This is to notify that the FERC Office of the Secretary has accepted the following electronic submission for filing (Acceptance for filing does not constitute approval of any application or self-certifying notice)." This seems to mean that the tariff filing has been "accepted" for purposes of electronic docketing but has not been "accepted" in the sense that the tariff may be used for jurisdictional electric sales or transmission. Order No. 714 explains, "Once passed validation, the standard eFiling e-mail will be sent to indicate whether the Secretary of the Commission has accepted and docketed the filing or rejected it. As occurs with all filings, the docketing e-mail does not guarantee that other filing deficiencies will not result in rejection or other action pertaining to the filing later in the review processes within the Commission. After this step, the filing is passed on to eLibrary, the tariff database and other Commission systems." Order No. 714, *supra* note 57, at P 21. It would be helpful if FERC would provide further clarification of the use of the term "accept" in this context or consider using a different term for approving the docketing of an electronic tariff filing versus accepting the tariff to be used for jurisdictional electric sales or transmission. While the difference between the date a tariff is accepted for filing and the eventual effective date may be mere days, the difference between whether an entity is a public utility or not within those few days could be determinative of whether FPA section 203 approval is required for closing.

58. 79 FERC ¶ 61,107, at 61,489.

59. *See e.g., Grid Assurance*, 152 FERC ¶ 61,116 at P 19 (2015) (Declaratory Order stating "[t]he Commission has found that transmission facilities that are not in service at the time of the transfer are not subject to its jurisdiction under section 203 of the FPA" (citing *N.Y. Transco*, 151 FERC ¶ 61,005 at P 16 (2015) (dismissing application under FPA section 203 where transmission facilities were not in service or energized)); *PacifiCorp*, 132 FERC ¶ 61,018 at P 20 (2010) (citing *Gamma Mariah, Inc. et al.*, 44 FERC ¶ 61,442, at p. 62,399 (1988)); *Idaho Power Co*., 132 FERC ¶ 61,019 at P 20 (2010).

60. *See also* 18 C.F.R. § 35.3(a)(1) (stating "[a]ll rate schedules or tariffs or any part thereof shall be tendered for filing with the Commission and posted not less than sixty days nor more than one hundred-twenty days prior to the date on which the electric service is to commence and become effective under an initial rate schedule. . . ."). Some entities (and investors) nonetheless prematurely file (or require filing) in order to ensure market-based rate authority is secure prior to closing a transaction.

61. Although section 201 of the FPA mentions only electric energy, this has been interpreted to include certain other related products, such as electric capacity and ancillary services. *See, e.g.*, Order No. 697, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, FERC Stats. & Regs. ¶ 31,252, at P 12, 72 Fed. Reg. 39,904 (2007) (codified at 18 C.F.R. pt. 35).

62. Some contracts now are not really *paper* facilities, because they may be entered into using electronic platforms, such as online systems used in organized electric markets in various parts of the country for sales of

wholesale energy sellers and purchasers under power purchase agreements often assign their interests in these contracts to other parties.[63] Under section 201 of the FPA it is the sales of electric energy—not the purchases—that fall under FERC's jurisdiction.[64] This is true even if the contract conveys control over all of the capacity of an electric generating facility, effectively resulting in a change in control over the facility.[65]

Bilateral contracts, such as contracts for the sale of electricity at wholesale in interstate commerce (commonly called a power purchase agreement, or "PPA"), do not become jurisdictional paper facilities until the earliest of (i) the date they are filed with FERC (which typically only occurs if the seller has not filed a tariff with FERC for making such sales), (ii) a tariff (such as a market-based rate tariff) pursuant to which PPA sales are made is filed, or (iii) they are actually used to sell energy at wholesale (which should not occur before (i) or (ii) occurs).[66] This comports with the "filed rate doctrine" because the PPA is not a filed rate until it is either filed and accepted by FERC or is subject to a tariff that has been filed and accepted by FERC.[67]

It is also consistent with the need for commercial flexibility in the early stages of project development. Entities will often enter into a PPA at a very early stage of project development in order to secure financing for construction of a project

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FERC-jurisdictional services. The electronic records established on these systems should be considered jurisdictional to the extent that they establish the terms and conditions of a public utility's jurisdictional sales. *See, e.g.*, *Potomac Elec. Power Co.*, 124 FERC ¶ 62,093 at P 64,245 n.3 (2008) (authorizing the transfer of a public utility's rights and obligations to sell capacity in the PJM Interconnection L.L.C. Reliability Pricing Model program, under which rights and obligations are auctioned and transferred on an online platform).

63. *See e.g.*, *id.*

64. 16 U.S.C. § 824 (limiting the FPA to the transmission and sale of electric energy (not the purchase)); *compare* 109 FERC ¶ 61,309, at P 8 (disclaiming jurisdiction over the transfer of the contractual right to purchase power under a power purchase agreement), *with Entergy Nuclear Indian Point* 2, 115 FERC ¶ 62,056 at P 2 (2006) (authorizing assignment of the right to sell power under power purchase agreements pursuant to FPA section 203).

65. *New England Power Co.*, 82 FERC ¶ 61,179, at p. 61,666 (1998), *reh'g denied*, 83 FERC ¶ 61,275, at p. 62,147 (1998) (finding that a customer under an FPA-jurisdictional contract did not require section 203 approval to transfer its interests in the contract because the right to receive a jurisdictional service is not a facility used for the transmission or sale of electric energy at wholesale); 109 FERC ¶ 61,309, at 8 (finding the same); *see also* Atlantic City Elec. Co. v. FERC, 295 F.3d 1, 11 (D.C. Cir. 2002) (discussed further below); *but see*, 18 C.F.R. § 35.42(a)(2) (an entity acquiring control over an electric-generating facility through assignment of a purchaser's interest in a power purchase agreement may have an obligation to report this to FERC under section 205 of the FPA).

66. "Filed" in this context means that the PPA or tariff has been filed under FPA section 205 and has been accepted for filing by FERC.

67. *See, e.g.*, *Res. Recovery (Dade Cnty.), Inc.*, 20 FERC ¶ 61,138, at p. 61,303 (1982); *Long Lake Energy Corp.*, 51 FERC ¶ 61,262 at n.14 (1990) ("In Ocean State Power, the Commission found that an entity owned 'facilities subject to the Commission's jurisdiction' within the meaning of FPA section 201 as soon as the Commission accepted its rates for filing. Accordingly, Commonwealth will be a public utility when the Commission accepts its rates for filing."); *Ocean State Power*, 43 FERC ¶ 61,466, at p. 62,139 (1988) (citing *Alamito Co. Shareholder v. Alamito Co.*, 38 FERC ¶ 61,241, at p. 61,779 (1987)); Town of Norwood v. New England Power Co., 202 F.3d 408 (1st Cir. 2000) ("It is the filing of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine.") (internal citations omitted).

based on the contracted revenues.[68] The project company will normally not apply for market-based rate authority until a later stage of development, after funding is secured and shortly before the project is completed and placed in service.[69] Ownership of the project company may change one or more times during the intervening period.[70] If the transfer occurs before the project company has legal authority to make energy sales (such as market-based rate authority from FERC under FPA section 205), then the direct or indirect transfer of the PPA is similar to a transfer involving physical facilities that will be jurisdictional, but that are not yet jurisdictional.[71]

Recommendation: While the authors believe that the discussion above regarding FPA section 203 jurisdiction over PPAs is consistent with FERC precedent and standard industry practice, the authors are not aware of any clear supporting precedent or FERC guidance. Given the importance of PPAs to project development, it would be useful if FERC would confirm that a PPA is not a jurisdictional paper facility triggering FPA section 203(a)(1) prior to the earliest of time that the owner or operator of the facility has (i) filed the PPA with FERC, (ii) filed a tariff allowing for sales at wholesale from the facility or (iii) any such sales have been made.[72] It would be even more helpful if FERC would change its current policy by stating that the mere fact an entity has market-based rate authority does not make it a jurisdictional public utility for purposes of FPA section 203

68. 43 FERC ¶ 61,466, at 62,139-40.

69. In Order 2001, FERC amended the filing requirements for public utilities under the FPA to eliminate the requirement that public utilities file individual market-based power sales agreements that conform to an effective market-based rate tariff (instead, requiring such transactions be reported in Electric Quarterly Reports). *See* Order No. 2001, *Revised Pub. Util. Filing Requirements*, 99 FERC ¶ 61,107, at P 9 (2002), *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074 (2002), *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342 (2002), *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003), *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270 (2007), *order on reh'g & clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, 125 FERC ¶ 61,103 (2008).

70. *See* Order No. 2001, *supra* note 69, at P 19.

71. *N.Y. Transco*, 153 FERC ¶ 61,259 at PP 19-22 (2015) (Order denying rehearing, confirming unenergized transmission facilities are not jurisdictional facilities, stating "[t]o find, as New York Public Power advocates, that the Commission had jurisdiction based on Applicants' intended use of the Transmission Projects for jurisdictional service or as jurisdictional facilities at some point in the future would expand the scope of the Commission's jurisdiction under FPA section 203 beyond the limits imposed by the statute, and could encompass facilities that Congress never intended for the Commission to have authority over."); *see also* 79 FERC ¶ 61,107, at 61,491 ("one of the fundamental prerequisites of FPA section 203 jurisdiction is the presence of jurisdictional facilities." (citing Duke Power Co. v. FPC, 401 F.2d 930 (D.C. Cir. 1968)).

72. FERC has clarified that "proposed transmission rates are contingent on, among other things, approval and closing of the proposed transaction, approval of the proposed transmission rates, and the transmission facilities actually being placed into service. Thus, there is no inconsistency in disclaiming jurisdiction under FPA section 203 while proceeding with review of proposed FPA section 205 transmission rates and incentives, which necessarily take effect only after the facilities are placed into service." *See* 153 FERC ¶ 61,259, at P 23. This same conclusion should apply to a PPA for sales from a generating facility that has not been constructed by a seller that does not have legal authority to sell energy. *See id*. (referencing *Desert Sw. Power*, 135 FERC ¶ 61,143 (2011).

until the tariff or rate schedule is actually used to sell energy.[73] This would streamline transactions involving late-stage development projects and facilitate earlier in-service dates. Applications for market-based rate authority are often delayed until after a developer transfers ownership to the long-term equity investors near completion of the project specifically to avoid being a public utility (and the time, resources, and extra closing conditions) necessary to obtain FPA section 203 approval.[74]

C. Change-in-Control Transactions

In addition to a public utility's direct transfer of jurisdictional assets, FPA section 203(a)(1)(A) applies to change-in-control transactions resulting from direct or indirect transfers of proprietary ownership interests, such as stock or partnership or membership interests, in public utilities or their upstream owners.[75] FERC has interpreted this jurisdiction over "change-in-control" transactions to derive from the "or otherwise dispose" language of FPA section 203(a)(1).[76] FERC clarified in the Supplemental Policy Statement "that transactions that do not transfer control of a public utility do not fall within the 'or otherwise dispose' language of section 203(a)(1)(A) and thus do not require approval" under that section.[77]

The obligation to obtain prior approval for upstream transfers of indirect interests in public utilities tends to result in a disproportionate amount of debate and angst among all of the FPA section 203 requirements in current transactional practice. This is due in part to the evolving nature of transactions, but also to often narrow and sometimes confusing precedent, discussed below. Timing is ripe for another FERC guidance order on FPA section 203 to clarify how precedent should be applied to future transactions involving indirect changes in interests of public utilities.

One major obstacle is the lack of a definition of "control." Historically, FERC presumed that a transfer of less than 10% of the voting securities of a public utility did not constitute a transfer of control.[78] FERC has emphasized, however, that the determination of whether a transaction results in a change of control is a fact-based inquiry and that no "bright-line standard will encompass all relevant factors and

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73. FERC would still have the opportunity to address changes in ownership through FPA section 205 change-in-status filings to the extent that there is a change in ultimate upstream ownership or a new affiliation (subject to regulatory thresholds) created as a result of the transfer. *See* 18 C.F.R. § 35.42.

74. As discussed in section 2(D) below, FERC's regulations provide for a blanket authorization for certain transfers of jurisdictional contracts (including PPAs) in certain circumstances. *See* 18 C.F.R. 33.1(c)(16).

75. *See, e.g.*, *Cent. Vt. Pub. Serv. Corp.*, 39 FERC ¶ 61,295, at p. 61,960 (1987); *Cent. Ill. Pub. Serv. Co.*, 42 FERC ¶ 61,073, at p. 61,328 (1998); 79 FERC ¶ 61,107, at 61,493-94; *PG&E Corp.*, 80 FERC ¶ 61,041, at p. 61,129 (1997).

76. *FPA Section 203, Supplemental Policy Statement*, FERC Stats & Regs. ¶ 31,253 (2007), 120 FERC ¶ 61,060 at P 37 (2007), 72 Fed. Reg. 42,277, *clarified*, 122 FERC ¶ 61,157, at P 4 (2008) [hereinafter *Supplemental Policy Statement*].

77. *Id*. at P 37 (stating the finding assumes "there is no sale or lease of the facilities").

78. *Id.* at P 57; *see also* 181 FERC ¶ 61,055, at P 25 ("The Commission has established that an ownership share under 10% creates a rebuttable presumption of no control." (citing Order No. 669-A, *supra* note 30, at 101 (2006))).

possibilities."[79] FERC has warned entities involved in proposed transactions that they have the burden to decide whether they need to obtain FERC authorization for the transaction.[80]

An example where a change of control may occur even absent a 10% or greater change in interests is when the general partner of a limited partnership changes. It is common for the general partner to only hold *de minimus* ownership interests, such as 1%, yet hold nearly all actual control over the entity.[81] In this case, depending on the rights set forth in the partnership agreement, a general partner with a very small economic interest may hold all—or at least 10% or more—of the voting securities.

Entities also need to consider upstream aggregation of interests.[82] If multiple companies under common control each acquire less than 10% of a public utility's voting securities, they might collectively hold more than 10%.[83] In that case, FERC stated it would view the transaction as potentially subject to authorization under sections 203(a)(1)(A) and (B).[84]

Certain precedent seems to focus on whether an entity has the ability to direct day-to-day activities and actual operational control of a public utility.[85] In *Entegra,* however, FERC stated applicant's "focus on day-to-day power sale activities and operational controls is [] an overly narrow reading of the Commission's authority."[86] Instead, "the determination of control is appropriately based on a review of the totality of the circumstances on a fact-specific basis. No single factor or factors necessarily results in control. The electric industry remains a dynamic, developing industry, and no bright-line standard will encompass all relevant factors and possibilities that may occur now or in the future."[87] This leaves the industry with scant grounds to independently assert whether an investor has control in any given transaction.

Arguably, once FERC has approved a change-in-control transaction, there is no further change in control as a result of the acquisition of *additional* ownership interests by the same acquirer, so that no further authorization should be required

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79. *Supplemental Policy Statement*, *supra* note 76, at P 43.

80. *Id.* at PP 55-56.

81. *See generally*, DEL. CODE ANN. tit. 6 §§ 17-401 – 407 (2022).

82. 16 C.F.R. § 801.13(a) (2005).

83. Order No. 669-B, *supra* note 30, at 42,582-83.

84. *Id.* at 42,583 (citing *Goldman Sachs Group*, 114 FERC ¶ 61,118 at P 15 (2006), *order on reh'g*, 115 FERC ¶ 61,303 (2006)).

85. *See, e.g., Tenaska Lotus Holdings, LLC, et al*., 173 FERC ¶ 61,199 at P 10 (2020) (finding a FPA section 203 application was timely filed by a passive tax equity investor because it was filed "prior to assuming operational management activities."); *Supplemental Policy Statement, supra* note 76, at P 54 (stating circumstances that indicate an investment is passive include "the acquired interest does not give the acquiring entity authority to manage, direct or control the day-to-day wholesale power sales activities, or the transmission in interstate commerce activities, of the jurisdictional entity.").

86. *Entegra Power Group LLC, et al*., 129 FERC ¶ 61,156 at P 19 (2009). Applicants in *Entegra* complained that FERC was not clear whether "control" should be interpreted as "day-to-day control over facility operations and sales of power" or "actions that any shareholder is normally entitled to take that are unrelated to the operation or control of jurisdictional facilities." *Id.* at P 10.

87. *Id.* (citing Order No. 697, *supra* note 61, at P 174).

(unless FERC placed limits on its earlier approval of a change-in-control).[88] FERC has not, however, provided clear guidance on this point. For example, FERC has found that, in a case involving a series of transactions in which a company ultimately acquired 100% of the voting interests in a public utility, that FPA section 203 authorization was required for at least one prior transaction in which that same company acquired additional interests in the public utility.[89] FERC has also asserted jurisdiction over a transaction where a public utility transferred an additional 20% voting interests to an investor already holding 20% voting interests under a prior blanket authorization.[90]

Entities have attempted to use contractual arrangements to limit control to varying degrees of success.[91] In *Cascade*, FERC determined that an acquisition of greater than 10% of the common stock in a public utility did not require authorization under FPA section 203(a)(1), subject to the conditions offered by the relevant investor in a Standstill Agreement to prevent the investor from exercising control over the public utility.[92] These conditions included that: the investment did not have the purpose and would not have the effect of changing or influencing the control of the public utility; the investor would not seek or hold a seat on the board of directors; the investor would not seek to set or influence the price, timing, or manner in which power would be sold from the public utility's generating facilities; the investor would provide FERC with copies of any Schedule 13D or 13G filed with the Securities and Exchange Commission; the investor would limit its investment to not more than 20%; the investor would not terminate a Standstill Agreement under certain of its provisions; and certain debt securities held by the investor did not provide any equity-related voting rights.[93]

In *Hartree*, FERC agreed that investor shares placed into a "Voting Trust" established pursuant to Delaware General Corporation Law did not constitute voting securities.[94] The Voting Trust had an independent trustee who could only be

88. *Supplemental Policy Statement*, *supra* note 76, at P 35.

89. *See, e.g.*, *id.* at P 55 (citing 104 FERC ¶ 61,270, at PP 15-17 (discussing that a transfer resulting in the increase of PDI Stoneman's ownership share in a public utility from one-fourth to one-third may have constituted a change in control despite the existence of a supermajority voting provision and that "the material change in the proportion of membership interests [in a subsequent transaction increasing PDI Stoneman's ownership share from one-third to two-thirds] resulted in a change in control"); the parties had not sought or obtained prior FERC authorization for either of these two transactions, and the target company had not been a jurisdictional public utility at the time of PDI Stoneman's acquisition of the initial one-fourth ownership interest).

90. *LS Power Dev.*, *LLC*, 125 FERC ¶ 61,267 at PP 24, 28 (2008) (asserting jurisdiction over an increase in ownership of common stock in a public utility holding company to 40% where FERC previously had granted a blanket authorization for the acquisition by the same acquirers of up to 20% of such common stock). It is not clear why the applicants in this and other similar proceedings only sought approval up to a certain percentage interest, such as 20%. FERC has not suggested that any percentage ownership limits over 10% matters for change-of-control analysis.

91. *See, e.g.*, *Cascade Inv.*, 129 FERC ¶ 61,011 at PP 9-10 (2009); 181 FERC ¶ 61,055, at PP 18-19.

92. 129 FERC ¶ 61,011, at PP 8-11.

93. *Id.* at P 20. FERC also imposed certain monitoring requirements, including quarterly filings certifying compliance with these conditions. *Id.* at P 21.

94. *Hartree Partners, LP, et al.*, 168 FERC ¶ 61,212 at P 10 (2019).

removed for cause and the investor only retained veto rights regarding "(1) issuances of stock; (2) liquidation of [the public utility]; (3) bankruptcy; (4) changes to [the public utility's] corporate form or tax treatment; (5) changes to certain investor rights under [the public utility's] corporate charter; and (6) merger or consolidation."[95] FERC conditioned approval on investors not having more than one representative on the public utility's Board in the future without FERC approval.[96] FERC also took the opportunity to provide the following guidance: "In the future, applicants asserting that a voting trust breaks an affiliate relationship should provide the Commission with information regarding their combined representation on relevant boards of directors (or similar governing bodies) and any other facts and circumstances that would indicate a lack of common control."[97]

Conversely, in *TransAlta*, FERC held that the parties should have sought authorization under FPA section 203 for a transaction that had certain similarities with the transactions in *Hartree* and *Cascade*.[98] Investors in *TransAlta* also employed a Standstill Agreement, but unlike *Cascade*, FERC determined the Standstill Agreement at issue was insufficient evidence of no control where the agreement did not explicitly prevent the investor from influencing day-to-day activities of a public utility holding company and its public utility subsidiary.[99]

Another factor differentiating *TransAlta* from *Hartree* and *Cascade* was that the investor in *TransAlta* and its affiliate also had the right to appoint two out of twelve members of the board of directors of the holding company with respect to several public utilities and had exercised this right to place two executives from the investor's affiliate on the board.[100] Relying on its holdings in two other recent decisions (involving determinations of affiliation under sections 205 and 206 of the FPA), FERC determined that the appointment of these board members "that are not independent from" the investor or its affiliates constitutes a change in control and announced that "[going forward], appointment of an investor's own officers or directors, or other appointee accountable to the investor, to the board of a public utility or holding company that owns public utilities will require prior Commission approval under section 203(a)(1)(A)."[101] It is not relevant to FERC whether the nature or number of appointees actually have the power to determine how the board will act.[102] FERC's rationale is that "board membership confers rights, privileges, and access to non-public information, including information on

95. *Id*. at P 11.

96. *Id.* at P 25.

97. *Id*. at P 27

98. 181 FERC ¶ 61,055, at P 33 (approving a transaction under section 203(a)(1) and 203(a)(2) and holding that authorization also was required under both FPA sections 203(a)(1)(A) and 203(a)(2)—but not sought or obtained—for an earlier transaction and distinguishing the finding in *Cascade*. FERC did not take any enforcement action for the parties' failure to timely apply for authorization of the earlier transaction).

99. *Id.* at PP 30-31.

100. *Id.* at PP 27-28.

101. *Id.* at P 29 (citing *Pub. Citizen, Inc. v. CenterPoint Energy, Inc*., 174 FERC ¶ 61,101 at P 33 (2021)*; Evergy Kan. Central, Inc.,* 181 FERC ¶ 61,044 (2022); *order addressing arguments on r'hg*, 184 FERC ¶ 61,003 (2023).

102. 181 FERC ¶ 61,055, at P 29.

commercial strategy and operations."[103] The Commission's order in *TransAlta* establishes that appointment of non-independent board members constitutes affiliation and leads to a requirement for prior FERC authorization under FPA section 203(a)(1). This relatively clear guidance will nonetheless likely lead to additional questions about how to determine whether a board member is independent.[104] There will likely be many cases with facts that do not align exactly with the facts in *TransAlta* that will require public utilities and their investors to determine whether they need to file for prior approval from FERC. Uncertainty about this may lead to additional applications filed "in an abundance of caution."

Although it is beyond the scope of this article, it is important to consider antitrust implications of transactions, regardless of whether approval is required under FPA section 203. FERC relies in part on Horizontal Merger Policy Guidelines established in 1992 by the DOJ and FTC to determine whether a proposed transaction will have an adverse effect on competition.[105] The DOJ and FTC modified these guidelines in 1997 and in 2010, but to date FERC continues to apply the 1992 guidelines.[106] The DOJ/FTC standards were further amended in 2020, but this amendment was later withdrawn, and the DOJ and FTC released updated draft Merger Guidelines on July 19, 2023, subject to a 60-day comment period.[107] Entities such as the American Antitrust Institute, the DOJ and the FTC have engaged in FERC Section 203 rulemaking proceedings. For example, the DOJ and FTC submitted comments to FERC in response to the 2016 NOI, urging FERC to

103. *Id.* (citing 181 FERC ¶ 61,044, at P 45). For cases further addressing whether the circumstances under which appointment by an otherwise non-controlling investor (i.e., holding less than 10% of the voting equity) of a member of a public utility (or its holding company) constitutes affiliation for purposes of FPA sections 205 and 205, *see id*.; *Mankato Energy Center*, 184 FERC ¶ 61,170 at P 62 (2023) (*Mankato*) (applying FERC's regulations at 18 C.F.R. § 35.36(a)(9)(iii) (providing for a Commission determination that there is liable to be an absence of arms-length bargaining making it necessary or appropriate that a person be treated as an affiliate, regardless of the amount, if any, of voting interests held) and finding affiliation between an investment advisor and certain public utilities based on review of the totality of the circumstances, where FERC found, among other factors, that an employee of the investment advisor sits on the board of directors of a holding company over the public utilities as the representative of the holding company advised by the investment advisor). Based on the Commission's decision in *TransAlta*, it is likely that FERC will apply the same test to determine affiliation under FPA section 203 as it does under FPA sections 205 and 206, except that, as discussed in Section III.D. below, blanket authorizations may apply in cases where the investor will hold less than 10% of the public utility's voting securities. The regulation applied by FERC to determine affiliation in *Mankato* does not necessarily involve a transfer of securities and likely would be made after any such transfer occurred, so situations similar to the one in Mankato likely would not invoke FPA section 203 jurisdiction.

104. 181 FERC ¶ 61,055, at PP 33-34.

105. *See* Notice of Inquiry, *Modifications to Commission Requirements for Review of Transactions under Section 203 of the Federal Power Act and Market-Based Rate Applications under Section 205 of the Federal Power Act,* 156 FERC ¶ 61,214 at P 3 (2016) (citing the DOJ and FTC's 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (1992).

106. *Foxhound Solar, LLC*, 184 FERC ¶ 62,004 at n.2 (2023) (citing *Merger Policy Statement*, FERC Stats. & Regs. ¶ 31,044 at 30,129 (1996); *Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2012)).

107. *Merger Guidelines*, US DEPT. JUSTICE & FED. TRADE COMM'N (Draft, for public comment, July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

"reduce its reliance on market structures to assess market power in electricity markets."[108] Instead, the DOJ and FTC suggested that "[s]tructural measures, such as market shares and market concentration, should be the starting point of an analysis of market power" and that FERC should supplement its analyses "with other types of evidence, such as a supply curve analysis."[109] It would be interesting to hear the views of the FTC and other parties on the extent to which, if any, equity interests with limited rights with respect to management of the public utility or holding company raise concerns about possible anti-competitive effects, and screens and analytical tools that could be used to separate out such interests that do raise concerns about competition from those that do not. These views would be particularly valuable once the DOJ and FTC have completed action on the recently proposed revisions to their Horizontal Merger Guidelines. It would be even more helpful to the industry if the FTC and FERC could establish joint criteria or guidelines that would allow parties to certain transactions to rely on the authority of one agency or the other for authorization rather than have to consider both agency's jurisdiction over the same transaction. Increased coordination between FERC and the FTC in cases where they have concurrent jurisdiction could increase efficiency for the regulated public and the Federal government.

1. Uncertainty About Whether Interests Are "Voting Securities"

FERC has disclaimed jurisdiction under FPA section 203(a)(1)(A) over transfers by public utilities of "non-voting" equity securities that do not convey control.[110] The analysis does not depend on the percentage of equity securities.[111] Nor does the analysis depend on labels – jurisdiction may attach if there is a change in actual control, even if a transaction involves equity securities that are labeled "non-

108. 156 FERC ¶ 61,214, at P 2 (filed November 28, 2016). FERC previously proposed changes in 2010 to its regulations regarding electric sector mergers, but ultimately terminated the rulemaking proceeding without further action. Notice of Proposed Rulemaking, *Control and Affiliation for Purposes of Market-Based Rate Requirements under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, FERC Stats. & Regs. ¶ 32,650, 75 Fed. Reg. 4498 (2010); Notice of Proposed Rulemaking, *Withdrawal Notice of Proposed Rulemaking and Termination of Rulemaking Proceeding*, 81 Fed. Reg. 78,756, 78,756 (2016).

109. Comment of the U.S. Department of Justice and the Federal Trade Commission, FERC Docket No. RM16-21, p. 2 (filed November 28, 2016).

110. Order No. 708, *Blanket Authorization Under FPA Section 203*, FERC Stats. & Regs. ¶ 31,265 at P 55, 73 Fed. Reg. 11,003 (2008) (citing the *Supplemental Policy Statement*, *supra* note 76, at P 37; *Legg Mason, Inc.*, 121 FERC ¶ 61,061 at P 18 (2007)), *order on reh'g*, Order No. 708-A, FERC Stats. & Regs. ¶ 31,273, 73 Fed. Reg. 43,066 (2008), *order on reh'g*, Order No. 708-B, FERC Stats. & Regs. ¶ 31,290, 74 Fed. Reg. 25,410 (2009). But FERC has not clearly defined the term "voting security" for purposes of section 203, even though it has provided clearer guidance for purposes of section 205 of the FPA. *See, e.g.*, *AES Creative Res., LP*, 129 FERC ¶ 61,239 at PP 21-28 (2009). In *Hartree*, FERC cited to the definition of voting security in the Public Utility Holding Company Act of 2005, stating it is "any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company." *Hartree Partners, LP, et al.*, 168 FERC ¶ 61,212 at n.41 (citing 42 U.S.C. § 16451(17) (2012)).

111. In many cases it is difficult to calculate the percentage of equity securities held, because the passive investor often will hold an entirely different class of securities than the active investor. For example, a passive investor may hold 100% of the "Class A" membership interests, whereas the managing member holds 100% of the "Class B" membership interests.

voting" but nevertheless grant to the holder control over the entity, for example, through veto rights.[112] It is often difficult to determine with certainty whether public utilities that issue "non-voting" equity securities with limited consent or veto rights benefit from this disclaimer of jurisdiction. There is no bright line for establishing when such securities convey control. In *D.E. Shaw Plasma Power*, FERC disclaimed jurisdiction under FPA section 203 over certain transfers of passive interests in a public utility, where the investors had only limited consent rights with respect to actions of the public utility in which they held interests.[113] FERC explained that the passive equity investors "will not have authority to manage, direct or control the activities of [the public utility] in its day-to-day operations, as it engages in wholesale power transactions" and that the consent rights "do not impart control of jurisdictional facilities to the [p]assive [i]nvestors and will not affect the ability of [the public utility] to conduct jurisdictional activities."[114] As discussed in more detail in *FERC May I?*,[115] FERC subsequently provided general guidance in Order No. 669, [116] the *Supplemental Policy Statement*,[117] and other orders on this topic.[118] This guidance provided some color, but has been insufficient for determining whether each of the veto and consent rights—sometimes

112. *See generally,* Order No. 708, *supra* note 110.

113. *D.E. Shaw Plasma Power, LLC*, 102 FERC ¶ 61,265 at PP 15, 19 (2003). The consent rights included material amendments to the indirect parent company's LLC Agreement under certain specified circumstances; issuance of new interests senior to the then-existing member interests of the indirect parent company; adoption of new limited liability company agreements (or other operative or constituent documentation) in connection with mergers, consolidations, combinations, or conversions in certain cases; appointment of a liquidator in certain circumstances; and assignment of investment advisory contracts under certain circumstances. *Id.* at PP 6 n.3, 19. This order predated the enactment of section 203(a)(2) of the FPA and involved the prior version of section 203(a), which is generally similar to the current section 203(a)(1) of the FPA. *But see* 104 FERC ¶ 61,270, at P 17 (holding that a transfer of membership interests in a public utility constituted a change-in-control transaction subject to FERC jurisdiction under section 203, even though the number of membership interests held did not surpass the 80% level required for approval of certain "major investment and broad-level actions" under the supermajority provisions of the operating agreement).

114. 102 FERC ¶ 61,265, at P 19.

115. *FERC May I?*, *supra* note 2, at 161-63.

116. Order No. 669, *supra* note 30, at P 141 n.101.

117. *Supplemental Policy Statement*, *supra* note 76, at 54 (footnotes omitted) (stating that an investment in a public utility that does not convey control will be considered to be a passive investment not subject to section 203(a)(1)(A) if, among other things: "(1) the acquired interest does not give the acquiring entity authority to manage, direct or control the day-to-day wholesale power sales activities, or the transmission in interstate commerce activities, of the jurisdictional entity; and (2) the acquired interest gives the acquiring entity only limited rights (e.g., veto and/or consent rights necessary to protect its economic investment interests, where those rights will not affect the ability of the jurisdictional public utility to conduct jurisdictional activities); and (3) the acquiring entity has a principal business other than that of producing, selling, or transmitting electric power.").

118. In *AES Creative Resources*, FERC "confirm[ed] that the term 'voting securities,' as used in our market-based rate regulations, was intended to have the same meaning as the definition of 'voting securities' adapted from the PUHCA 1935 and set forth in PUHCA 2005," which defines voting securities as "any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company." 129 FERC ¶ 61,239, at PP 21-28 (citing 42 U.S.C. § 16451(17) (2006)). *Ad Hoc Renewable Energy Fin. Grp.*, 161 FERC ¶ 61,010 (2017). In the Ad Hoc Order, FERC stated that it "see[s] no reason to not to" apply the same findings that the tax equity interests constituted non-voting securities that did not transfer control "for purposes of FPA section 203." *Id.* at P 16.

numbering two dozen or more—in many equity investment documents are consistent with a finding that the investment is passive. FERC diluted the value of its guidance in the *Supplemental Policy Statement* by adding that "the circumstances that convey control in section 203 analysis vary depending on a variety of factors" and that "the burden remains upon the entities involved in a proposed transaction to decide whether they need to obtain Commission authorization under section 203 to undertake a proposed transaction."[119]

Given uncertainty about the scope of FERC's jurisdiction, parties to passive equity investment transactions often file FPA section 203 applications "out of abundance of caution" requesting FERC authorization without seeking a ruling on jurisdiction.[120] Parties' willingness to submit to FERC jurisdiction in these cases stems in part from the reluctance of their counsel to issue clean opinions that no FERC authorization is required on transfers of non-controlling equity interests, given the lack of clear FERC guidance applying to the specific situation. These filings are designed to obtain prompt approval—whether required or not—rather than risk delay while FERC considers whether the transaction is subject to FERC jurisdiction.[121]

In 2017, FERC provided guidance on one type of transaction that was the subject of many of these "abundance of caution" filings—namely, whether FPA section 203 authorization was needed for transfers of passive interests in renewable energy generating companies when financial institutions and other non-utility parties acquire "tax equity" interests in such companies.[122] Previous FERC guidance established that the types of equity interests typically acquired in these transactions were not "voting securities" for purposes of section 205 and 206 of the FPA (regarding the rates charged by public utilities).[123] The order in *AES Creative Resources* was important for these renewable energy generating companies with market-based rate authorization, since it relieved them of the burden of considering their passive investors (and other public utilities in which such investors also hold equity interests) as affiliates for purposes of conducting the competition analysis required to qualify for market-based rates.[124] In the 2017 *Ad Hoc Group* order,

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119. *Supplemental Policy Statement*, *supra* note 76, at PP 55-56.

120. *See, e.g.,* FERC Docket No. EC22-121-000, at n.4 (requesting approval out of an abundance of caution for the transfer of passive membership interests that do not confer rights to control the applicant). FERC typically acts on these applications without making any determination on whether it has jurisdiction, based on the precedent established in 43 FERC ¶ 61,466.

121. FERC has 180 days to rule on an application under FPA section 203, but as discussed above, often grants applications for such authorization within about 60 days of filing upon a request for expedited action. 16 U.S.C. § 824b(a)(5); 18 C.F.R. § 33.11. The alternative – a request for declaratory order – is not subject to a deadline by which FERC must act.

122. 161 FERC ¶ 61,010. Investors in these transactions normally seek equity treatment under the tax laws due to requirements related to tax incentives offered to those projects; they do not seek an active role in management but rather seek consent rights with certain major actions, such as issuing new equity securities, taking on new debt or other obligations, changing the organizational documents, changing the tax treatment, or entering into, amending, or terminating certain material contracts (which often includes power purchase agreements). They typically can remove the managing member of the public utility only for cause. *Id.* at P 5.

123. 129 FERC ¶ 61,239, at PP 21-28.

124. *Id.*

FERC expanded this guidance to FPA section 203, holding that "the tax equity interests in public utilities or public utility holding companies identified in *AES Creative Resources* do not constitute voting securities for purposes of FPA section 203" and therefore that "the issuance or transfer of them do not constitute a transfer of control" and do not require authorization under FPA section 203.[125] FERC cautioned, however, that the guidance is limited to securities having the characteristics of the securities at issue in *AES Creative Resources* and that "it remains the investor's responsibility to make a determination as to whether prior Commission approval" is necessary for securities with characteristics that vary from those at issue in *AES Creative Resources*.[126]

In fact, the securities in tax equity transactions rarely—if ever—are exactly the same as those at issue in *AES Creative Resources*. Key aspects to consider in reviewing voting or consent rights granted to tax equity investors include the extent of any rights with respect to the sales by the public utility of electric energy at wholesale or rights to remove the manager of the public utility for reasons other than cause. The public utility or its holding company issuing or transferring direct or indirect tax equity interests to investors often is able to provide a representation and warranty, as well as an opinion of counsel, that no FPA section 203 authorization is required. But in cases where the investor has interests that differ from those in *AES Creative Resources* in a way that raises questions about coverage under the *Ad Hoc Group* guidance (for example, where rights involving management of the day-to-day activities of the public utility or its sales of electric energy at wholesale are materially different from those in *AES Creative Resources*), the parties typically will agree that the public utility will obtain FPA section 203 authorization before the securities are issued.[127] Note that public utilities that are the target of tax equity transactions may have obligations to make filings with FERC under section 205 of the FPA with respect to such transactions, regardless of whether they sought FERC approval for the transaction under FPA Section 203.[128]

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125. 161 FERC ¶ 61,010, at P 17. Similarly, the acquisition of such interests by a holding company does not require specific authorization from FERC because it qualifies for a blanket authorization under section 33.(c)(2)(ii) of FERC's regulations (as discussed further below). *Id.*

126. *Id.* at P 17, n.30. Interestingly, although FERC stated it is the investor's burden to determine passivity, it is typically the public utility that has the compliance obligation. *Id.* at P 14. Investors often take a position that their investment is passive, but nonetheless require the seller/public utility to represent that no FPA section 203 application is required (and may even require regulatory compliance indemnities). *See* 161 FERC ¶ 61,010, at P 3.

127. In some cases, the public utility or its counsel may prefer to file an application "out of an abundance of caution" rather than make the requisite representation—or provide the requested opinion—to the investor, even where the securities are substantially similar to those in AES Creative Resources. FERC typically acts on these applications without making any determination on whether it has jurisdiction, based on the precedent established in 43 FERC ¶ 61,466.

128. When *FERC May I?* was published, FERC guidance provided that public utilities with market-based rates that obtain FPA section 203 authorization for passive investments were required to file with FERC a change-in-status notice under section 205 of the FPA, even though it otherwise would not be required because no affiliation was created as a result of the transaction under *AES Creative Resources*. *See FERC May I?*, *supra* note 2, at 163. Since then, FERC has issued new guidance and changed its regulations to require a uniform reporting regime under section 205 for these types of transactions, so that obtaining authorization under section 203 does not affect the reporting under section 205. Order No. 860, *Data Collection for Analytics & Surveillance and*

The *Ad Hoc Group* order did not address transactions other than tax equity transactions. One major unanswered question is whether it is appropriate to rely on this precedent for other types of transactions given that key elements of the transaction – the purpose of the investment and type of investor – is different. This is becoming more salient since the passage of the Inflation Reduction Act in 2022, because entities may now transfer individual tax credits.[129] The traditional tax equity finance arrangement that requires a transfer of actual ownership in an entity to the investor may become less prevalent, which may open doors for other types of investors, many of whom may want to be classified as passive.

FERC has determined interests are not voting securities in the context of certain other types of investments, but these orders are normally in response to requests for declaratory orders.[130] FERC's findings are therefore generally limited to the specific facts described in the application and may only be relied upon by the applicants.

FERC has only issued limited broadly-applicable guidance regarding passive investments. The guidance is generally too narrow to account for the nuanced rights that investors negotiate. Arguably, every right an investor has in its public utility borrower is "necessary to protect their . . . investments."[131] The value of the investment is directly tied to the success of the public utility.[132] In fact, the jurisdictional activity the public utility is engaged in (i.e., wholesale sales of energy or transmission in interstate commerce) is likely the primary revenue-generator of their borrower and thus the source of funds to repay loans or pay returns

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Market-Based Rate Purposes, 168 FERC ¶ 61,039 (2019). Under current regulations and guidance, a market-based rate seller in which any investor has acquired passive securities—regardless of whether section 203 authorization was obtained—is required to file a notice of change-in-status identifying the passive investor (if the investors has not been previously identified in a market-based rate proceeding) and must include an affirmation that the relevant "ownership interests consist solely of passive rights that are necessary to protect passive investors' or owners' investments and do not confer control" (i.e., that in accordance with *AES Creative Resources*, the interests held by the passive owners are not voting securities, do not confer more than limited consent/veto rights, and do not provide the investor with the power to remove the manager without cause). 18 C.F.R. § 35.37(a)(2).

129. Inflation Reduction Act of 2022, H.R. 5376, 117th Cong. (1st Sess. 2022).

130. *See, e.g.*, *Starwood Energy Group Global, LLC, et al.*, 153 FERC ¶ 61,332 at n.6 (2015) (granting declaratory order regarding the "passive" status of investors comprised of "a mix of sovereign wealth funds, insurance companies, pension funds, superannuation funds, fund[s] of funds, charitable endowments, family offices, high net worth individuals and banking institutions."); *NextEra Energy Partners, LP*, 150 FERC ¶ 61,071 at PP 29-30 (2015) (disclaiming jurisdiction over future transactions of certain specified investment interests [same]); *Solios Power LLC*, 114 FERC ¶ 61,161 at PP 5, 10 (2006) (holding that there would be no change in control, and thus no need to obtain section 203 authorization, resulting from transfers of equity interests in a company that held passive shares in a public utility where the holder of such shares "ha[d] the right to vote only at class meetings where matters concerning any proposed changes to its share rights [were] to be determined" and otherwise "no right to receive notice of, attend, or vote at general [shareholder] meetings."); *cf. Entegra Power Group LLC*, 125 FERC ¶ 61,143 (2008), *clarif. granted and reh'g denied*, 129 FERC ¶ 61,156 (2009) (holding that certain restrictions on the exercise of voting rights were necessary in order for a company to be granted a blanket authorization to hold up to 20% of the voting interests in two public utilities where the transaction otherwise raised concerns regarding effects on competition).

131. 129 FERC ¶ 61,239, at P 25 (citing *Solios Power LLC*, 114 FERC ¶ 61,161 at PP 9-10 (2006)).

132. 129 FERC ¶ 61,239, at P 26.

on the investment.[133] An investor is therefore keenly interested in ensuring the success of the jurisdictional activity.

Besides being fact-specific based on the totality of facts presented in each case, the precedential cases also seem contradictory in certain respects to the limited criteria FERC has provided. For example, FERC has stated an element of passivity is that "the acquired interest gives the acquiring entity only limited rights (*e.g.*, veto and/or consent rights necessary to protect its economic investment interests, where those rights will not affect the ability of the jurisdictional public utility to conduct jurisdictional activities)."[134] It is normal, however, for a passive equity investor (or even a lender) to have veto or consent rights over any modification to a public utility's material contracts. Material contracts typically include jurisdictional paper facilities such as wholesale power purchase agreements and transmission capacity agreements.[135] In some circumstances, investors also pre-negotiate limits on the public utility's merchant trading activities that the public utility cannot veer from without "passive investor" consent.[136] These restrictions typically are designed to protect the investor from losses that might be incurred from the public utility engaging in speculative activities instead of the core activity of selling the electric energy generated by the public utility's facilities. The line between controlling jurisdictional activities and protecting an investment can be difficult to navigate. *Recommendation:* As discussed above, FERC has provided further guidance over the past ten years regarding whether certain types of transactions constitute a change of control for purposes of triggering review under FPA section 203 (or create affiliation for purposes of FPA section 205). However, there are other situations that arise on a regular basis where parties are not clear about whether a transaction invokes FERC jurisdiction and therefore file for authorization out of an "abundance of caution." One simple example is a transaction where an investor obtains nearly identical veto or consent rights as the investor in *AES Creative Resources*, but the investor is not a tax equity investor and is investing

133. 114 FERC ¶ 61,161, at PP 9-10.

134. 161 FERC ¶ 61,010, at P 13 (citing *Supplemental Policy Statement, supra* note 76, at P 54).

135. For example, the rights considered by FERC in the *Ad Hoc Group* proceeding (as previously addressed in *AES Creative Resources*) included the rights to "[c]ancel, suspend, renew, amend, terminate or replace a principal project document, including power purchase agreements, under certain circumstances (this does not give the non-managing equity investors the right to select the offtaker or to negotiate the price or other terms and conditions of the power purchase agreement, but it may provide such investors a consent right, similar to what a lender would have, with respect to what typically is the most important revenue contract for the project company".). FERC Docket No. EL17-26-000, at 22 (Dec. 9, 2016); s*ee also* 161 FERC ¶ 61,010 (finding limited consent/veto rights listed in petition do not confer control).

136. *See, e.g.,* Notice of Non-Material Change in Status, *Enel Green Power Diamond Vista Wind Project, LLC*, Docket No. ER18-2312-000 (Dec. 31, 2018) (stating the Managing Member requires the investor's consent before "[e]ngaging in any speculative financial activities, excluding forward sales of renewable energy credits or market or contracted energy sales, in each case to the extent permitted under the LLCA, including, for the avoidance of doubt, sales pursuant to the day-ahead trading plan set forth in Exhibit G thereto.") (accepted by delegated letter order, issued Oct. 30, 2018); *see also* Notification of Changes in Status, *Haystack Wind Project, LLC*, Docket No. ER21-2140-000 (Mar. 3, 2022) (stating the Managing Member requires consent to "Cause the Company or the Project Company (i) to sell any electric energy generated by the Project other than in a manner consistent with (A) each Offtake Agreement, (B) the Interconnection Agreement, (C) applicable Law (including FERC requirements), (D) the Energy Sales and Trading Strategy set forth as Exhibit E to the Haystack Holdings LLCA.").

for reasons other than to receive tax benefits. In the authors' experience, there is a wide spectrum of opinions among FERC practitioners on this very issue.

Rather than relegating the industry to cull examples from the limited available precedent and try to conform transaction documents to identically match investors' veto and consent rights in the limited precedent, it would be very helpful if FERC were to more specifically identify the factors it considers to constitute control and disclaim jurisdiction over interests that do not possess that type of control. For example, it appears based on FERC's limited guidance that it interprets its jurisdiction to cover any investor that can actually affect jurisdictional activities. Accordingly, the Commission could categorically explain that FPA section 203 jurisdiction will not attach to a transfer of equity interests to any investor that cannot direct a public utility's actions concerning sales of wholesale energy or transmission in interstate commerce, through the ability to appoint the people who make such decisions or otherwise. The industry would also benefit from a bright line test of whether the energy-related activities (if any) of an investor – passive or active – matters for purposes of determining whether an FPA section 203 application is required. If it is irrelevant, then a blanket authorization should apply, such that no specific application would be required. For example, independent wholesale power generators (i.e., registered "power generation companies") located in Texas are only required to seek prior approval from the Public Utility Commission of Texas for mergers if the newly merged companies will offer for sale more than 10% of the total electricity for sale in Texas.[137] It would often be easier to determine whether investors will control a certain percentage of interests in energy assets within a region than it is to try to classify each such interest as active or passive.

2. Secondary Market Transactions

Recognizing that a public utility may not have any control over, or even knowledge about, transfers of its direct or indirect upstream equity interests, FERC established in its *Supplemental Policy Statement* that public utilities do not require prior authorization under FPA section 203(a)(1) for "secondary market transactions."[138] FERC defined these as "purchases or sales of the securities of a public utility or its upstream holding company by a third-party investor."[139] Notwithstanding FERC's broad definition of secondary market transactions, FERC clarified that this exemption does not apply in all cases of purchases or sales of public utility or holding company securities by a third-party investor.[140] FERC initially granted this exemption in the context of the following circumstances:

> (1) [the public utility or holding company's] common stock is publicly traded; (2) huge volumes may change ownership every day between third-party investors in arm's-length transactions; (3) neither the holding company nor its public utility subsidiaries are parties to the transactions; (4) neither the holding company nor its public

137. Tex. Util. Code Ann. § 39.158 (West 2023).

138. *Supplemental Policy Statement*, *supra* note 76, at P 36.

139. *Id.*

140. *Id.*

> utility subsidiaries have any control over transfers of the common stock; and (5) neither the holding company nor its public utility subsidiaries are required to be given prior notice of these transactions.[141]

The use of "and" in FERC's list of circumstances suggests all five criteria must apply. To the extent that any one of these circumstances does not apply, it is not clear whether FERC would find that a transfer of the securities of a public utility or holding company is exempt from the requirements of FPA section 203(a)(1).[142] The factors set forth in the *Supplemental Policy Statement* are not particularly clear. In particular, the language in factor (2) is vague ("huge volumes may change ownership"), and the "every day" requirement in that factor seems too extreme.[143] It is not clear why it is necessary to exclude transactions where the holding company or its public utility subsidiary has prior notice, as set forth in factor (5). FERC denied a request to clarify that secondary market transactions include:

> circumstances where: (1) the securities are regularly traded but are not necessarily traded at a volume of thousands of shares per day on a public exchange and (2) the public utility or its holding company may review proposed transactions in advance and play a ministerial role in approving the transactions but is not a party to them.[144]

FERC stated the request for clarification was "unsupported" in part because the request was not accompanied by an assertion "that, without the requested clarification, a public utility would be put in an impossible position of having to seek authorization for transactions it knew nothing about."[145] This indicates a key element of a secondary market transaction is the public utility must not have prior notice of the transaction.

Recommendation: It would be useful for FERC to provide further guidance on its policy on secondary market transactions and to expand the scope to transactions over which a public utility has no direct involvement.

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141. *Id.* at P 4.

142. In FERC's order on reconsideration and clarification of the *Supplemental Policy Statement*, *supra* note 76. FERC declined to adopt a broad interpretation of the scope of this policy and, in particular, rejected an interpretation under which it would apply to "what may be an indirect disposition of control of jurisdictional facilities in circumstances in which the public utility knows of and has a role in such transactions." *Id.* at 6. In at least one case, however, FERC did not object to application of the secondary market transaction policy to an acquisition of certain trusts and investment funds that indirectly held the voting securities of several public utilities where it appears that some of the circumstances described in Order No. 697, *supra* note 64 (for example, publicly traded shares and large volumes of transactions) were not met. *BlackRock, Inc.*, 131 FERC ¶ 61,063 at P 13 (2010) (holding that the transaction otherwise required authorization under section 203(a)(2), however). In another case, FERC declined an opportunity to clarify further the application of its policy regarding secondary market transactions. 129 FERC ¶ 61,011, at P 18 n.20.

143. *Supplemental Policy Statement*, *supra* note 76, at P 4.

144. *Id*. at P 3.

145. *Id*.

D. FPA Section 203(a)(1)(A) Transactions That Are Preapproved Under Blanket Authorizations

FERC has established in its regulations a number of "blanket authorizations" that apply to transactions for which specific approval under FPA section 203 otherwise would be required.[146] A transaction covered by a blanket authorization is automatically approved pursuant to the regulation itself rather than pursuant to an order resulting from an application and adjudicatory proceeding at FERC.[147] The discussion below addresses issues arising with respect to some of the blanket authorizations under FPA section 203(a)(1)(A) for dispositions of jurisdictional facilities by public utilities. Blanket authorizations under FPA section 203(a)(2) for acquisitions by holding companies are discussed in Section V.B., below.

- Transfer by a public utility of its outstanding securities to a holding company that is granted blanket authorization pursuant to 18 C.F.R. section 33.1(c)(2)(ii) for acquisition of any voting security in a transmitting utility or an electric utility company (or a holding company with respect to either of them) if, after the transaction, the holding company and its associate and affiliate companies in aggregate will own less than 10% of the voting securities of the public utility.[148]

Recommendation: As discussed in Section V.B., this blanket authorization is confusing. The 10% cap is incongruous with the corresponding blanket authorization for holding companies. At a minimum, it should be consolidated with the blanket authorization for transfers to "[a]ny person other than a holding company," as discussed immediately below.

- Transfer by a public utility of its outstanding voting securities to "[a]ny person other than a holding company if, after the transfer, such person and any of its associate or affiliate companies in aggregate will own less than 10[%] of the outstanding voting interests of such public utility."[149] This blanket authorization is subject to certain reporting requirements.[150]

Note that there is some overlap between this blanket authorization and FERC's guidance in the *Supplemental Policy Statement* that it has made a rebuttable presumption that transfers of less than 10% of a public utility's voting securities do not constitute a change in control and accordingly do not invoke

146. Order No. 669-A, *supra* note 30, at P 2.

147. In the *2016 NOI*, FERC requested comments on, among other things, whether its current blanket authorizations were appropriate and whether further blanket authorizations were appropriate, but FERC did not take any further action in the proceeding. 156 FERC ¶ 61,214, at PP 1, 12, 35-38.

148. 18 C.F.R. § 33.1(c)(12)(i).

149. 18 C.F.R. § 33.1(c)(12)(ii).

150. 18 C.F.R. § 33.1(c)(17). A public utility engaging in a transfer pursuant to this blanket authorization is required to file a report with FERC within thirty days after the transaction stating the names of the parties, the parties' pre- and post-transaction voting security holdings, the date of the transaction, the identities of any public utility holding company affiliates of the parties, and that the transaction will not result in certain types of cross-subsidization or pledges or encumbrances of utility assets. *Id.*

FERC jurisdiction under FPA section 203(a)(1).[151] FERC has explained that this blanket authorization helps eliminate uncertainty due to the fact that the *Supplemental Policy Statement* guidance was only a rebuttable presumption and that in some cases a transfer of less than 10% of a public utility's voting stock may be jurisdictional.[152] FERC's finding in *TransAlta* that FPA section 203 jurisdiction is triggered by an acquisition by an investor of securities providing certain "control" rights over the public utility involved a situation where the investor had acquired more than 10%of the subject securities.[153] FERC arguably would reach a different result (finding that the transaction benefits from this blanket authorization, or the blanket authorization under 18 C.F.R. section 33.1(c)(2)(ii), as discussed above) in a situation where the investor acquires less than 10% of the voting securities of the public utility.[154]

For investments involving less than 10% of a public utility's securities, parties need to determine whether these transactions are simply non-jurisdictional under the *Supplemental Policy Statement* guidance or instead are jurisdictional but preapproved by FERC under this blanket authorization. The distinction matters because of the reporting requirements attached to the blanket authorization.[155] Based on the very small number of entities that have ever filed reports in connection with this blanket authorization, it appears that public utilities have not found this blanket authorization useful.[156]

Recommendation: It is unclear why a distinction is made between transfers to holding companies that benefit from their own blanket authorization and transfers to any other person. Why not instead consolidate paragraphs (i) and (ii) of this blanket authorization and simply state that a public utility has blanket authorization under FPA section 203(a)(1) to transfer less than 10% of its outstanding voting securities to any person, unless the transfer will cause that person and its associate or affiliate companies to hold an aggregate of 10% or more of the public utility's outstanding voting securities? This would streamline the regulations and reduce confusion.

- Internal corporate reorganizations of nontraditional public utilities that do not have captive customers or own or provide transmission service over jurisdictional transmission facilities and that present no cross-subsidization issues.[157]

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151. Order No. 708, *supra* note 110, at PP 23, 25-26.

152. *Id*. at 26.

153. *See* discussion *supra* at Section III.C; *see also* 181 FERC ¶ 61,055, at PP 27, 31.

154. 18 C.F.R § 33.1(c)(12)(i).

155. 18 C.F.R. § 33.1(c)(17).

156. These compliance reports are required to be filed in FERC Docket No. HC09-8-000 (for fiscal year 2009). Order No. 708-B, *supra* note 110, at P 13. As of March 15, 2013, according to records available on FERC's eLibrary electronic docket record system, only three entities have filed compliance reports under Docket Nos. HC09-8-000, HC10-8-000, HC11-8-000, HC12-8-000, and HC13-8-000.

157. 18 C.F.R. § 33.1(c)(6) ("Any public utility or any holding company in a holding company system that includes a transmitting utility or an electric utility is granted a blanket authorization under sections 203(a)(1) or 203(a)(2) of the Federal Power Act, as relevant, for internal corporate reorganizations that do not result in the

FERC has not defined "internal corporate reorganizations," making it difficult in some cases for parties contemplating a proposed transaction to determine whether this authorization applies to their specific circumstances. Based on the limited available precedent on this issue, it appears that it is not sufficient that ultimate ownership and control of the public utility remains the same.[158] This authorization does not cover transfers of assets, unless the transfer is between two nontraditional utility subsidiaries and only one survives the transaction.[159]

One FERC order that predates this blanket authorization—but may help in interpreting it—provides that FERC authorization is not required for transfers of ownership interests in public utilities where the transaction simply involves inserting or compressing one or more layers in a corporate structure without changing the overall upstream ownership.[160] A nontraditional utility, such as an exempt wholesale generator (EWG)[161] that owns and operates an electric-generating facility, may qualify for this blanket authorization even if it owns some jurisdictional interconnection facilities, as long as it does not have captive customers served under cost-based rates.[162] FERC further clarified that "captive customers" are "any wholesale or retail electric energy customers served *by a franchised public utility* under cost-based regulation."[163]

Recommendation: We are not aware of any policy reason for the distinction between equity and asset transfers as long as no traditional public utility with captive customers is involved. We suggest that FERC provide further guidance on the definition of internal corporate reorganizations and apply the blanket authorization to asset transfers (as long as no utility with captive customers is involved).

- A public utility has blanket authorization "to transfer a wholesale market-based rate contract to any other public utility affiliate that has the same ultimate upstream ownership, provided that neither affiliate is affiliated with a traditional public utility with captive customers."[164]

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reorganization of a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and that do not present cross-subsidization issues.").

158. 111 FERC ¶ 61,162, at P 11.

159. Order No. 708-A, *supra* note 110, at PP 51, 55 nn.41-43 (clarifying the statement in the *Supplemental Policy Statement* under which this blanket authorization does not apply to asset transfers). *Supplemental Policy Statement*, *supra* note 76, at PP 51, 55; *see also* Order No. 669-A, *supra* note 30, at P 73; 111 FERC ¶ 61,162, at P 19 (holding that authorization was required under section 203(a)(1) where an intermediate owner of a public utility was eliminated, resulting in no change in the ultimate upstream ownership, and where the public utility's jurisdictional facilities were transferred to a wholly-owned subsidiary of the same ultimate upstream owner that previously had held an intermediate ownership interest in the prior owner of the facilities); *Delmarva Power & Light Co.*, 71 FERC ¶ 61,160, at p. 61,610 (1995) (jurisdiction over transfer of electric transmission line to the parent company of the prior owner of the line); *Kentucky Utilities Co.*, 56 FERC ¶ 61,184, at p. 61,653 (1991).

160. *Commonwealth Atl. Ltd.*, 57 FERC ¶ 61,193, at pp. 61,666-67 (1991).

161. EWGs are companies engaged exclusively in the generation and sale of electric energy at wholesale and certain incidental activities; they benefit from certain exemptions under PUHCA. *See generally* 18 C.F.R. § 366.1 (2012).

162. Order No. 708, *supra note* 110, at PP 60-61.

163. *Id.* at 62 (codified at 18 C.F.R. § 33.1(b)(5)).

164. 18 C.F.R. § 33.1(c)(11).

- Transfer by a public utility of its outstanding securities to a holding company that is granted blanket authorization pursuant to 18 C.F.R. §§ 33.1(c)(8), 33.1(c)(9), or 33.1(c)(10).[165]

As discussed in Section V. below, these blanket authorizations cover acquisitions by holding companies that are holding companies solely with respect to EWGs, qualifying facilities (QF),[166] and foreign utility companies (FUCO);[167] are regulated financial institutions engaging in certain specified transactions;[168] or are acquiring securities for certain underwriting or hedging activities.[169] However, with respect to the blanket authorization for a holding company acquisition of securities of EWGs, QFs, or FUCOs, FERC imposed a limitation in 18 C.F.R. § 33.1(c)(13) such that it applies only if, "after the transfer, the holding company and any of its associate or affiliate companies in aggregate will own less than 10[%] of the outstanding voting [securities] of such public utility."[170] Accordingly, FERC authorization may nevertheless be required under FPA section 203(a)(1) for a disposition of interests in an EWG (or a QF that is not exempt from section 203) to the extent that there is a change of control with respect to such entity.[171]

IV. APPLICATION OF FPA SECTIONS 203(A)(1)(B)-(D) TO MERGERS AND ACQUISITIONS BY PUBLIC UTILITIES

Compared to the large number of applications under FPA section 203(a)(1)(A), there are relatively few applications for authorization under FPA Sections 203(a)(1)(B) – (D).[172] Whereas FPA Section 203(a)(1)(A) pertains to public utility dispositions, the remaining sections of FPA section 203(a)(1) concern mergers and certain acquisitions by public utilities.[173] If an application is required for an acquisition under FPA sections 203(a)(1)(B)-(D), however, then it

165. *Id.* §§ 33.1(c)(8)-(10).

166. QFs are generally facilities used for electric generation, either small facilities used to generate electric energy from renewable resources or cogeneration facilities of any size (using industrial or other waste heat to generate electric energy or using waste heat from electric-generating activities for other beneficial purposes); they qualify for certain exemptions under PUHCA, the FPA, and certain state utility regulations. *See generally* 18 C.F.R. § 33.1(c)(8).

167. FUCOs are companies engaged in certain utility activities outside the United States; they benefit from certain exemptions under PUHCA. 18 C.F.R. § 366.1.

168. The authorization under 18 C.F.R. § 33.1(c)(14) is for public utilities to transfer securities to certain types of holding companies that are financial institutions, whereas the corresponding authorization under 18 C.F.R. § 33.1(c)(9) is for such holding companies to acquire securities in other holding companies, so the two authorizations do not precisely match. However, the public utilities are presumably granted authorization for change-in-control transactions involving transfers of securities by their upstream holding companies and not just transfers of their own securities. 18 C.F.R. §§ 33.1(c)(9), (14).

169. 18 C.F.R. § 33.1(c)(10).

170. *Id.* § 33.1(c)(13).

171. *See, e.g.,* Order No. 669-B, *supra* note 30, at 44; *see also* 125 FERC ¶ 61,267, at P 24.

172. 18 C.F.R. §§ 33.1(a)(1)(i)-(iv).

173. *Id.; see FERC May I?*, *supra* note 2, at 168 nn.95-96.

is likely FPA section 203(a)(1)(A) also applies to any public utility on the "disposing" side of the transaction.[174]

A. Public Utility Mergers & Consolidations under FPA Section 203(a)(1)(B)

FPA section 203(a)(1)(B) grants FERC jurisdiction over any transaction in which a public utility would:

> [M]erge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with the facilities of any other person, or any part thereof, that are subject to the jurisdiction of the Commission and have a value in excess of $10,000,000, by any means whatsoever.[175]

The FPA does not define "merge or consolidate" as used in FPA section 203(a)(1)(B). FERC interprets the terms broadly, beyond customary corporate vernacular.[176] It has said: "we do not believe Congress intended a narrow interpretation of 'merge' or 'consolidate.' Section 203(a) 'clearly was not written to describe the strict legal concepts of corporate mergers and consolidations. This language speaks of merger or consolidation of *facilities*, not of corporate entities.'"[177] It may be useful to think of a merger generally as a public utility acquisition.[178]

Applications under FPA section 203(a)(1)(B) typically arise in connection with the acquisition by a public utility of electric interconnection or other transmission facilities of another public utility.[179] The result is that the transferred facilities are merged or consolidated with the acquiring public utility's other transmission and jurisdictional facilities.[180]

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174. 18 C.F.R. §§ 33.1(a)(1)(i)-(iv).

175. 16 USC § 824b(a)(1)(B).

176. *Id.*

177. *Enova Corp. & Pacific Enter.*, 79 FERC ¶ 61,607, at p. 61,489 n.22 (1997) (citing *Pennsylvania Electric Co.* (*Pennsylvania Electric*), 9 FPC 91, 95 (1950) (emphasis in original; footnote omitted); *see also Duke Power Co*. *supra* note 71, at 933.

178. *See*, *e.g.,* H.R. Rep. No. 115-253, at 5 (2018) [hereinafter Rep. No. 115-253] (stating "Section 1 amends section 203(a)(1)(B) of the FPA to ensure that the threshold is for facilities *to be acquired* having a value in excess of $10 million.") (emphasis added); *Testimony of James Danley, General Counsel, Federal Energy Regulatory Commission, Before the United States Senate Committee on Energy and Natural Resources, Subcommittee on Energy*, FERC 2 (Oct. 3, 2017), https://www.ferc.gov/media/9204 [hereinafter *S. 1860 Testimony*] (stating a merger is an "acquisition").

179. 18 C.F.R. § 33.1(a)(1)(ii).

180. *See, e.g.*, 139 FERC ¶ 61,003, at 3; *Interstate Power Company*, 26 FERC ¶ 61,328, at pp. 61,702-03 (1984); *Duke Power Co*., *supra* note 71, at 931. Filings under this section were more frequent prior to 2018 when Congress established a $10 million minimum value threshold for these transfers. Order No. 669, *supra* note 30, at P 32. This eliminated an issue, as discussed in *FERC May I?*, that was caused by the ambiguity in the 2005 version of the statute and FERC's regulations interpreting that version of the statute to mean that no dollar threshold applied. Prior to this clarification, applications were filed for the transfer of facilities with a value much less than $10 million. *See, e.g.*, *ITC Great Plains, LLC*, 137 FERC ¶ 62,037 at P 64,083 (2011) (filing made after the transaction was completed, referring to a "mistaken interpretation of [FPA] [s]ection 203(a)(1)(B)"); *PECO Energy Co. & Exelon Generation Co.*, 137 FERC ¶ 62,120 at P 4 (2011); *PECO Energy Co. & Exelon Generation Co.*, FERC Docket No. EC11-120-000 (Sept. 26, 2011) (filed "out of an abundance of caution" despite low value of the facility). In both of these cases, the orders were issued by FERC staff acting under authority delegated by the Commission. 18 C.F.R. § 375.307 (2012).

Jurisdictional mergers and consolidations are not, however, limited to acquiring facilities from another public utility. Rather, FPA section 203(a)(1)(B) covers mergers in which a FERC-jurisdictional public utility acquires electric transmission assets from an entity that is not subject to FERC jurisdiction (i.e., that is exempt from jurisdiction under FPA section 203(a)(1)(A)), such as municipal and other government-owned utilities and cooperatives financed by the Rural Utilities Administration.[181] It only applies, however, when such facilities would be FERC-jurisdictional *but for* the fact they are owned by an entity that is exempt from FERC jurisdiction.[182] In contrast, FERC has found a public utility does not require authorization to acquire assets that would not have been subject to FERC's jurisdiction at the time acquired, even if the acquiring entity intends to use the facility for jurisdictional purposes (e.g., converting a local distribution facility into an interstate transmission asset).[183]

In its regulations implementing the 2018 amendment to FPA section 203(a)(1)(B), FERC implemented a new reporting requirement established by Congress for transactions that do not exceed the $10 million threshold but otherwise would be covered by the statutory provision and have a value in excess of $1 million.[184] This has the potential to significantly increase the reporting burden on entities transferring certain transmission facilities pursuant to an option to build provision. The new requirement is discussed in more detail in Section VI, below.

The language of FPA section 203(a)(1)(B) is broader than the other FPA section 203(a)(1) provisions, because it states the merger or consolidation may occur "directly or indirectly" and "by any means whatsoever."[185] It is commonplace for affiliates of public utilities to acquire other public utilities and associated or separate jurisdictional facilities.[186] Even though FPA section 203(a)(1)(B) applies only

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181. *See, e.g.*, *Duke Power*, *supra* note 71, at 932; Final Rulemaking, *Mergers or Consolidations by a Public Utility*, 166 FERC ¶ 61,120, 84 Fed. Reg. 6,069, 6,069-70, 6,073 (codified at 18 C.F.R. § 33) (2019) [hereinafter Order No. 855].

182. *See, e.g.*, 26 FERC ¶ 61,328, at 61,702-03 n.3. There were several years of uncertainty regarding whether FPA section 203(a)(1)(B) applied to facilities owned by non-jurisdictional entities. It was an open question at the time *FERC May I?* was published, as discussed in Section IV.B. *FERC May I?, supra* note 2, at 171-72. FERC fixed this issue (as recommended in *FERC May I?)* in its order implementing the 2018 amendment to section 203(a)(1)(B). Order No. 855, *supra* note 181, at 6,073. In response to comments received during the rulemaking process, FERC explained how the revised statutory language supports the interpretation in *Duke Power* and noted that the legislative history of the 2018 amendment does not indicate any Congressional intent to "reverse the Commission's longstanding reliance on Duke Power Co. to assert jurisdiction over a public utility's acquisition of transmission facilities from a non-public utility." *Id.* (citations omitted). This result can occur, for example, when a public utility acquires interconnection facilities constructed by another public utility (or even a non-jurisdictional entity) under the "option-to-build" provision of FERC's pro forma interconnection agreement. *See* Order No. 2003, *supra* note 51, at P 353; Order No. 2003-A, *supra* note 51; Order No. 2003-B, *supra* note 51; Order No. 2003-C *supra* note 51. As noted above, the "option to build" has become more popular in recent years given commonplace transmission owner construction delays and following FERC Order No. 845, which revised FERC's *pro forma* large generator interconnection procedures to expand the customer's right to opt to build certain of the transmission provider's interconnection facilities. 163 FERC ¶ 61,043, at PP 1-2.

183. Order No. 855, *supra* note 181, at P 30.

184. 18 C.F.R. § 33.12; 16 USC.§ 824b(a)(7).

185. *Id.* § 33.1(a)(1)(ii).

186. Order No. 855, *supra* note 181, at P 20.

to public utilities, and not to public utility holding companies, FERC has used the provisions in FPA section 203(a)(1)(B) to exercise jurisdiction over mergers between, and changes of control with respect to, holding companies that result in an indirect merger of public utilities.[187] FERC has found that a merger of public utility holding companies is also a merger of their respective public utility subsidiaries.[188] This can get complicated quickly. A project company public utility might not know about the acquisitions of its remote partial upstream equity holders.

1. Blanket Authorizations Applicable to Public Utility Mergers & Consolidations

FERC's regulations make the blanket authorizations discussed above for purposes of FPA section 203(a)(1)(A) applicable to all portions of 203(a)(1).[189] The types of transactions addressed by section 203(a)(1)(B), however, often do not meet the requirements of these authorizations.

B. Acquisitions by Public Utilities of Public Utility Securities Under FPA Section 203(a)(1)(C)

Under FPA section 203(a)(1)(C), a public utility requires FERC authorization before it may acquire any security "with a value in excess of $10 million of any other public utility."[190] The U.S. Supreme Court has expressly upheld FERC's jurisdiction over the acquisition by a public utility of securities of another public utility, pursuant to the portion of FPA section 203 now set forth in FPA section 203(a)(1)(C).[191] Today, the principal question that arises with respect to the extent of FERC's jurisdiction under this section involves the application of the $10 million threshold, as discussed in Section VI below.

1. Blanket Authorizations Applicable to Acquisitions by Public Utilities of Public Utility Securities

Among the blanket authorizations discussed above for purposes of FPA section 203(a)(1)(A), only two of them would apply to the types of transactions covered by section 203(a)(1)(C). First, the blanket authorization for internal corporate reorganizations, pursuant to section 33.1(c)(6) of FERC's regulations, authorizes the acquisition by a public utility of securities of another public utility under FPA section 203(a)(1)(C), provided that such acquisition is part of an internal corporate

187. *See, e.g.*, *Illinois Power Co.*, 67 FERC ¶ 61,136, at p. 61,351, 61,353 (1994) ("approval under section 203 is required for the indirect merger of the public utilities."). In *Illinois Power*, FERC "clarified" its order in *Missouri Basin Municipal Power Agency v. Midwest Energy Co.*, 55 FERC ¶ 61,464 (1991) in which FERC previously had disclaimed such jurisdiction. FERC later rejected arguments relying on *Missouri Basin*. *See* 79 FERC ¶ 61,107, at p. 61,494; *see Morgan Stanley Capital Group Inc.*, 79 FERC ¶ 61,109, at p. 61,504 (1997). *See also NorAm Energy Servs., Inc.*, 79 FERC ¶ 61,108, at p. 61,500 (1997); *Phelps Dodge Corp. et al.*, 121 FERC ¶ 61,251 at PP 15-18 (2007) (affirming FERC's interpretation after enactment of EPAct 2005).

188. 67 FERC ¶ 61,136, at pp. 61,352-53 ("[M]ost mergers of public utility holding companies will simultaneously involve an indirect merger of the public utility subsidiaries of such holding companies.").

189. Order No. 708-A, *supra* note 110.

190. 16 U.S.C. § 824b(a)(1)(C), (2).

191. *Jersey Cent. Power & Light Co*., 319 U.S. at 77-78.

reorganization.[192] Another blanket authorization that would apply precisely to the type of transactions covered by FPA section 203(a)(1)(C) is the blanket authorization under section 33.1(c)(7) of FERC's regulations for "[a]ny public utility in a holding company system that includes a transmitting utility or an electric utility" to acquire "securit[ies] of a public utility in connection with an intra-system cash management program, subject to safeguards to prevent cross-subsidization."[193]

In some cases, a public utility subject to FPA section 203(a)(1)(C) also is a holding company and therefore also is subject to FERC jurisdiction under FPA section 203(a)(2) with respect to acquisitions of securities of transmitting utilities or electric utility companies (which often are public utilities, as well).[194] While FERC has added to its regulations blanket authorizations under FPA section 203(a)(2) for holding companies to acquire public utility securities in certain circumstances, as discussed below,[195] it has not done the same for public utilities seeking to acquire similar securities.[196] Accordingly, a holding company that is also a public utility may have to seek authorization from FERC under section 203(a)(1)(C) to acquire securities of public utilities even if its acquisition is covered by a blanket authorization under FERC's regulations for purposes of section 203(a)(2).[197]

C. Acquisitions by Public Utilities of Existing Generating Facilities Under FPA Section 203(a)(1)(D)

Section 203(a)(1)(D) requires FERC authorization before a public utility may "purchase, lease, or otherwise acquire an existing generation facility" with "a value in excess of" $10 million "that is used for interstate wholesale sales over which the [FERC] has jurisdiction for ratemaking purposes."[198] In most cases, authorization for such transactions also is required under section 203(a)(1)(A), since the transferor is often a public utility subject to FPA section 203, and typically there are some transmission facilities being transferred in addition to generating facilities.[199] In certain situations, however, FPA section 203(a)(1)(A) will

192. 18 C.F.R. § 33.1(c)(6).

193. *Id.* § 33.1(c)(7); *see also* Order No. 669-A, *supra* note 30, at PP 89-91.

194. 16 U.S.C. § 824b(a)(2).

195. *See generally* 18 C.F.R. §§ 33.1(c)(2), (8)-(10).

196. *Id.*

197. A holding company that also is a public utility can seek an order from FERC granting such a blanket authorization under conditions similar to those provided by the regulatory blanket authorization. *See, e.g.*, *UBS AG*, 125 FERC ¶ 61,282 at P 1 (2008) (granting a blanket authorization for acquisitions of public utility securities under section 203(a)(1)(C) subject to the same restrictions applicable under the regulatory blanket authorizations under section 203(a)(2)).

198. 16 U.S.C. § 824b(a)(1)(D).

199. This section was added in EPAct 2005 apparently to address concerns over the ability of a large, integrated public utility to acquire an electric-generating facility without needing to obtain FERC authorization by structuring the transaction such that no FERC-jurisdictional interconnection facilities would be included. *See, e.g.*, *Perryville Energy Partners, LLC*, 109 FERC ¶ 61,019 at PP 14, 17 (2004) (disclaiming jurisdiction over transfer of generation-only assets under pre-EPAct section 203, which included the provision now in section 203(a)(1)(A) but not the provision now in section 203(a)(1)(D), notwithstanding protests filed by a number of competing electric generators and wholesale electric purchasers).

not apply while FPA section 203(a)(1)(D) will.[200] Examples include when the transferred facility is a QF exempt from regulation under FPA section 203 (see discussion above in Section II.C.), or when the transfer includes only generation facilities and not any transmission facilities or "paper facilities" otherwise subject to FERC's jurisdiction.[201]

FERC has defined "existing generation facility" as "a generation facility that is operational at or before the time the section 203 transaction is consummated"; "operational" means that the facility "is capable of producing power;" and "the time the transaction is consummated" means the time when the transaction actually closes and control of the facility changes hands."[202] FERC makes the rebuttable presumption that this requirement applies to any acquisition of an existing generation facility unless the purchaser can demonstrate with substantial evidence that the facility is used only for retail sales.[203] The requirement applies to acquisitions of mothballed facilities that previously were operational as well as to acquisitions of QFs that themselves may be exempt from section 203 requirements.[204] It also applies to acquisitions of new electric-generating facilities in cases in which the acquisition will close shortly after the facility begins commercial operation.[205] In cases where one public utility is acquiring electric-generation assets from another public utility, the seller may need authorization under FPA section 203(a)(1)(A) for the disposition of interconnection facilities and any jurisdictional paper facilities, and the purchaser may need authorization under FPA section 203(a)(1)(D) to acquire the generation facilities.[206] Section 203(a)(1)(B) may apply as well if there is a consolidation of jurisdictional interconnection facilities previously held by separate entities.[207] The fact that there are multiple bases for jurisdiction makes little substantive difference: the standard for FERC approval is the same for each.[208] Applicants should nonetheless ensure that their request for approval lists all the required authorizations.

FERC staff, by delegated order, has disclaimed jurisdiction under FPA section 203(a)(1)(D) where the acquiring entity was not a public utility under section

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200. Order No. 669, *supra* note 30, at P 87.

201. *Id.*

202. 18 C.F.R. § 33.1(b)(1); Order No. 669, *supra* note 30, at PP 84-85.

203. 18 C.F.R. § 33.1(b)(1).

204. Order No. 669, *supra* note 30, at PP 85, 87.

205. *See, e.g.*, *Order Authorizing Acquisition of Generating Facilities, NorthWestern Corp.*, 136 FERC ¶ 62,088 at P 2 (2011). This may become increasingly relevant given the recent rise in utility interest in build-transfer agreements (or similar agreements that call for a project sponsor to construct a generating facility and then transfer ownership to a utility). As long as the seller does not obtain market-based rate authority and does not sell any energy from the project (including test energy), then it would not be a public utility subject to FPA 203(a)(1)(A) for the disposition.

206. 16 U.S.C. §§ 824b(a)(1)(A), (D).

207. *See, e.g.*, *E.I. du Pont de Nemours and Co.*, 132 FERC ¶ 62,138, at p. 64,426 (2010).

208. FERC's general standards for FPA section 203 applications include review of whether the transaction is consistent with the public interest (including evaluation of effects on competition, rates, and regulation) as well as whether it will result in cross-subsidization. 16 U.S.C. §§ 824b(4)-(5); Order No. 669, *supra* note 30, at PP 7-10, 19 (discussing the Merger Policy Statement (codified at 18 C.F.R. § 2.26)).

201 of the FPA.[209] On the other hand, FERC staff has authorized under FPA section 203(a)(1)(D) the transfer of undivided ownership interests in a radial electric transmission line used to connect electric-generating facilities to the electric grid,[210] although it is not clear that such authorization was required. FERC also has approved transactions under this section in the context of lease transactions, including a transaction involving an extension of a lease of an existing electric-generating facility.[211] Conversely, FERC has approved an acquisition of electric-generating turbines by a public utility that previously had leased the turbines and exercised its option under the lease to purchase them from the lessor.[212] FPA section 203(a)(1)(D) also has been applied in the context of transfers between affiliated entities (reflecting the fact that the blanket authorization for intra-corporate transfers generally does not apply to asset transfers).[213]

FPA section 203(a)(1)(D) by its terms applies only to acquisitions of generation facilities with a value in excess of $10 million.[214] Section VI below provides an analysis of FERC's precedent regarding calculation of the $10 million threshold.

1. Blanket Authorizations Applicable to Public Utility Acquisitions of Generating Facilities

FERC has not included in its regulations any blanket authorizations that apply to the types of transactions subject to FPA section 203(a)(1)(D).

V. APPLICATION OF FPA SECTION 203(A)(2) TO HOLDING COMPANY TRANSACTIONS

Congress added section 203(a)(2) to the FPA as part of the Energy Policy Act of 2005 ("EPAct 2005").[215] This section requires prior authorization from FERC before any:

> holding company in a holding company system that includes a transmitting utility or an electric utility shall purchase, acquire, or take any security with a value in excess of $10,000,000 of, or, by any means whatsoever consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system

209. *KGen Enterprise LLC*, 115 FERC ¶ 62,055 at P 64,407 (2006).

210. *Milford Wind Corridor Phase I, LLC et al.*, 129 FERC ¶ 62,237, at p. 64,752 (2009).

211. *See, e.g.*, *Covanta Union, Inc.*, 137 FERC ¶ 62,122 at P 64 (2011) (where the lessee was a public utility with market-based rate authority and the lessor was a non-jurisdictional governmental entity, the initial lease had been entered into before enactment of section 203(a)(1)(D) and had not been previously approved); *see also PacifiCorp*, 139 FERC ¶ 62,259 (2012); *Calpine Fox LLC*, 116 FERC ¶ 61,261 at PP 5, 38 (2006) (termination of lease in the context of a bankruptcy).

212. *Hardee Power Partners Ltd.*, 140 FERC ¶ 62,121 at PP 1, 4 (2012).

213. *See, e.g.*, *El Dorado Energy, LLC*, 136 FERC ¶ 62,219 at P 1 (2011).

214. 16 U.S.C. § 824b(a)(1)(D).

215. Energy Policy Act of 2005, H.R. 6, 109th Cong. §§ 15801-16524 (2005). For a discussion of the changes made to PUHCA in 2005 versus the original 1935 version of PUHCA, please *see FERC May I? supra* note 2, at 176-77.

that includes a transmitting utility, or an electric utility company, with a value in excess of $10,000,000.[216]

A. In Practice - Remaining Relevance of "Part 2" of FPA Section 203

FPA section 203(a)(2) is largely obsolete today because most acquisitions occur through a newly formed entity (a special purpose vehicle, a joint venture, or other new entity established for the express purpose of acquiring the target interests).[217] FERC held that a company that is not *itself* a holding company under PUHCA 2005 does not require authorization to acquire securities of a transmitting utility, electric utility company, or other holding company irrespective of whether it is a direct or indirect subsidiary of a holding company.[218]

FERC later clarified, however, that its ruling in *Goldman Sachs* does not apply where a holding company is, in fact, the acquiring company but the securities ultimately are owned by a non-holding company subsidiary of the acquiring holding company.[219] Therefore, to benefit from the *Goldman Sachs* finding of non-jurisdiction, it is important that any holding company parent of the acquiring non-holding company not be a party to, or directly involved in, the acquisition transaction.[220]

1. Holding Company Acquisitions of Securities

FPA section 203(a)(2) has been applied most often in the context of acquisitions of securities of a transmitting utility, electric utility, or a holding company with respect to a transmitting utility or electric utility. FERC has defined the terms "purchase, acquire, or take" broadly to include situations in which the holding company acquires the right to vote securities even if the holding company does not have a proprietary interest in the securities.[221] This contrasts with section 203(a)(1), where under *Atlantic City* a proprietary interest is required to establish jurisdiction for a change-in-control transaction, as discussed above.[222]

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216. 16 U.S.C. § 824b(a)(2). FERC clarified that the terms "associate company," "electric utility company," "foreign utility company," "holding company," and "holding company system" have the same meanings as under PUHCA 2005. Order No. 669, *supra* note 30, at 49, 51; 18 C.F.R. § 33.1(b)(4). The terms "transmitting utility" and "electric utility" are defined in sections 3(22) and (23), respectively, of the FPA. 16 U.S.C. §§ 796(22)-(23).

217. *FERC May I?*, *supra* note 2, at 182-83.

218. 114 FERC ¶ 61,118, at PP 13-15 (relying in part on the omission of the word "indirect" from the statutory language), *order on reh'g*, 115 FERC ¶ 61,303; *see also Supplemental Policy Statement, supra* note 76, at P 58 n.48; *Horizon Asset Mgmt., Inc.*, 125 FERC ¶ 61,209 at P 33 (2008).

219. 131 FERC ¶ 61,063, at PP 13-14.

220. FERC also stated in dictum that the transaction could be an indirect consolidation of public utility company assets, which could trigger FPA section 201(a)(1)(B). 114 FERC ¶ 61,118, at P 15.

221. 125 FERC ¶ 61,209, at 62,092 (holding that an investment adviser that has been delegated the responsibility to vote the shares of its account holders constituting 10% or more of the voting interests in a public-utility company (or a holding company with respect to a public-utility company) is a holding company and that it requires authorization under section 203(a)(2) to acquire rights to vote with respect to additional such securities (but granting the investment adviser a blanket authorization, subject to certain conditions, to engage in such activities for a three-year period)).

222. *Atlantic City Elec. Co.*, 295 F.3d at PP 11-13.

FPA section 203(a)(2) applies to acquisitions by holding companies of securities of some entities that are not themselves subject to FERC jurisdiction under FPA section 203(a)(1), and it does not apply to similar acquisitions of securities in some entities that are subject to FERC jurisdiction under FPA section 203(a)(1). For example, FPA section 203(a)(2) applies to holding company acquisitions of interests in the owners of QFs, which may be exempt under FPA section 203(a)(1), and FUCOs, which typically are exempt from section 203(a)(1); however, in both of these instances, blanket authorizations may apply,[223] as discussed below. Similarly, FPA section 203(a)(2) can apply to holding company acquisitions of interests in utilities operating in Hawaii, Alaska, and areas of Texas that are not engaged in interstate commerce and accordingly are exempt from FPA section 203(a)(1).[224] Because the term "electric utility company" does not specifically exclude government-owned entities (although the term "holding company" does), FERC has interpreted FPA section 203(a)(2) to require a holding company to obtain FERC authorization before acquiring any government-owned entity that owns interstate transmission facilities, or facilities used for wholesale sales in interstate commerce, even though such entities themselves may be exempt from section 203(a)(1).[225] On the other hand, FPA section 203(a)(2) does not apply to holding company acquisitions of interests in power marketers that do not own or operate any facilities used for generation, transmission, or distribution of electric energy for sale, even though such power marketers with authorization from FERC to sell electric energy at wholesale would be subject to section 203(a)(1).[226] It is difficult to understand how this level of complexity is justified.

With respect to holding company acquisitions of securities, FPA section 203(a)(2) applies only to acquisitions of any security with a value in excess of $10 million.[227] Note that, in contrast to FPA section 203(a)(1), jurisdiction is not determined by whether the holding company acquiring securities in a public utility or holding company also acquires control. If the holding company acquires securities with a value in excess of $10 million in the public utility, then FERC jurisdiction attaches under FPA section 203(a)(2), regardless of whether any control is acquired.[228] However, as discussed below, a blanket authorization applies to certain transactions, including acquisitions of voting securities in an aggregate amount of less than 10%.[229] Section VI below discusses how FERC determines whether a security has a value in excess of $10 million.

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223. Order No. 669, *supra* note 30, at PP 60, 70.

224. *Id.* at PP 54-57.

225. *Id.* at P 58 (stating that this requirement applies if the holding company would turn the acquired company into a private company subsidiary).

226. *See FERC May I?*, *supra* note 2, at P 154 n.10 (discussing definition of "electric utility company"); Order No. 669-A, *supra* note 30, at P 54.

227. 16 U.S.C. § 824b(a)(2); *see also* 18 C.F.R. § 33.1(a)(1)(iii).

228. *See* 181 FERC ¶ 61,055, at P 32.

229. *Id.* at P 27 n.31 (citing the blanket authorization at 18 C.F.R. § 33.1(c)(2)).

2. Holding Company Mergers and Consolidations

In addition to covering acquisitions of securities, FPA section 203(a)(2) applies to an action by a holding company to "by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of $10,000,000."[230] FERC suggested in one case that jurisdiction may attach pursuant to this provision where a holding company increased its ownership interest in certain public utility holding companies from just over 10% to 100% "'to achieve a consolidation of financial management firms.'"[231] FERC's precedent regarding the determination of whether the $10 million threshold has been crossed is discussed in Section VI below.

3. Potential Integration of Multiple Transactions

FPA section 203(a)(2) applies only to purchases by a holding company of securities of a transmitting utility, an electric utility company, or a holding company with respect to a transmitting utility or an electric utility company (or consolidations among such entities).[232] Accordingly, if the entity engaging in the acquisition or consolidation does not hold 10% or more of the voting securities of any transmitting utility or electric utility company immediately prior to the transaction (and therefore is not a holding company covered by FPA section 203(a)(2)), then the purchaser could, in a single transaction, acquire any amount of the securities of an electric utility company or transmitting utility, or the holding company of a transmitting utility or an electric utility company, without being subject to the requirement under FPA section 203(a)(2) to obtain authorization from FERC prior to the acquisition.[233] But issues could arise if an acquisition were made in such a way that it was not clearly a single transaction, such as sequential purchases from the market or separate purchases from multiple holders.[234] It is also very possible that other parts of FPA section 203 may be implicated, such as a merger under FPA section 203(a)(1)(B) if the acquiring entity is affiliated with a public utility, or a disposition under FPA section 203(a)(1)(A) if the transaction results in a change in control with respect to the public utility.[235] FERC has also made clear

230. 16 U.S.C. § 824b(a)(2).

231. 131 FERC ¶ 61,063, at P 13, n.9 (citation omitted).

232. 18 C.F.R. § 33.1(a)(2).

233. *Id.* §§ 33.1(c)(2)(ii)-(iii).

234. FERC has focused on "the overall economic substance of [a] transaction, rather than its component parts." *Turners Falls Ltd.*, 55 FERC ¶ 61,487, at p. 62,668 (1991) (citing *San Diego Gas & Elec. Co. v. Alamito Co.*, 38 FERC ¶ 61,241, at p. 61,778 (1987)). For example, FERC has viewed a transaction with multiple steps as a single integrated transaction where adhering strictly to the form of the transaction might frustrate FERC's statutory authorities. *See, e.g.*, *Alamito*, 38 FERC ¶ 61,241, at 61,778. FERC likely would be reluctant to consider multiple, related transactions to be separate transactions if the result would be a finding that FERC did not have jurisdiction over the transaction(s).

235. *See FERC May I?*, *supra* note 2. *See* § III.B. for a detailed discussion of change-in-control transactions.

"that entities may not evade Commission jurisdiction by separating an otherwise jurisdictional transfer into separate transactions."[236]

B. Blanket Authorizations Under FPA Section 203(a)(2)

FERC has established in its regulations a number of blanket authorizations for transactions subject to FPA section 203(a)(2).[237] The following blanket authorizations under FPA section 203(a)(2) overlap with authorizations described in Section III.D. above with respect to FPA section 203(a)(1), and accordingly raise some of the same questions regarding their application:

- Acquisition by a holding company of "any voting security in a transmitting utility or an electric utility company or a holding company" (with respect to either of them) "if, after the transaction, the holding company and its associate and affiliate companies will own less than 10% of the voting securities" of the public utility.[238] As discussed in Section III.D, FERC's regulations also include a corresponding blanket authorization under FPA section 203(a)(1) for transfers by a public utility of voting securities to a holding company that benefits from the blanket authorization "described above if, after the transfer, the holding company and any of its associate or affiliate companies in aggregate will own less than 10% of the outstanding voting interests of such public utility."[239] As discussed in Section III.C. above, there is an overlap between this blanket authorization and FERC's traditional presumption that transfers in which the transferee and its affiliates will hold less than 10% of the voting interests are not jurisdictional. And, for the same reasons discussed in Section III.D., FERC arguably would find that a transaction involving transfer of less than 10% of a public utility's securities to a holding company benefits from this blanket authorization even if FERC finds that for purposes of FPA sections 205 and 206 that the investor is considered to be an affiliate of the public utility due to rights to appoint a member to the board of directors or other indicia of control. In contrast, the section 203(a)(2) blanket authorization is required, since no such presumption applies in that context. This authorization is subject to the restrictions and reporting requirements set forth in 18 C.F.R. §§ 33.1(c)(3) and (4).[240]

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236. *Tenaska Lotus Holdings, LLC*, 173 FERC ¶ 61,199 at P 10 (2020) (citing 79 FERC ¶ 61,107, at p. 61,495 ("the Commission would be remiss in upholding its statutory mandate if it allowed control over jurisdictional facilities to be removed from its oversight merely by how the transaction is structured.")).

237. FERC has found that it lacks the statutory authority to waive FPA section 203 obligations, so it relies on blanket authorizations to exempt certain transactions. *See, e.g.*, 20 FERC ¶ 61,138, at p. 61,303.

238. 18 C.F.R. § 33.1(c)(2)(ii).

239. 18 C.F.R. § 33.1(c)(12)(i).

240. 18 C.F.R. §§ 33.1(c)(3)-(4); *see also* 129 FERC ¶ 61,011, at P 20 n.22 (emphasizing FERC's expectation that holding companies relying on a blanket authorization subject to these obligations comply with the

Recommendation: We recommend that FERC simplify this blanket authorization, as discussed in Section VIII. In addition, as discussed in Section III.D, the notification requirement in paragraph (ii) of this blanket authorization appears to be rarely used (and unnecessary). Accordingly, we recommend elimination of this reporting requirement.

- Internal corporate reorganizations for nontraditional public utilities that do not have captive customers or own or provide "transmission service over jurisdictional transmission facilities" and that present no cross-subsidization issues.[241]
- Acquisition by a person that is a holding company solely with respect to EWGs, QFs, and FUCOs of the securities of additional EWGs, QFs, or FUCOs.[242] (See discussion in Section III.D above with respect to the blanket authorization in 18 C.F.R. § 33.1(c)(13)).[243] This authorization applies also to the acquisition of securities of holding companies that are holding companies solely as a result of ownership of interests in EWGs, QFs, or FUCOs.[244]
- Acquisition by a holding company, or its subsidiary, that is regulated by the Board of Governors of the Federal Reserve Bank or by the Office of the Comptroller of the Currency under the Bank Holding Act of securities of holding companies that include a transmitting utility or electric utility company if the acquisition is for certain banking purposes.[245]

This blanket authorization covers such acquisitions that are in the normal course of business and the securities are held as a fiduciary, as principal for derivatives hedging purposes (subject to not voting more than 10% of the voting securities), as collateral for a loan or solely for purposes of liquidation and in connection with a prior loan and beneficially owned for not more than two years (subject to certain conditions).[246] (See discussion in Section III.D above with respect to the blanket authorization in 18 C.F.R. § 33.1(c)(14)).[247] FERC has granted more

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requirement to file with FERC copies of certain filings with the SEC with respect to their holdings of securities in a target company).

241. 18 C.F.R. § 33.1(c)(6).

242. *Id.* § 33.1(c)(8).

243. *See supra* notes 170-171 and accompanying text.

244. Order No. 669, *supra* note 30, at 44; 18 C.F.R. § 33.1.

245. 18 C.F.R. § 33.1(c)(9).

246. *Id*.

247. *See supra* note 168 and accompanying text. Note that the definition of "holding company" excludes banks and certain other financial institutions and their subsidiaries that own, control, or have the power to vote public utility or holding company securities, "as long as the securities are (i) held as collateral for a loan, (ii) held in the ordinary course of business as a fiduciary, or (iii) acquired solely for purposes of liquidation in connection with" a prior loan (if owned beneficially for a period of two years or less); or, as a broker dealer if the securities are "(i) not beneficially owned by the broker or dealer and are subject to any voting instructions . . . given by customers . . . or (ii) acquired within [twelve] months in the ordinary course of business . . . with the bona fide intention of effecting [further] distribution." 42 U.S.C. § 16451(8)(B). The blanket authorization in 18 C.F.R.

expansive blanket authorizations to financial institutions in response to specific requests where the applicants have provided assurances that regulation by the SEC and securities exchanges, contractual obligations, and internal policies will prevent the applicants from exercising control over the public utility in which they acquire securities, but has imposed a 20% limitation on the voting securities that may be held in certain circumstances.[248]

The following blanket authorizations that apply only in the context of FPA section 203(a)(2) also raise issues meriting discussion:

- Acquisition by a holding company of any security of certain smaller or intrastate utilities, including: (a) "a transmitting utility or company that owns, operates, or controls only facilities used solely for" (i) electric transmission or sales in intrastate commerce or (ii) local distribution and/or retail sales subject to state commission regulation (in each case subject to reporting requirements in certain circumstances); or (b) "an electric utility company that owns generating facilities that total 100 MW or less" and are used fundamentally for individual load or affiliated end-users (e.g., industrial self-generators).[249] FERC granted these blanket authorizations based on its recognition that the definition of "electric utility company" encompasses companies that own or operate facilities used for the generation, transmission, or distribution of electric energy, which is broader than the definition of "public utility" (which is limited to entities engaged in interstate sales at wholesale or interstate transmission of electric energy), and that it did not consider its review of such transactions necessary to protect consumers.[250]

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§ 33.1(c)(9) covers situations that do not benefit from the exclusion from the holding company definition. Order No. 669-A, *supra* note 30, at P 122.

248. *See, e.g.*, *The Vanguard Group, Inc. et al.*, 180 FERC ¶ 62,065 at P 5 (2022) (2022 Delegated Order); *Morgan Stanley*, 134 FERC ¶ 61,234 at PP 14-15 (2011); *Franklin Res., Inc. et al.*, 126 FERC ¶ 61,250 at PP 38-40 (2009); *Horizon Asset Mgmt., Inc*., 125 FERC ¶ 61,029 at PP 45-50 (2008); *Legg Mason, Inc*., 121 FERC ¶ 61,061 at PP 26-32 (2007); *Goldman Sachs Group, Inc*., 121 FERC ¶ 61,059 at P 30 (2007); *Morgan Stanley*, 121 FERC ¶ 61,060 at PP 36-51 (2007); *Capital Research & Management Co. et al.*, 116 FERC ¶ 61,267 at P 28 (2006). *See also The Vanguard Group, Inc, et al.*, FERC Docket No. EC19-57-002, at P 4 (May 9, 2023) (stating an extension of a blanket authorization under a prior Commission order pursuant to FPA section 203(a)(2) was granted by operation of law rather than Commission decision). It is uncommon for the Commission to allow the statutory timeline to review a FPA section 203 application to expire. The FERC Chair has authority to set the Commission's agenda and it may be that this application was skipped due to a likely deadlock if it went to vote. Two of the four seated Commissioners, Commissioners Danley and Christie, subsequently issued a Joint Statement claiming that the "Application raises a number of issues that demand Commission scrutiny because Vanguard may be able to exercise profound control over the Utilities whose securities it holds, including the potential to influence decisions of the Utility management that could have serious effects on the reliability of power service and rates for customers." *Id.* This may indicate a political divide at the Commission regarding the level of scrutiny and standards for granting blanket authorizations; the standstill could also incentivize more requests for blanket authorizations. It would be interesting to see whether an application for FPA section 203 approval of an acquisition of control by this investor group would be found contrary to public interest as opposed to debating whether blanket authorizations based on assertions of no control should be extended.

249. 18 C.F.R. § 33.1(c)(1); *see also Goldman Sachs Group, Inc.*, 115 FERC ¶ 61,303 at P 4 (2006).

250. Order No. 669, *supra* note 30, at PP 12-17, 56-57; Order No. 669-A, *supra* note 30, at PP 62-63.

- Acquisition by a holding company of any security of a "subsidiary company" in the same holding company system (the "Subsidiary Securities Authorization").[251] This authorization is subject to the restrictions and reporting requirements set forth in 18 C.F.R. §§ 33.1(c)(3) and (4).[252] The scope of this authorization is ambiguous, however. The term "subsidiary company" is not defined for purposes of FPA section 203 or in FERC's regulations implementing section 203.[253] Although FERC specified in its regulations implementing FPA section 203 that the terms "holding company," "holding company system," and several others are to have the meanings given them in PUHCA 2005,[254] FERC did not include the term "subsidiary company" in this provision.[255] FERC's order establishing this blanket authorization suggests that it may have been intended to allow for the use of "cash management programs, money pools and other intra-holding company financing arrangements," but the text of the order does not specifically link the blanket authorization in section 33.1(b)(2)(iii) to FERC's interest in facilitating such programs.[256] FERC's orders citing this regulation have involved acquisitions by holding companies of securities of their wholly owned public utility subsidiaries in the context of money pool and other intra-system financing arrangements, but it

251. 18 C.F.R. § 33.1(c)(2)(iii).

252. *Id.* § 33.1(c)(3-4).

253. "Subsidiary company" is defined in FERC's regulations in parts 101 (the Uniform System of Accounts) and 366 (implementing PUHCA 2005). 18 C.F.R. pts. 101 and 366 (2012). In each case the definition is specific to that respective part of FERC's regulations and does not have any general applicability under the FPA or FERC's regulations implementing the FPA. In part 101, "Subsidiary Company": in the case of Major utilities means a company which is controlled by the utility through ownership of voting stock. (See Definitions item 5B, Control). A corporate joint venture in which a corporation is owned by a small group of businesses as a separate and specific business or project for the mutual benefit of the members of the group is a subsidiary company for the purposes of this system of accounts. 18 C.F.R. pt. 101 (39). In part 366, "subsidiary company" is defined with respect to a holding company as "[a]ny company, 10[%] or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company" (as well as an additional definition not applicable here). 18 C.F.R. pt. 366.1. Subsection 201(g)(5) of the FPA defines "subsidiary company" as having the same meaning as in PUHCA 2005 (which is the same definition in part 366 of FERC's regulations), but this definition applies only for purposes of such subsection (dealing with access by state commissions to books and records of certain electric utility companies and holding companies). 16 U.S.C. § 824(g)(5) (referring to PUHCA 2005, 42 U.S.C. § 16451).

254. "Holding company" is defined in PUHCA 2005 as "any company that directly or indirectly owns, controls, or holds with power to vote, 10[%] or more of the outstanding voting securities of a public-utility company or of a holding company of any public-utility company" (as well as an additional definition not applicable here). 42 U.S.C. § 16451(8). "Holding company system" is defined in PUHCA 2005 as "a holding company, together with its subsidiary companies." *Id.*

255. 18 C.F.R. § 33.1(b)(4).

256. Order No. 669, *supra* note 30, at P 142.

> is not clear from the language of these orders that the blanket authorization necessarily is limited to those types of situations.[257]

If "subsidiary company" is defined in the same manner as in PUHCA 2005, then any company that acquired 10% or more of the voting securities of an electric utility company (which by definition is a public-utility company), and thereby became a "holding company," could acquire additional securities of such electric utility company without obtaining further authorization from FERC pursuant to section 203(a)(2) of the FPA because such electric utility would be a "subsidiary company" of such holding company and therefore the transaction would be covered by the Subsidiary Securities Authorization.[258] FERC, however, might take the view that this blanket authorization was not intended to apply in such circumstances, given the fact that the rule apparently was developed in the context of money pool scenarios where the holding company wholly owned the subsidiary company, and given a natural proclivity of regulatory agencies to interpret their jurisdiction broadly.[259] Moreover, a court may find that, due to the ambiguity in the regulation, any interpretation by FERC should be afforded deference.[260] Therefore, it is not clear whether the interpretation suggested above would be upheld in any proceeding at FERC or upon review by the U.S. Court of Appeals. Regardless of whether this blanket authorization applies for purposes of FPA section 203(a)(2), it is possible that authorization may be required by the public utility in which the holding company is acquiring a direct or indirect interest pursuant to section 203(a)(1)(A) of the FPA if there is a direct or indirect acquisition of 10% or more of the voting securities of a public utility.[261]

Regardless of whether the Subsidiary Securities Authorization applies for purposes of FPA section 203(a)(2), it is possible that authorization may be required pursuant to section FPA 203(a)(1) of the FPA if there is an acquisition of 10% or more of the voting securities of a public utility.

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257. *See, e.g.*, *Ameren Servs. Co. et al*., 114 FERC ¶ 62,290 at pp. 1-2 n.3 (2006); *Ky. Utilities Co*., 114 FERC ¶ 62,050 at p. 1 n.3 (2006); *Louisville Gas & Electric* Co., 114 FERC ¶ 62,051 at pp. 1-2 n.3 (2006); *S.C. Electric & Gas Co*., 114 FERC ¶ 62,262 at p. 2-3 (2006); *Exelon Corp*., 114 FERC ¶ 61,116 at PP 9-10 (2006); *Entergy Servs., Inc*., 114 FERC ¶ 61,120 at P 9 (2006).

258. FERC has held that under the blanket authorization in 18 C.F.R. § 33.1(c)(8) a holding company may increase its ownership interests in EWGs, FUCOs, or QFs in which it has already acquired interests without obtaining further authorization under section 203(a)(2) (subject to the possible requirement for the EWG, FUCO, or QF to obtain any needed authorization under section 203(a)(1)). *Harbinger Capital Partners Master Fund I, Ltd.*, 125 FERC ¶ 61,144 at PP 23-24 (2008).

259. This would be similar to the narrow interpretation by FERC of its rule regarding secondary market transactions, as discussed above, notwithstanding the broad interpretation supported by the plain language of the regulation. *See supra* notes 138-145, and accompanying text.

260. See generally Chevron v. Natural Res. Def. Council, 467 U.S. 837, 842-45 (1984). The long-standing "Chevron Deference" to federal agencies established in this case may no longer be as reliable, however, because the US Supreme Court announced on May 1, 2023, that it will reconsider the case. The reconsideration remained pending at the time this article was finalized.

261. To the extent that the holding company is a holding company solely with respect to EWGs, QFs, and FUCOs, and is acquiring additional interests in such entities, FERC's regulations at 18 C.F.R. § 33.11(c)(8), as discussed below, provide a blanket authorization for such acquisition under section 203(a)(2). *LS Power Development, Inc*., 125 FERC ¶ 61,267 at P 23 (2008).

Recommendation: We recommend that FERC align the blanket authorizations among affiliates for public utilities and holding companies. It is not clear why a holding company has blanket authorization to acquire any amount of securities of a subsidiary company,[262] but that same subsidiary company only has blanket authorization in the same transaction for a transfer of securities to the holding company if the holding company will own less than 10% of the public utility's outstanding voting interests.[263] It means that a public utility does not have blanket authorization to transfer as little as 1% of its outstanding voting interests to an entity that already owns 10% or more of the public utility's outstanding voting interests.

Perhaps the reason for this difference is that there arguably is *no* requirement for FERC authorization for a public utility to transfer additional securities to an entity where the public utility already has transferred—with FERC approval—10% or more of its securities to that entity (as discussed in Section III.C. above). This is because FERC already presumes control once the holding company acquires 10% of the voting interests of the public utility, so there is no additional change in control for subsequent transfers to the same holding company. But, as discussed above, it would be helpful for FERC to provide clarification on this point, and at the same time FERC could clarify the intent of this discrepancy between the relevant blanket authorizations. Although not included in a specific blanket authorization, FERC has clarified that authorization is not required under FPA section 203(a)(2) for a holding company to repurchase its own stock.[264]

VI. CALCULATION OF $10 MILLION THRESHOLD

FERC's jurisdiction under FPA section 203 is limited in many instances to transactions where the value of the transferred assets or securities is in excess of $10 million. Until 2005, FERC's jurisdiction under FPA section 203 was limited solely to the types of transactions addressed in what now are FPA sections 203(a)(1)(A)–(C), with a lower dollar threshold of $50,000 instead of the current $10 million threshold, where applicable.[265] EPAct 2005 increased the jurisdictional dollar threshold to $10 million, added a new section, 203(a)(1)(D), which governs acquisitions by public utilities of certain existing generating facilities, and added FPA section 203(a)(2), which governs certain transactions by holding companies.[266]

Since the publication of *FERC, May I?*, Congress further amended FPA section 203 in 2018 to extend the $10 million threshold to merger transactions under

262. 18 C.F.R. § 33.1(c)(2)(ii).

263. *Id.* § 33.1 (c)(12)(i).

264. Order No. 669-A, *supra* note 30, at P 13 (citing National Grid plc, 114 FERC ¶ 61,115 at P 11 (2006)).

265. Order No. 669-A, *supra* note 30, at P 1.

266. 16 U.S.C. § 824b(a)(1)-(2). (It is generally understood that the increase in value was a result of inflation); *see FERC, May I?*, *supra* note 2, at 155 (for further discussion of the reasons for certain amendments to Section 203 included in EPA 2005).

section 203(a)(1)(B).[267] This has doubtlessly resulted in fewer FPA section 203 applications.[268] At the same time, however, Congress created a new requirement for submitting a notification filing within 30 days following a merger or consolidation that falls under this jurisdictional threshold if "the facilities, or any part thereof, to be acquired are of a value in excess of $1,000,000."[269] This will likely disproportionately impact transmission owners that take ownership of additional transmission facilities, including via interconnection customers' election of an option-to-build.[270]

The $10 million dollar threshold does not apply consistently to all transactions. It applies to a public utility for mergers, consolidations, and acquisitions under FPA section 203(a)(1)(B)–(D) and to holding companies for acquisitions under FPA section 203(a)(2).[271] It also applies to transfers of *less than* all of the voting securities in a public utility under FPA section 203(a)(1)(A).[272] There is no threshold, however, under FPA section 203(a)(1)(A) if a public utility disposes of "the whole" of its jurisdictional facilities.[273] There are no clear policy grounds for

267. An Act to Amend Section 203 of the Federal Power Act, H.R. 1109, 115th Cong. § 3152 (2018) [hereinafter H.R. 1109].

268. *Id.*; 16 U.S.C. § 824b(a)(7).

269. *Id.*; *see also* Order No. 855, *supra* note 181 at P 5 (adding a new section 33.12 to FERC's regulations, 18 C.F.R. § 33.12 ("[M]erge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with the facilities of any other person, or any part thereof, that are subject to the jurisdiction of the Commission and have a value in excess of $10 million, by any means whatsoever. . . ."). The "purpose" of the act was "to correct the misinterpretation" by FERC regarding whether the $10 million threshold applied to FPA section 203(a)(1)(B). Rep. No. 115-253, *supra* note 178. The report provides a comprehensive history of this subsection and detailed explanation of why FERC should have interpreted the $10 million threshold to apply to FPA section 203(a)(1)(B). The $1 million notice filing appears to be an afterthought, and the report does not explain its purpose. *Id.*

270. See discussion above, *supra* Section III.A. In the authors' experience, it is rare that the value of transmission facilities constructed pursuant to an option-to-build is less than $1 million. The option-to-build context does raise another interesting issue, however, because the project company building these facilities typically transfers them to the transmission owner at no cost. FERC's regulations state that the value of transmission facilities "means the market value of the facilities . . . for transactions between non-affiliated companies" and "the Commission will rebuttably presume that the market value is the transaction price." 18 C.F.R. § 33.1(b)(3). A rational conclusion would be that none of the option-to-build transmission facility transfers trigger FPA section 203(a)(1) because the "value" of the transmission facilities is $0 as defined by FERC's regulations. Practitioners appear to generally take a more conservative route, however, and base the value of the asset on other mechanisms. *See, e.g.*, 184 FERC ¶ 61,005, at P 9 (order granting requested open access waivers, and indicating that the applicant stated FPA section 203 approval was not required for the transfer of interconnection facilities pursuant to an option to build because the facilities were less than $10 million).

271. 16 U.S.C. § 824(b)(a)(1).

272. Order No. 708, *supra* note 110, at PP 21, 22; *see also PPL Electric Utilities Corporation*, 168 FERC ¶ 61,046 at P 2 (2019) (dismissed application because the $10 million threshold was not met).

273. Order No. 669-B, *supra* note 30, at P 28 n.41 ("Because of the placement of the comma in [section 203(a)(1)(A)], we do not interpret the $10,000,000 threshold as applying to dispositions of the whole of a utility's jurisdictional facilities."). FERC stated in its notice of proposed rulemaking that this same interpretation applied for the pre-EPAct 2005 section 203. Notice of Proposed Rulemaking, *Transactions Subject to FPA Section 203*, FERC Stats. & Regs. ¶ 32,589 at P 27 n.21, 70 Fed. Reg. 58,636 (2005); *but see*, *S. 1860 Testimon*y, *supra* note 178; Parity Across Reviews (PARs) Act, H.R. 115th Cong. Amending § 203 (1st Sess. 2017); H.R. 1109, *supra* note 267 (stating "[t]he bills would align [Section 203(a)(1)(B)] of the FPA with the other three subsections of Section 203(a)(1). Subsections (A), (C), and (D) only require Commission approval if the transaction at issue

this distinction; particularly given that a public utility typically has reporting requirements under FPA section 205 that would alert FERC to changes in affiliation and control.[274] The recommendation below in this section suggests that FERC grant a blanket authorization for transfers of "the whole" of a public utility's jurisdictional facilities if the value is less than $10 million.

In Order No. 669,[275] FERC added a definition of "value" to its regulations as follows:

(i) For jurisdictional facilities and companies, value is the market value for transactions between non-affiliated companies, which is rebuttably presumed to be the transaction price. For transactions between affiliated companies, value is the original undepreciated cost, as defined in FERC's Uniform System of Accounts (18 C.F.R. pt. 101), or original book cost, as applicable.[276]

(ii) For wholesale contracts, value is the market value for transactions between non-affiliated companies, which is rebuttably presumed to be the transaction price. For transactions between affiliated companies, value is the total expected "revenues over the remaining life of the contract."[277]

(iii) For securities, value is the "market value for transactions between non-affiliated companies," which is rebuttably presumed to be the transaction price. For transactions between affiliated companies, value is the market value for widely-traded securities (determined by the market price at the time of the transaction) or, if the securities are not widely traded, it is determined by multiplying the value of the issuing company's total undepreciated book value by the ratio of the number of equity securities involved in the transaction to the total number of outstanding equity securities of the issuer.[278]

The method in (i) above would apply to physical, jurisdictional facilities, and existing generation facilities addressed by sections 203(a)(1)(A) and (D).[279] This section also would apply for purposes of a merger or consolidation (addressed by sections 203(a)(1)(B) and (D)).[280] For "paper jurisdictional facilities," however,

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exceeds $10 million in value. Subsection 203(a)(1)(A) requires Commission approval before a public utility sells, leases, or otherwise disposes of facilities worth more than $10 million."). Then-General Counsel Danley's statement (which is not precedential) reflects common confusion in the industry regarding the proper application of the $10 million threshold in section 203(a)(1)(A) given the manner in which the sentence structure differs from the remaining subsections of 203(a)(1). *S. 1860 Testimony*, *supra* note 178.

274. *See, e.g.*, 18 C.F.R § 35.42 (stating a condition of retaining market-based rate authority is reporting, among other things, changes in ownership of electric generating capacity in excess of 100 MW, inputs to electric generation, or electric transmission facilities).

275. *See* Order No. 669, *supra* note 30, at PP 113, 116, 120-21.

276. 18 C.F.R. § 33.1(b)(3)(i).

277. *Id.* § 33.1(b)(3)(ii).

278. *Id.* § 33.1(b)(3)(iii).

279. Order No. 669, supra note 30, at P 27; Entergy Gulf States, Inc., 121 FERC ¶ 61,182 at P 16 n.11 (2007) (market value, rebuttably presumed to be transaction price, used for purposes of section 203(a)(1)(D)(1)).

280. Order No. 669, *supra* note 30, at P 96.

the method in (ii) above would apply.[281] Finally, for securities, as addressed by section 203(a)(1)(C) and 203(a)(2), the method in (iii) above would apply.[282]

FERC clarified that for non-affiliate transactions including transfers of both jurisdictional facilities (including "paper facilities") and non-jurisdictional facilities, any valuation performed by the acquiring entity of the constituent parts of the transaction may be used to determine whether FPA section 203 authorization is required.[283] If such a valuation is not available, then original cost undepreciated should be used.[284]

FERC also clarified that in cases involving non-affiliate security acquisitions under FPA section 203 or mergers or consolidations under section 203(a)(2), the appropriate measure is the entire transaction price and not some value prorated to reflect only the portions of the underlying assets that are subject to FERC jurisdiction.[285] This could capture portfolio transactions that involve the purchase and sale of multiple entities and assets where the individual assets would not have triggered the filing requirement. For similar cases involving affiliates, the original book cost of all of the acquired company's assets should be used.[286]

Recommendation - Revise Dollar Thresholds for FPA Section 203 Transactions: One straightforward way to reduce the number of unnecessary FPA section 203 applications would be for Congress to amend Section 203(a)(1)(A) to make the $10 million threshold apply to acquisitions of "the whole" of a public utility's jurisdictional assets, as discussed above. This would serve a similar function to the 2018 revision to FPA section 203(a)(1)(B), including to promote consistency throughout FPA Section 203 and "ease the regulatory burden on industry."[287] There is no apparent policy reason for distinguishing between transfers of the whole of a public utility's assets with a value of $10 million or less and transfers of a portion of a public utility's assets with a similar value. If amending the statute is considered to be too difficult to achieve, then FERC could amend its regulations to add a blanket authorization for transfers of "the whole" of a public utility's jurisdictional assets if the value is less than $10 million.

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281. *Id.* at P 97 (Rather than transfer a market-based rate tariff and trigger an application under Section 203 (with a potential 180-day approval period), it is often easier for the would-be acquiring entity simply to file for its own original market-based rate authority (which it should be able to get within 60 days under FPA section 205)).

282. *Id.* at P 98 (Note that even if the securities represent 10% or more of the target company's voting securities, no section 203(a)(1)(C) authorization is required if the securities have a value of less than $10 million). Order No. 669-B, supra note 30, at P 28.

283. Order No. 669, *supra* note 30, at PP 116, 120. (Such valuation should be consistent with the value placed by the acquiring company for purposes of its audited financial statements and in keeping with generally accepted accounting principles); Order No. 669-A, supra note 30, at P 90.

284. Order No. 669-A, supra note 30, at 117.

285. *Id.* at Appendix B, pt. 33(5)(b)(3)(iii).

286. *Id.* at P 126.

287. Rep. No. 115-253, *supra* note 178, at 8 ("In my view, the proposal to add a $10 million threshold to Subsection 203(a)(1)(B) of the FPA would ease the regulatory burden on industry without impeding the Commission's regulatory responsibilities. Transactions below the proposed threshold are unlikely to impose a significant negative impact on competition or the rates of utility customers.").

In addition, Congress could amend FPA section 203 to provide FERC with discretion to establish the value threshold for all transactions governed by FPA section 203. Rather than legislate transactional dollar thresholds, Congress should grant FERC the discretion to determine appropriate thresholds based on its specialized knowledge of the industry to exclude the types of minor transactions the dollar threshold was (presumably) originally designed to exclude.[288] Alternatively, Congress could provide for the threshold to be adjusted annually for inflation, similar to the threshold for Hart-Scott-Rodino review of mergers and acquisitions.[289] It would be fantastic if, as part of these amendments, Congress would eliminate the $1 million threshold for providing notice of mergers, which was added as part of the 2018 amendment to FPA section 203. The threshold is met with even minor transactions in the current market. It merely creates paperwork and unnecessary risk of non-compliance.

VII. ISSUES IF FPA SECTION 203 APPROVAL IS REQUIRED, BUT NOT OBTAINED

Failure to obtain FPA section 203 approval when required can result in adverse regulatory and commercial consequences. FERC has imposed civil penalties for failure to obtain needed authorization under FPA section 203, it has required a company to disgorge revenues received under wholesale electric sales contracts transferred in violation of FPA section 203, and it has threatened other consequences for unauthorized transactions.[290] Before EPAct 2005 (which, in addition to the changes to FPA section 203 discussed above, also expanded FERC's civil penalty authority), FERC remarked upon finding that a particular set of merger transactions had been consummated without obtaining the required prior authorization that "the parties to the merger transactions voluntarily assumed the risk of any consequences that may result" from FERC's subsequent review of the transactions, and warned the parties that FERC could pursue remedies including "initiat[ing] an action to undo a merger consummated in violation of the FPA and/or refer[ring] violations of the FPA to the Department of Justice."[291] In another pre-EPAct 2005 case, FERC threatened to impose remedies as a term or condition of

288. *Id*.

289. Clayton Act, H.R. 8532, 94th Cong. § 201(7a)(2)(a) (1976).

290. *See, e.g., American Transmission Company, LLC*, 160 FERC ¶ 61,030 at PP 10-11 (2017); *Idaho Power Co.*, 103 FERC ¶ 61,182 (2003).

291. *San Diego Gas & Elec. Co. v. Alamito Co.*, 38 FERC ¶ 61,241, at p. 61,779 n.16 (1987) (citing 16 U.S.C. § 825m(a) (1992), which provides: "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter."). FERC has never filed an action under section 314, however.

its subsequent approval of a transaction that had been implemented without obtaining prior FERC authorization, noting (without citing any authority) the "obvious risk to the public utility that a disposition implemented without *prior* authorization may be voidable in court by any affected party."[292] The authors are not aware of any case in which an affected party, or FERC, has actually sought to void a transaction for failure to obtain FPA section 203 authorization. In a case involving the unauthorized transfer of wholesale electric sales contracts from a franchised public utility to its power marketing affiliate without obtaining authorization under FPA section 203, FERC required the transferee to reimburse the transferor, or its counterparties under the contracts, approximately $5 million.[293] While FERC has approved a number of transactions under FPA section 203 after the transactions had already occurred, FERC usually refuses to grant such authorizations retroactively.[294]

EPAct 2005 provided FERC with civil penalty authority for violations of Part II of the FPA (including section 203).[295] FERC has used this authority involving a violation of section 203 sparingly. In one case, a public utility agreed to a settlement including payment of a $500,000 civil penalty for its failure to obtain authorization under section 203(a)(1) of the FPA in connection with its merger with another company (among other violations).[296] In another, a public utility agreed to pay a civil penalty of $205,000 for violations of both FPA section 203 and 205, in addition to implementing certain compliance requirements.[297] The Commission also has authority to refer entities to its Office of Enforcement for violations. FERC exercised this jurisdiction in a matter involving multiple applications by a

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292. 104 FERC ¶ 61,270, at P 25; see also *Kandiyohi Power*, 102 FERC ¶ 61,213 at P 17 (2003) (similar language); *Northern Iowa Windpower II LLC*, 110 FERC ¶ 61,059 at P 13 (2005) (same). Note that FERC does not have clear authority to condition approval of a FPA section 203 application given that the statute states FERC "shall approve" a transaction under FPA section 203 "if it finds it is consistent with the public interest and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company." 16 USC § 824b(4)(5).

293. 103 FERC ¶ 61,182, at P 17.

294. *See, e.g., Int'l Trading Co*., 139 FERC ¶ 61,003 at P 10 n.17 (2012); *BlackRock, Inc.*, 131 FERC ¶ 61,063 at Ordering P (A) (2010); *Horizon Asset Mgmt., Inc*., 125 FERC ¶ 61,209 at PP 1-2 (2008); *Phelps Dodge Corp*., 121 FERC ¶ 61,251 at Ordering P (A) (2007); *Mesquite Investors L.L.C.*, 111 FERC ¶ 61,162 at P 19, Ordering PP (A)(B) (2005); 110 FERC ¶ 61,059, at PP 7-8, 13; *Kandiyohi Power Corp*., 107 FERC ¶ 61,285 at PP 17, Ordering P (A) (2004) (authorizing transaction as of the date of the order); see *JPMorgan Chase & Co*., 123 FERC ¶ 61,088 at PP 13, 31 (2008) (granting rare retroactive approval for transaction implemented with the purpose of stabilizing financial markets and where the public utility aspects were incidental to the transaction as a whole).

295. Energy Policy Act of 2005, H.R.6, 109th Cong. § 1284(e) (1st Sess. 2005).

296. *Gexa Energy*, *LLC*, 120 FERC ¶ 61,175 at P 11 (2007) (The merger occurred before FERC was granted civil penalty authority under Energy Policy Act 2005, but the public utility did not receive authorization until after FERC received such authority, and FERC considered the violation to be continuing after that time. *Id*. at 13. FERC noted that the penalty could have been much higher had the public utility's new owner not investigated and self-reported the violation and taken measures to prevent future occurrences. *Id*. at 14. Counsel advising public utilities on merger transactions should note that FERC stated in its order approving the settlement that the public utility had represented in its merger documents that no FERC authorization was required for the transaction and its regulatory counsel had provided an opinion to that effect.) *Id*. at 4.

297. 160 FERC ¶ 61,030, at PP 1-2.

public utility and its affiliates seeking authorization under FPA section 203 for transactions that had already been implemented.[298]

FERC generally only approves transactions described by and based on the information as it is provided in the application. This gives parties a strong incentive to file an application based on accurate information to ensure that the associated authorization by FERC is valid. If material facts in the application are incorrect, then FERC's FPA section 203 authorization arguably does not apply and the transaction – if consummated – is subject to the consequences described in this section as if authorization had not been sought. Also, FERC has assigned civil penalties to a public utility for providing inaccurate information in an FPA section 203 application.[299]

VIII. PROPOSALS FOR IMPROVEMENT

The ability to promptly close a transaction can make or break the economics of a deal. The end of a calendar year is a stressful time for every transactional regulatory lawyer and presumably FERC staff. Government holiday schedules collide with numerous requests for expedited action to rule on FPA section 203 applications in time to close before the calendar year rolls over.

A project's eligibility for tax incentives may depend heavily on when financing transactions close and the project can be placed in service.[300] There are often other corporate accounting and reporting requirements that incentivize closing before the end of a calendar or fiscal year. FERC has informally stated commercial considerations are not good cause to support expedited action, so if expedited action is required, it is prudent to file an application at least 180 days prior to December 31 (or other deadline) if possible. However, the reality is that deals often are not yet contemplated or are in very preliminary stages of negotiation six months in advance of closing. The facts that (i) FPA section 203 applications are public and (ii) and the application must include a copy of the transaction document (or at least a Term Sheet that counsel must verify reflects the ultimate deal) further disincentivizes early filings.[301]

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298. 139 FERC ¶ 61,003, at P 10 n.18.

299. *Duke Energy Corp.*, 163 FERC ¶ 61,189 P 1 (2018) (Civil penalty for providing inaccurate information in 203 application).

300. The Inflation Reduction Act of 2022 has reduced this stress to some extent by making it possible to monetize and sell tax credits, but the placed-in-service date is still material in various ways, such as whether production tax credits will be created at the point of sale of energy or measurement. The placed-in-service date also may have implications for other accounting or tax reasons, including the timing of accelerated depreciation for tax purposes.

301. Publicizing possible change in ownership could result in unwanted interest. For example, Exelon Corporation filed an application with FERC in connection with its hostile takeover bid for NRG Energy, seeking authorization for, among other things, a change in control with respect to NRG Energy's subsidiaries that were public utilities under the FPA, even though NRG Energy and its public utility subsidiaries did not participate in that application. *Exelon Corp.*, 127 FERC ¶ 61,161 at PP 25-26 (2009); 130 FERC ¶ 61,095 (2010) (denying motion for rehearing as moot given that Exelon withdrew its tender offer, and denying motion for vacatur); *see also Cincinnati Gas & Elec. Co.*, 64 FERC ¶ 61,237, at p. 62,682 (1993); *Kansas City Power & Light Co.*, 53 FERC ¶ 61,097, at p. 61,273 (1990). While we are not focusing on the contents of FPA section 203 applications in this article, in the interest of making the whole process more efficient we recommend that FERC revisit the

If you have arrived at this point, you know that this article is peppered with various recommendations for improving specific provisions of FPA section 203 and FERC's implementing regulations. The authors offer a few broader proposals below. The government has an opportunity to significantly reduce the amount of inefficiency associated with FPA section 203 and facilitate investment and development in the industry.

A. Expand the Scope of the "Blanket Authorizations"

Of the thousands of FPA section 203 applications that the industry has dutifully presented to FERC, it appears that FERC has only found that a transaction was *not* in the public interest and denied approval three times.[302] In each case, FERC denied approval because the applicants "failed to demonstrate that the Proposed Transaction will not have an adverse effect on rates."[303] This means the vast majority of proposed transactions are consistent with the public interest. It would save a lot of time and resources if the rules more effectively resulted in applications for transactions that actually have potential to raise public interest concerns. This will facilitate "greater industry investment and market liquidity," which FERC has agreed "are important goals."[304]

It will also modernize FPA section 203, which was initially enacted in a very different market that did not have ISOs/RTOs subject to market mitigation and that was dominated by vertically integrated utilities with captive customers and consolidated ownership of such utilities.[305] Today, the electric generation market in most areas of the nation is saturated with independent power producers that are special purpose entities that each own a single generating facility (although they often are affiliated with other such entities).[306] They typically sell all of the output

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obligation to substantially complete negotiations before an application under FPA section 203 can be filed. Most of the information in the transaction documents is irrelevant to FPA section 203. If the parties can agree to the information that is relevant – i.e., the parties to the transaction, percentage interests and degree of control – it should be sufficient. This will allow applicants to start the approval process earlier while they finalize more of the irrelevant (to the FPA section 203 analysis) commercial terms. Even if the parties to the transaction decided to wait to make the proposed transaction public by filing an application, it would help gain necessary sign-off from private investors who find the idea of filing a proprietary commercial agreement with the government undesirable.

302. *See Liberty Utilities*, 181 FERC ¶ 61,212 at P 2 (2022); *Electric Energy Inc*., 168 FERC ¶ 61,130 at P 2 (2019); *GridLiance High Plains LLC*, 166 FERC ¶ 61,171 at P 2 (2019). The Commission has also conditioned approval on compliance measures, including divestiture of generation (*see, e.g*., *Exelon Corporation & Public Service Enterprise Corp.*, 112 FERC ¶ 61,011 (2005), *order denying reh'g*, *Accepting Compliance Filing and Granting Clarification*, 113 FERC ¶ 61,299 (2005)), and adoption of ratepayer protection commitments (*see*, *e*.g., *IES Utilities*, 81 FERC ¶ 61,187, at p. Introduction (1997); *Colorado Interstate Gas Co.*, 83 FERC ¶ 61,089, at p. Summary (1998) (Order Denying Rehearing, Granting Clarification in Part and Denying Clarification in Part).

303. 181 FERC ¶ 61,212, at P 2.

304. 120 FERC ¶ 61,060, at P 33.

305. *Energy Primer: A Handbook for Energy Market Basics*, FERC 35-71 (2020), https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020_Final.pdf.

306. *Id.*

of the generating facility pursuant to a long-term contract in order to obtain financing and build the project, or they sell their output into wholesale markets administered by ISOs/RTOs that are subject to FERC regulations that seek to ensure competition.[307] Energy sales are made at negotiated rates within structured market rules and self-regulated by competitive forces, subject to FERC oversight.[308]

FERC is bound by Congress's directives, and ideally Congress would amend the statute to cull out unnecessary applications, but FERC is an independent agency and is often more nimble than Congress. FERC should therefore consider establishing a blanket authorization that covers all aspects of modern transactions other than the limited circumstances that may realistically be contrary to the public interest, such as transactions that may have an effect on captive customers (including as a result of cross subsidization by entities with captive customers of entities without such customers) or that create concerns for horizontal or vertical market power that are not mitigated by other market protections.

FERC has periodically updated its regulations in a manner that "streamlines filing requirements and reduces the information burden for mergers and other dispositions of jurisdictional facilities that raise no competitive concerns and eliminates certain filing requirements in part 33 that are outdated or no longer useful to the Commission in analyzing mergers and other dispositions of jurisdictional facilities"[309] and we think the time is ripe for further revisions to achieve the same goal.[310]

Based on the limited precedent denying or conditioning approval on mitigating measures, we recommend FERC add the following succinct and comprehensive blanket authorization to section 33.1(c) of its regulations:

> A public utility is granted blanket authorization under FPA section 203(a)(1) if: (i) it is not, and is not affiliated with, a franchised public utility with captive customers, (ii) it does not provide transmission service over jurisdictional transmission facilities, (iii) it has market-based rate authority pursuant to Section 205 of the Federal Power Act and (iv) either (1) all of the electric generating capacity that it owns or controls is committed under one or more long-term contracts, or (2) if it has any such capacity not contracted under such a long-term contract, then it sells all of the energy output of such uncontracted capacity only into liquid wholesale energy markets that are subject to FERC-approved mitigation measures.[311]

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307. *Id.*

308. *Id.*

309. Final Rule, Order No. 642, *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001).

310. In the *2016 NOI*, FERC sought comments on whether blanket authorizations would be appropriate for certain transactions that do not give rise to competitive concerns, including dispositions of securities with limited governance rights and transfers of transmission assets that will be integrated into a public utility's existing transmission network. 156 FERC ¶ 61,214, at P 38. As noted above, FERC has taken no further action after receiving comments on this question.

311. 18 C.F.R § 33.1(c).

This would cover a large portion of the types of transactions involving investments in independent power producers that are common today.

FERC must approve a transaction "if it finds that the proposed transaction will be consistent with the public interest, and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company."[312] FERC has stated that determining whether a transaction is in the "public interest" generally involves analyzing the transaction's "effect on competition, effect on rates, and effect on regulation."[313]

Part (i) of this proposed Blanket Authorization ensures that the transaction will not affect retail energy rates of any captive customers and there will be no cross-subsidization of a non-utility associate company.[314]

Part (ii) of this proposed Blanket Authorization ensures that the transaction will not affect rates for transmission service.[315]

Part (iii), in conjunction with part (ii), means the transaction will not have an effect on regulation.[316] FERC will continue to regulate the public utility in the same manner under FPA section 205. The majority of independent power producers that are not exempt from FPA section 203 under the QF exemption have market-based rate authority and are required to provide FERC notice of material changes in status (including changes in upstream ownership and control).[317] FERC would receive notice of any transactions that otherwise would be subject to FPA section 203 but for the proposed Blanket Authorization.

Part (iv)(2) of the proposed Blanket Authorization reflects FERC's findings that there is little cause for market power concerns when a public utility operates within FERC-regulated RTO/ISO markets. FERC streamlined FPA section 205 applications for entities seeking market-based rates when it dispensed with the obligation to provide market power screens for certain jurisdictional sales that occur within RTOs/ISOs.[318] The rationale was that "approved market monitoring and mitigation was sufficient to address market power concerns."[319] If there are no market power concerns related to a public utility's jurisdictional activities due

312. 16 U.S.C. § 824b(a)(4).

313. *Supplemental Policy Statement*, *supra* note 76, at P 4.

314. *Id*. at P 34 (FERC has also stated that "a blanket authorization can be granted only when the Commission can be assured that the statutory standards will be met, including ensuring that the interests of captive customers are safeguarded.").

315. *Id.* at PP 13-16.

316. *Id.* at P 80.

317. *See generally* Order No. 652, *Reporting Requirement for Change in Status for Public Utilities with Market-Based Rate Authority*, 110 FERC ¶ 61,097 (2005); Order No. 816, *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electricity Energy, Capacity and Ancillary Services by Public Utilities*, 153 FERC ¶ 61,065 (2015); Order No. 697, *supra* note 61; Order No. 860, *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 168 FERC ¶ 61,039 (2019); 18 C.F.R. § 35.42.

318. *Refinements to Horizontal Mkt. Power Analysis for Sellers in Certain Reg'l Transmission Org. & Indep. Sys. Operator Mkts.*, 168 FERC ¶ 61,040 at P 6 (2019) (citing Order No. 697-A, 119 FERC ¶ 61,295 at P 62 (2007) "establishing the rebuttable presumption that Commission-approved market monitoring and mitigation was sufficient to address market power concerns.").

319. *Id.* at P 26.

to the structure of the market the public utility operates within, then it makes little sense for such public utility to have to seek FPA section 203 approval for upstream changes in control. We therefore recommend granting a blanket authorization under FPA section 203 for public utilities to engage in transactions if they have no captive customers and do not provide electric transmission service, and if they solely operate within markets in which FERC has determined that there is adequate mitigation of market power concerns.

Similarly, FERC has found that there are no horizontal market power concerns for purposes of FPA section 203 when a public utility sells all of its capacity to one or more buyers pursuant to long-term contract.[320] This justifies Part (iv)(1) of the proposed Blanket Authorization. If a public utility has no available capacity because it is fully committed via contract, it reasonably cannot do anything to harm the public interest and should thus be eligible for a blanket authorization under FPA section 203.

B. Provide Clarifications in Response to "Abundance of Caution" Filings

FERC should look for opportunities to clarify in its orders whether it has jurisdiction over transactions that are the subject of abundance of caution filings. We do not propose delaying an order on individual applications; rather, we suggest that FERC periodically issue guidance addressing issues raised in applications filed out of an abundance of caution. If there are fewer unnecessary applications filed, FERC staff should have more time to address open issues. FERC has precedent to follow in the form of its FPA section 203 policy statement and Supplemental Policy Statement.[321] Alternatively, applicants could file requests for declaratory order together with, or after, the initial applications seeking FERC authorization in an abundance of caution. Although the declaratory order proceeding arguably would be moot once FERC had approved the transaction,[322] FERC's rules with respect to requests for a declaratory order do not require that a petition involve a live controversy.[323] Accordingly, it would appear that FERC would have the option to continue addressing the request for declaratory order, based on the actual facts set forth in the petition, if it chose to do so. To the extent that FERC is concerned about opening a loophole through which parties could evade FERC review in situations where such review is appropriate, a rulemaking process may help to avoid this result, because a wide variety of entities likely would participate

320. Order No. 816, *supra* note 317, at P 39 ("The Commission clarifies here that when all of a seller's generation capacity is sold on a long-term firm basis to one or more buyers, the seller has no uncommitted capacity and in such cases will not be required to file the indicative screens. Sellers may explain that their generation capacity is fully committed in lieu of including indicative screens in their filings in order to satisfy the Commission's market-based rate requirements regarding horizontal market power in instances where all generation owned or controlled by a seller and its affiliates in the relevant balancing authority areas or markets, including first-tier balancing authority areas or markets, is fully committed.")

321. Order No. 592, *Inquiry Concerning the Comm'n's Merger Policy Under the Fed. Power Act: Policy Statement*, FERC Stats. & Regs. ¶ 31,044, 61 Fed. Reg. 68,595 (1996); Order No. 592-A, *Inquiry Concerning the Comm'n's Merger Policy Under the Fed. Power Act: Order on Reconsideration,* 62 Fed. Reg. 33,341 (1997); *Supplemental Policy Statement*, *supra* note 76.

322. *See, e.g., Koch Hydrocarbon Co.,* 65 FERC ¶ 61,202, at p. 61,964 (1993).

323. 18 C.F.R. § 385.207(a)(2) (providing for filing of a petition for a declaratory order to "remove uncertainty").

and help identify such potential shortcomings. In any event, FERC could adjust its regulations, or issue clarifying adjudicative orders, at a later date if it becomes clear that transactions that should be reviewed under FPA section 203 are evading scrutiny. The point is that we expect the commercial world to continue to outpace regulations in creativity and complexity. We encourage FERC to seek ways to keep up and help facilitate responsible industry investment and growth. Keeping pace with evolving transaction structures by timely providing clear FPA section 203 rules is proverbial low hanging fruit.

Even if FERC does not take any of the actions discussed above, parties planning to engage in future transactions that are substantially similar to a transaction previously approved by the Commission in response to an abundance of caution filing (with no Commission ruling on jurisdiction) could file a request for declaratory order asking FERC to rule on whether it has jurisdiction over a transaction with identical facts. This is essentially the same approach used in obtaining the FERC order in the *Ad Hoc Group* order. This approach avoids the problem of asking FERC to provide guidance based on hypothetical facts while at the same time avoiding holding up FERC action on the initial approval application pending a FERC ruling on jurisdiction. The disadvantage of this approach is that it requires a filing fee, takes time and resources from both applicant and the Commission, and the ruling is limited to the specific facts.

IX. CONCLUSION

FERC could reduce regulatory costs and uncertainty, as well as its own workload, by issuing orders or regulations changing or clarifying its policies—or seeking legislative changes—with respect to some of the issues discussed above. Reducing the number of FPA section 203 filings through implementation of some or all of the proposals listed above would have multiple benefits. At a minimum, it would reduce the time, cost, and effort for the industry and FERC. In addition, it would reduce the risks faced by public utilities and holding companies in connection with financing and merger and acquisition transactions. These risks include the possibility that the parties to the transaction may erroneously decide that they do not need to seek FERC authorization, potentially leading to civil penalties and uncertainty whether a transaction may be void or voidable. Alternatively, if the parties decide that they do need to file a FPA section 203 application, they are exposed to the risk that during their wait for authorization some external event may occur that changes the value of the transaction to one or both parties. Clearer guidance on the scope of FERC's jurisdiction under FPA section 203 will facilitate market liquidity for public utility assets and public utility ownership interests, which in turn will support greater and more efficient investment in public utilities and FERC jurisdictional assets. If the measures to adopt the proposals discussed above are carefully crafted, then they would achieve these benefits without compromising the Commission's jurisdiction under the FPA to review transactions in situations where review is necessary to protect the public interest, including transactions that have the potential to have a material effect on consumers.

DECARBONIZING THE WORLD: CAN THE EU CBAM PROVIDE THE INCENTIVE WE NEED?

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Synopsis: The European Union (EU) Carbon Border Adjustment Mechanism (CBAM) began its transition phase[1] in October 2023. The CBAM extends beyond EU's borders, covering imported goods like electricity, iron and steel, aluminum, cement, fertilizers and hydrogen.[2] This measure could impact EU's trade partners lacking a similar in-house measure, leaving them with three choices: paying a carbon tax to the EU through the CBAM, establishing a comparable domestic measure, or challenging the CBAM at the World Trade Organization (WTO) Dispute Settlement Body. This paper examines differing state perspectives to the EU CBAM, with a focus on key players like the United States and China. Additionally, it addresses concerns raised by developing countries about sharing climate change mitigation costs with major polluters in global trade. Finally, the study evaluates the CBAM in light of the General Agreement on Tariffs and Trade (GATT) to assess potential challenges at the WTO Dispute Settlement Body. Although the measure may face a challenge in the WTO Dispute Settlement Body, if such an attempt proves unsuccessful, other countries will be encouraged to adopt a comparable measure within their own borders.

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1. *See Carbon Border Adjustment Mechanism*, EUR. COMM'N 2-3 (May 13, 2023), https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en. During the Transition Phase, traders of electricity, iron and steel, aluminum, cement, fertilizers, and hydrogen will have to report carbon emissions of the products imported into the EU. During this phase, they will not be required to pay a carbon tax. Upon completion of the transition phase, during which EU gathered the necessary data, a carbon tax will be paid for the goods imported into the EU as elaborated herein. *Id.*

2. Initially, hydrogen was not part of the European Commission proposal, however as a result of negotiations between the European Commission, the European Parliament, and the Council, hydrogen was included in the EU CBAM. The data on this article precedes the inclusion of hydrogen.

I. INTRODUCTION

Climate change has emerged as a pressing global issue, necessitating prompt and concerted action by world leaders to avert catastrophic consequences.[3] In this context, the European Union (EU) member states took a progressive step in December 2022 by implementing the Carbon Border Adjustment Mechanism (CBAM),[4] aimed at deterring carbon-intensive processes, preventing carbon leakage, promoting green innovations, encouraging environmentally friendly investments, and leveling the field between EU products and imported products that are not subject to an EU Emissions Trading System (ETS) equivalent scheme.[5] The EU CBAM is a tariff trade measure on carbon emissions of imported products by imposing financial obligations for embedded carbon emissions of imported goods within the EU.[6] Although the EU's move is commendable because it strives to reduce emissions, the adoption of the CBAM raises questions about its potential impact on global trade and whether other countries will adopt similar domestic measures.[7]

3. *Climate Change 2023 Synthesis Report: Summary for Policymakers*, IPCC 24 (2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf.

4. Press Release, European Commission, *European Green Deal: Agreement Reached on the Carbon Border Adjustment Mechanism (CBAM)* (Dec. 13, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7719.

5. *CBAM: What you need to know about the new EU decarbonization incentive*, WORLD ECON. F. 3 (Dec. 19, 2022), https://www.weforum.org/agenda/2022/12/cbam-the-new-eu-decarbonization-incentive-and-what-you-need-to-know/ [hereinafter WORLD ECON. F.].

6. *Carbon Border Adjustment Mechanism*, *supra* note 1, at 1.

7. WORLD ECON. F., *supra* note 5, at 5.

Key EU trading partners like the United States (U.S.) and the People's Republic of China (PRC) have presented ambitious goals for reducing carbon emissions and achieving carbon neutrality,[8] but they have not yet implemented a CBAM or similar measure.[9] This article explores the extent to which the EU CBAM will impact the most prominent players in international trade, and whether a CBAM may be on the table for them as well?

Relatedly, one controversial aspect of the EU CBAM is that it does not provide any exemption for developing or least developed countries,[10] which could negatively impact the economies of those poorer countries.[11] While the exemption of least developing countries from this measure would not undermine significantly EU's decarbonization effort, the lack of an exemption would likely cause material damage to least developing countries.[12] This article argues that the EU should exclude least developed countries from this measure and support developing and least developing countries on their climate change mitigation efforts.

Other large countries potentially affected by the EU CBAM have expressed their dissatisfaction with the EU's attempt to impose to them a carbon tax comparable to the EU ETS.[13] Some of them consider the CBAM an EU's unilateral protectionist measure as well as a violation of GATT's main principles.[14] Russia, as the most negatively affected country, asserts that this measure is a violation of global trade rules set forth in the GATT.[15] Turkey considers the measure a serious threat to its economy.[16]

This article conducts a five-part analysis to predict whether more countries will join the EU in implementing measures similar to the CBAM. In the first two sections, the article considers the role of international trade in climate change and

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8. Paris Agreement, art. 6. Dec. 12, 2015, 80 Stat. 271, T.I.A.S. No. 16-1104.

9. Silvia Weko, *The Future of Global Trade in a Changing Climate*, CHATHAM HOUSE 2 (Dec. 5, 2022), https://www.chathamhouse.org/2022/12/future-global-trade-changing-climate.

10. *Id.*

11. Sam Lowe, *The EU's carbon border adjustment mechanism: How to make it work for developing countries*, CTR. FOR EUR. REFORM 6 (Apr. 22, 2021), https://www.cer.eu/publications/archive/policy-brief/2021/eus-carbon-border-adjustment-mechanism-how-make-it-work. Currently, EU unilateral preference schemes or economic partnership agreements have offered most of the developing countries quota free access to the EU Market. While these arrangements have given these countries a significant advantage in the Market, this adjustment mechanism would add an additional burden to them by worsening their position in the EU Market. As the carbon price increases, the tariff would increase as well. This would affect the competitiveness of the products of developing countries in the market. *Id.*

12. *Id.* at 14.

13. Adrien Assous et al., *A Storm in a Teacup: Impacts and Geopolitical Risks of the European Carbon Border Adjustment Mechanism*, SANDBAG SMARTER CLIMATE POL'Y (Aug. 2021), https://sandbag.be/wp-content/uploads/E3G-Sandbag-CBAM-Paper.pdf.

14. *Id.* at 4.3; *Russia Says EU Carbon Border Tax May Impinge on Global Trade*, REUTERS 1 (June 17, 2021), https://www.reuters.com/business/russia-says-eu-carbon-border-tax-may-impinge-global-trade-rules-2021-06-17/ [hereinafter REUTERS].

15. *Id.* at 1; *EU's Planned Carbon Border Adjustment Mechanism Could Cause Additional Costs for Russian Exporters*, BOFIT (Nov. 26, 2021), https://www.bofit.fi/en/monitoring/weekly/2021/vw202147_3/.

16. Heli Simola, *CBAM! – Assessing Potential Costs of the EU Carbon Border Adjustment Mechanism for Emerging Economies*, BOFIT Policy Brief, No. 10/2021, ECONSTOR 8 (2021), https://www.econstor.eu/bitstream/10419/251711/1/bpb2110.pdf.

analyzes the CBAM as an international trade mechanism in the fight against climate change. Third, it analyzes the practical implications of the EU CBAM. Fourth, it addresses the reactions of other players in global trade — will they support the EU CBAM by implementing similar measures or will they challenge this measure at the WTO or through other mechanisms? Lastly, this article analyzes General Agreement on Tariffs and Trade (GATT) provisions that may conflict with the CBAM and potential EU defenses. Following this five-part discussion, this article will conclude, on which countries are likely to implement a similar measure to the EU CBAM on their efforts to mitigate climate change.

II. HOW CARBONIZATION IS FUELING CLIMATE CHANGE

Climate change is no longer a matter of the future; climate change is happening now. Today, we can visually observe the effects of climate change caused by human activity. This visual observation has led to climate change becoming one of the most concerning issues of this century, crossing every border and reaching every human being. The Intergovernmental Panel on Climate Change (IPCC), in its 2023 report, highlights some of the observed changes and impacts such as heatwaves, heavy precipitation, droughts, tropical cyclones, food and water insecurity, human mortality, and many other visible issues.[17]

In 2015, one hundred ninety-six countries joined the Paris Agreement at the United Nations Climate Change Conference of Parties.[18] The Paris Agreement Parties committed to limiting global warming to less than 2°C, and put their best effort into limiting it to 1.5 °C.[19] Under Article 14(2) of the Paris Agreement, this year in 2023, Parties will hold a Conference where they will provide an update on Parties' efforts and results.[20] However, the United Nations Environmental Programme (UNEP) warns that the Paris Agreement Parties are off-schedule in meeting the Agreement's goals.[21]

International trade can play an essential role in decarbonization efforts.[22] Countries can adopt strategies to reduce carbon emissions associated with international trade, such as carbon efficiency in transportation and the environmental sustainability of supply chains.[23] In the realm of international trade, several strategies can be used to foster carbon efficiency in transportation.[24] These approaches encompass shifting to more carbon-efficient transportation modes, opting for shorter transportation routes, and encouraging use of fuel-efficient vehicles.[25] In addition,

17. *Synthesis Report of the IPCC Sixth Assessment Report Summary for Policymakers*, IPCC 5 (Mar. 20, 2023) https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_SPM.pdf.

18. *The Paris Agreement: What is the Paris Agreement?*, UNFCCC, https://unfccc.int/process-and-meetings/the-paris-agreement.

19. Paris Agreement, *supra* note 8, at 3.

20. *Id.* at 19.

21. *World is Off Track to Meet Paris Agreement Climate Targets*, UNEP COPENHAGEN CLIMATE CTR. (Sept. 16, 2021) https://unepccc.org/world-is-off-track-to-meet-paris-agreement-climate-targets/.

22. *World Trade Report 2022: Climate Change and International Trade*, WTO 102, 113 (Sept. 1, 2022), https://www.wto.org/english/res_e/booksp_e/wtr22_e/wtr22_e.pdf [hereinafter *World Trade Report 2022*].

23. *Id.* at 100.

24. *Id.* at 9.

25. *Id.* at 12.

countries can facilitate environmental sustainability through a range of policy measures.[26] These initiatives include promoting the use of sustainable materials, optimizing energy efficiency throughout the supply chain, minimizing waste generation, and enhancing consumer education.[27]

Regions such as the EU have encouraged carbon-free technologies in international trade by applying measures such as Carbon Border Adjustment Mechanism.[28] Such measures put a price on carbon by incentivizing businesses to invest towards eco-friendly technology to compete in the market.[29] Other decarbonization measures applied in international trade include taxes for climate change mitigation, technical regulations, labelling schemes, and conformity assessment procedures as shown in the below diagram.[30] While many countries have implemented domestic measures in mitigating climate change (e.g., Canada – renewable fuel regulations, Switzerland – Emission Trading Scheme, Japan – carbon tax),[31] the EU CBAM is anticipated to impact international trade by encouraging other countries to adopt similar approaches.

Examples of trade measures included in countries' nationally determined contributions

Type of measure	Measures indicated in nationally determined contributions
Taxes	Tax for Climate Change Mitigation (Japan)
	Carbon Border Adjustment Mechanism (European Union)
Market-based mechanisms	Participation in carbon markets (Panama)
	Emission Trading Scheme (European Union, Switzerland)
Technical regulation and standards	Renewable fuel regulations (Canada)
	Import ban on vehicles older than 3 years (Gabon)
	Establishment of efficiency standards for the importation of all vehicles and appliances (Antigua and Barbuda)
	Issue national standards to ensure the quality of energy-saving equipment (Viet Nam)
Subsidies	State-level Renewable Portfolio Standards (United States of America)
	Removal of fossil fuel subsidies (Ethiopia)
	Feed-in tariffs (selected European Union Members and Switzerland)

Source: Table compiled by the authors on the basis of national NDCs communicated to the UNFCCC Secretariat.

Source: United Nations, Making Trade Work for Climate Change Mitigation: The Case of Technical Regulations. [32]

26. *World Trade Report 2022*, *supra* note 22, at 135.

27. *Id.* at 118-119.

28. *Carbon Border Adjustment Mechanism*, *supra* note 1.

29. *Id.* at 1.

30. U.N. Conference on Trade and Development, *Making Trade Work for Climate Change Mitigation: The Case of Technical Regulations*, UNCTAD/DITC/TAB/2022/7, 1, 7 (2022), https://unctad.org/system/files/official-document/ditctab2022d7_en.pdf [hereinafter UNCTAD].

31. *Id.*

32. *Id.*

III. UNDERSTANDING THE EU CARBON TAX AND ITS IMPACT ON TRADE

Global trade expansion has promoted economic growth in many regions but has also raised environmental sustainability concerns.[33] The production and distribution of traded goods and services, estimated at eight billion tons, is responsible for approximately one quarter of global emissions (32 billion tons).[34]

While trade has a significant impact on climate change, it can also play a critical role in its mitigation.[35] "The Marrakesh Agreement, which led to the creation of the World Trade Organization (WTO) recognized the importance of adopting international trade policies that align with environmental protection in its preamble."[36] Countries have responded to the threats of climate change by implementing various trade measures, including taxes, market-based mechanisms, technical regulation, and standards/subsidies.[37]

Recently, the EU introduced a first-of-its-kind carbon tax on imported products that extends beyond its borders, sparking a vigorous global debate on whether this measure is a violation of international trade rules and what will be the reaction of EU's trade partners.[38] This carbon border adjustment mechanism is a revolutionary trade measure to reduce greenhouse gas emissions.[39] The following sections address various types of carbon border adjustment mechanisms, history and implementation of the EU CBAM, and the practical implications of this measure.

A. Exploring Different Types of Carbon Border Adjustment Mechanisms

CBAM was established in the fight against climate change and puts a price on the carbon emissions of imported products.[40] The carbon tax on imports sets the CBAM apart from other types of domestic carbon tax policies, which some countries have already implemented.[41] According to the World Bank, as of June

33. *Trade and the environment*, OECD 2, https://www.oecd.org/trade/topics/trade-and-the-environment/ (last visited May 15, 2023) (noting that expanding trade for economic growth can directly harm the environment by causing pollution and depleting natural resources. Furthermore, when trade opens up, countries with varying environmental regulations may specialize in pollution-intensive activities, a phenomenon known as the pollution haven hypothesis).

34. Paul Brenton & Vicky Chemutai, *The Trade and Climate Change Nexus*, WORLD BANK GRP. 8 (2021), https://openknowledge.worldbank.org/server/api/core/bitstreams/5d543ded-1163-5fc6-8fe8-319d913cf269/content.

35. United Nations Treaty Series Marrakesh Declaration, Apr. 15, 1994, 1867 U.N.T.S. 148.

36. *Id*.; "[R]elations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, [. . .], while seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development." *Agreement Establishing the World Trade Organization*, WTO 1, https://www.wto.org/english/docs_e/legal_e/04-wto.pdf (last visited Oct. 8, 2023).

37. UNCTAD, *supra* note 30, at 7, 30.

38. REUTERS, *supra* note 14.

39. *Id.*

40. *Carbon Border Adjustment Mechanism*, *supra* note 1, at 1.

41. Hannah Ritchie & Pablo Rosado, *Which countries have put a price on carbon?*, OUR WORLD IN DATA 5 (Oct. 14, 2022), https://ourworldindata.org/carbon-pricing.

2022, there are sixty-eight carbon pricing instruments operating in forty-six national jurisdictions, and of these, there are thirty-six carbon tax regimes and thirty-two emissions trading systems in operation.[42]

Generally, some of the advantages of a well-designed CBAM include reducing greenhouse gas emissions and the corresponding risk of climate change, minimizing the cost of emissions reductions, encouraging innovation of environmentally friendly technologies, levelling the field between domestic and foreign products, raising new public revenues, and incentivizing other countries to implement similar measures.[43]

Despite these benefits, countries have been slow to implement such measures.[44] Sometimes, carbon taxes are considered relatively more costly for poorer countries than richer ones.[45] Poorer countries suffer the most from the increase in the prices that this mechanism can cause due to lack of capital to invest in environmental-friendly technologies.[46] Other times, it may be politically difficult to impose such taxes because of the pressure that domestic businesses put on the governments,[47] especially if other trading partners do not apply such a measure. In that scenario, domestic companies would be economically disadvantaged because manufacturers would be incentivized to move the production of the goods out of that country and sell them in the high-emitting countries, thus, creating an adverse internal effect.[48]

Generally, there are three types of Carbon Border Adjustment Mechanisms: Carbon Tax CBAMs, Regulatory Cost CBAMs, and Emission Performance CBAMs.[49]

In theory, a Carbon Tax CBAM imposes a price on the carbon emission of imports from countries without similar domestic carbon emission regulations and with less rigid carbon emission regulations.[50] If the trading partner applies lower tariffs for carbon emissions, a Carbon Tax CBAM is applied only to the remaining difference.[51] If the trading partner does not have any tariff for carbon emission, their imports will be subject to the same carbon tax as domestic products.[52] Second, a Regulatory Cost CBAM identifies regulations aiming to reduce carbon

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42. *Explainer: Which Countries Have Introduced a Carbon Tax*, WORLD ECON. F. 3 (July 8, 2022), https://www.weforum.org/agenda/2022/07/carbon-tax-emissions-countries/.

43. Donald B. Marron & Eric J. Toder, *Tax Pol'y Issues Designing Carbon Tax,* 104 AM. ECON. REV. 563 (2014).

44. Roumeen Islam, *What a Carbon Tax Can Do and Why It Cannot Do It All*, WORLD BANK GRP. BLOG 1 (Jan. 19, 2022), https://blogs.worldbank.org/energy/what-carbon-tax-can-do-and-why-it-cannot-do-it-all.

45. *Id.* at 2.

46. *Id.*

47. *Id.* at 2-3.

48. Erin Campbell et al., *Border Carbon Adjustments 101*, RES. FOR FUTURE 3 (Nov. 10, 2021), https://media.rff.org/documents/BCA_101_Explainer.pdf.

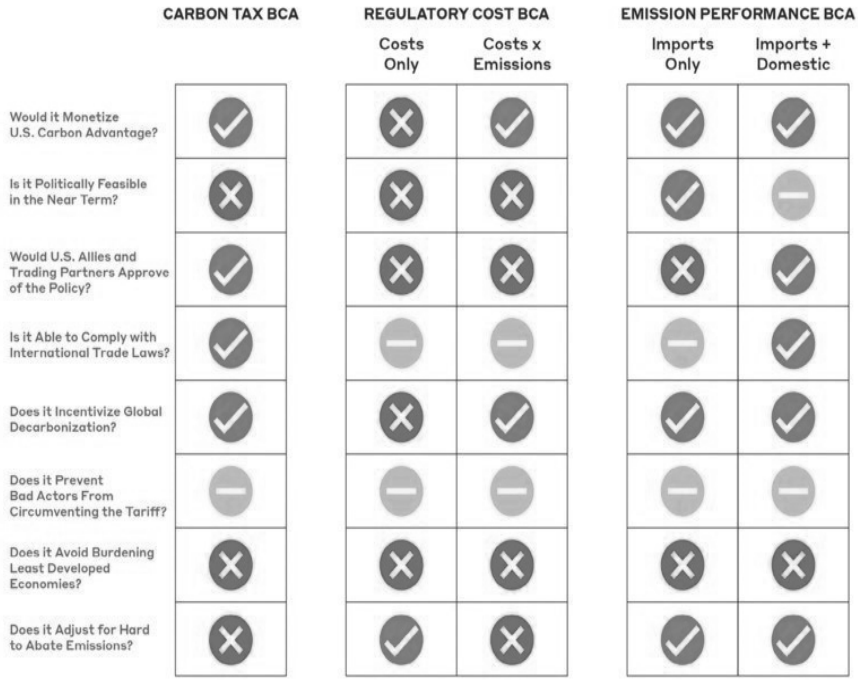
49. Xan Fishman et al., *Understanding Border Carbon Adjustments: The Pros and Cons of BCA Policy Designs*, BIPARTISAN POL'Y CTR. 1 (Nov. 2022), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2022/11/BPC_Energy-CBAM-Report_Final.pdf [hereinafter Fishman et al.].

50. *Id.* at 3.

51. *Id.*

52. *Id.*

emission sector-by-sector, and estimates the additional cost for complying with such regulations.[53] The imports of the same sector that do not have equivalent emission-reducing policies will be imposed the exact cost of compliance as a fee.[54] Thirdly, an emission performance CBAM does not take into consideration any policy, but simply applies a fee on the emission performance.[55] The EU CBAM falls into the Carbon Tax CBAM because it imposes a carbon price on the emission of imports from countries without similar domestic carbon emission regulation to the EU ETS.[56]



Source: Xan Fishman & Co, Understanding Border Carbon Adjustments - The Pros and Cons of BCA Policy Designs.[57]

Beyond these three general types, a CBAM can be applied on a regional and international basis.[58] A regional CBAM is applied unilaterally from a region (e.g., the European Union CBAM), based on its regional carbon emission policies, and

53. Fishman et al., *supra* note 49, at 4.
54. *Id.*
55. *Id.*
56. *Id.* at 3.
57. Fishman et al., *supra* note 49, at 9.
58. *Id.* at 1.

is imposed against trade partners of that region.[59] This unilateral approach may garner opposition from trading partners, as we have seen in the case of the EU CBAM.[60]

However, countries can also put aside their differences and prioritize emissions reductions by establishing a joint CBAM or by harmonizing their domestic carbon taxes.[61] For example, countries can implement an international carbon tax, under which each country pays a tax designed to be proportional to its carbon emissions, perhaps under the auspices of an international agency.[62] This approach will require a framework for reimbursement and clear rules.[63] Separately, countries could create a self-executing international agreement[64] that imposes uniform rules for carbon taxes. This approach would need to be supported by data analyses and scientific research on the adequate rate of an international carbon tax needed to reach Paris Agreement goals.[65]

B. From Idea to Action: Past and Present of EU Carbon Tax

In recent years, the European Union has issued several environmentally-friendly policies that aim to reduce its carbon footprint.[66] The EU members have established ambitious goals to reduce a minimum of 55% of greenhouse gas emissions by 2030 and aim to make EU climate neutral by 2050.[67] In order to reach these targets, one of the most significant initiatives that EU has implemented is the EU Emission Trading System (EU ETS).[68]

The EU Emission Trading System (EU ETS), as the cornerstone of EU's green strategy and the world's first emission trading system, works on a "cap and trade" principle.[69] Under this system, the EU has set a cap on the total amount of certain greenhouse gases that can be emitted by the operators.[70] Under this cap, operators can buy and receive emission allowances and trade them with each other.[71] If their emission is reduced, they can keep the allowances for next year or

59. Memorandum, Questions and Answers: Carbon Border Adjustment Mechanism (CBAM), EUR. COMM'N 1-2 (Jul. 14, 2023), https://taxation-customs.ec.europa.eu/system/files/2023-07/20230714%20Q%26A%20CBAM_0.pdf [hereinafter CBAM Memo].

60. REUTERS, *supra* note 14, at 2-3.

61. Michael Hoel, *Carbon Taxes: Int'l Tax or Harmonized Domestic Taxes*, 36 EUR. ECON. REV. 400, 404 (1992), http://www.sciencedirect.com/science/article/pii/0014-2921(92)90096-F.

62. *Id.* at 401.

63. *Id.* at 401-03.

64. Self-executing agreements become judicially enforceable upon their ratification, but non self-executing agreements require legislative implementation in order to become judicially enforceable.

65. Hoel, *supra* note 61, at 405.

66. Sebastion Oberthür & Claire Dupont, *Eur. Union's Int'l Climate Leadership: Towards Grand Climate Strategy?*, 27 J. EUR. PUB. POL'Y 1095, 1095-96 (2021).

67. *Climate Change: What the EU is Doing,* COUNCIL EUR. UNION 1-2, 4 (last visited on Feb. 7, 2023), https://www.consilium.europa.eu/en/policies/climate-change/.

68. *EU Emissions Trading System (EU ETS)*, EUR. COMM'N 1 (last visited Sept. 24, 2023), https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en.

69. *Id.* at 1-3.

70. *Id.* at 2.

71. *Id.*

sell them to another operator.[72] Each year, operators should have sufficient allowances to cover their emissions; otherwise, they face significant fines.[73] This has shown to be an effective tool in reducing emissions between 2005 and 2021.[74]

While policies such as EU ETS play a crucial role in reducing emissions for participating economies, they can disadvantage those participants if other trade partners have less rigid climate policies.[75] For example, the ETS could cause "carbon leakage," meaning that operators move their production from the EU to countries with less rigid climate policies, such that more expensive EU products are being replaced by less expensive but more carbon-intensive imports.[76] Furthermore, the ETS could create a disadvantage for EU producers when competing with countries that lack comparable policies.[77] In the event of carbon leakage, the EU's effort to reduce emissions will be unsuccessful because emissions will be shifted outside of the European Union.[78]

In response to carbon leakage and economic disadvantage for EU producers, the European Commission introduced a CBAM by establishing a carbon price for imported products coming from countries with less rigid policies.[79] The aim of this measure was to prevent operators from moving their production to third countries, promote fair competition between EU producers and producers from other countries, and incentivize other nations, especially trading partners, to adopt similar practices.[80]

The EU's adoption of CBAM took several years, including a rigorous stakeholder and public consultation process through 2020 and a provisional agreement reached in 2022.[81] The Commission had public consultations with stakeholders, NGOs, and business associations in order to get feedback on the CBAM.[82] It finally decided that EU CBAM is the best mechanism to respond to the setbacks of the ETS.[83] In December 2019, the European Commission introduced CBAM, and public consultation took place between July to October 2020.[84] After being reviewed by different committees and amended and supplemented on December

72. *EU Emissions Trading System*, *supra* note 68, at 3.

73. *Id.*

74. *Id.* at 4.

75. Gary Clyde Hufbauer et al., *Can EU Carbon Border Adjustment Measures Propel WTO Climate Talks?*, PETERSON INST. FOR INT'L ECON. 1 (Nov. 2021), https://www.piie.com/publications/policy-briefs/can-eu-carbon-border-adjustment-measures-propel-wto-climate-talks.

76. *Carbon Border Adjustment Mechanism*, *supra* note 1, at 1.

77. Hufbauer et al., *supra* note 75 at 1.

78. *Carbon Border Adjustment Mechanism*, *supra* note 1, at 1.

79. *Id.*

80. Hufbauer et al., *supra* note 75 at 1.

81. Press Release, Council of the EU, *EU Climate Action: Provisional Agreement Reached on Carbon Border Adjustment Mechanism* (Dec. 13, 2022), https://www.consilium.europa.eu/en/press/press-releases/2022/12/13/eu-climate-action-provisional-agreement-reached-on-carbon-border-adjustment-mechanism-cbam/.

82. *Carbon Border Adjustment Mechanism*, *supra* note 1, at 7.

83. *Id.* at 1.

84. Henrique Simões, *Carbon Border Adjustment Mechanism as Part of the European Green Deal*, EUR. PARLIAMENT, https://www.europarl.europa.eu/legislative-train/package-fit-for-55/file-carbon-border-adjustment-mechanism (last visited Oct. 7, 2023).

2022, a provisional political agreement was reached.[85] The transitional period of EU CBAM starts from October 2023 until December 2025, and full implementation starts in January 2026.[86]

Initially, the CBAM will apply only to imported goods of six heavy carbon emission sectors: electricity, iron and steel, aluminum, cement, fertilizers, and hydrogen.[87] From October 2023 until the end of 2025, the CBAM will be in a transitional phase, which will allow for a gradual and careful transition for non-EU businesses.[88] During this transitional phase, importers will only have to report greenhouse gas emissions without having to make any financial payments.[89] During this transitional phase the EU will review CBAM's functioning and assess if more sectors should be covered by it.[90]

Starting from January 2026, the date of full implementation, all remaining provisions of the EU CBAM will be effective.[91] First, EU-based importers of goods covered by the CBAM will have to register with national authorities, and they will also be able to buy CBAM certificates.[92] The price for the certificates will be calculated depending on the weekly average auction price of EU ETS allowances.[93] Second, each year in May, EU companies that are importing products will have to declare emissions from importing goods in the preceding year and surrender the number of CBAM certificates that correspond to the amount of greenhouse gas emissions declared.[94] Third, if the companies can prove that they have paid a carbon price during the production, the amount that has been paid will be deducted from the final bill.[95] The EU will get the information for registering the emission of goods from the non-EU producers.[96] If such information is not available, EU importers will be able to use default values in order to determine the number of certificates they will need.[97]

C. The Practical Implications of the EU Carbon Tax

Starting from 2026, the EU CBAM is expected to impact exporters to the EU, especially those coming from countries with less rigid or no comparable climate policies.[98] Initially, this is expected to have only a short-term impact on trade, since it is still covering only goods from five heavy carbon emission sectors.[99] However, as EU CBAM expands to cover other sectors, it will increasingly impact

85. *Id*. at 2.
86. *Id.*
87. *Carbon Border Adjustment Mechanism*, *supra* note 1, at 1.
88. *Id.* at 2-3.
89. *Id.*
90. *Id.*
91. *Carbon Border Adjustment Mechanism*, *supra* note 1, at 2-3.
92. *Id.* at 1.
93. *Id.*
94. *Id.*
95. *Carbon Border Adjustment Mechanism*, *supra* note 1, at 1.
96. CBAM Memo, *supra* note 59, at 8.
97. *Id.*
98. Hufbauer et al., *supra* note 75, at 5, 12.
99. *Id.* at 3, 5

the producers in other countries.[100] Countries that are expected to be most affected are Russia, China, Turkey, the United Kingdom, South Korea, India, and Ukraine.[101] Of the sectors covered by the CBAM, iron and steel will be hit the hardest, considering they comprise up to two-thirds of EU imports of CBAM products.[102]

Electricity accounts for 30% of the total greenhouse gas emissions,[103] and as a result, it falls under the scope of the EU CBAM.[104] However, applying CBAM to electricity imports is challenging due to the presence of physical interconnectors (i.e., transmission) through which electricity is traded, particularly with non-EU accession countries like Albania, Kosovo, Serbia, whose electricity markets are coupled with that of the EU.[105] This interconnection complicates the application of the CBAM to electricity because when electricity is traded through these interconnectors, it is difficult to attribute the exact carbon footprint to a specific country of origin.[106]

Despite its significance in emissions, electricity only accounts for 0.2% of the EU total imports.[107] Switzerland and Russia are the primary suppliers,[108] with Switzerland being part of the EU ETS and thus unaffected by the EU CBAM.[109] Russia, on the other hand, is among the five most affected countries affected by the EU CBAM,[110] largely because its electricity is 25% more carbon intensive than the EU average.[111] To mitigate the effects of the CBAM, Russia should seriously consider implementing a domestic emission trading system. Doing so would be crucial for avoiding severe consequences for its electricity exports into the EU market.

We still do not know precisely what the EU CBAM will look like, therefore, we can still not define what would be the implication of this mechanism. Generally, implementation could have both positive and negative effects on the efforts

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100. *Id.* at 2.

101. *Id.*

102. Hufbauer et al., *supra* note 75, at 5.

103. *Id.*

104. *Carbon Border Adjustment Mechanism*, *supra* note 1, at 1.

105. Karova Rozeta, *EU's Carbon Border Adjustment Mechanism Energy and Community: Threat for Electricity Trade or Tool for Raising Climate Ambition and Electricity Market Integration*, 2022 CARBON & CLIMATE L. REV. 99, 99, 102 (2022).

106. *Id.* at 102.

107. Fredrik Erixon, Policy Brief No. 14/2021, *Europe's Carbon Border Adjustment Mechanism: Time to Go Back to the Drawing Board*, ECIPE 7 (2021), https://ecipe.org/wp-content/uploads/2021/11/ECI_21_PolicyBrief_14_2021_LY02-1.pdf?_gl=1*136rcvu*_up*MQ..*_ga*MTA4ODE2MzQzNS4xNjk2MjYyMzAz*_ga_T9CCK5HNCL*MTY5NjI2MjMwMi4xLjAuMTY5NjI2MjMwMi4wLjAuMA.

108. *Id.*

109. *Id.* at 9.

110. Sinan Ülgen, *A Political Economy Perspective on the EU's Carbon Border Tax*, CARNEGIE EUR. 2 (May 9, 2023), https://carnegieeurope.eu/2023/05/09/political-economy-perspective-on-eu-s-carbon-border-tax-pub-89706.

111. Jos Delbeke, et al., *Key Issues for the Coming Trade and Climate Debate,* EUI SCH. OF TRANSNAT'L GOVERNANCE 5 (2021), https://cadmus.eui.eu/bitstream/handle/1814/71572/PB_2021_12_STG.pdf?sequence=1&isAllowed=y.

of the EU. On one hand, it could help fulfill the EU's aspirations; on the other hand, it could have unintended consequences and produce counter-effects.

Among its positive impacts, the EU CBAM may encourage environmentally friendly technologies, reduce emissions, prevent carbon leakage, and serve as an incentive for international cooperation on environmental issues.[112]

This measure is likely to foster the adoption of environmentally friendly technologies, serving as a powerful incentive for countries and investors to channel resources into research and development of innovative solutions that yield lower carbon emissions during production. By encouraging investment in these sustainable technologies, nations can enhance their competitiveness in the market while simultaneously making substantial progress towards fulfilling their commitments under the Paris Agreement to reduce carbon emissions.

While it has the potential for a positive global impact, the effectiveness of the EU CBAM may be short-lived if it is successfully challenged in the WTO,[113] countries like China and Russia are concerned with the EU's unilateral decision. They accused this measure of being a violation of WTO rules.[114] Russia has been particularly outspoken about the EU's violation of global trade regulations, as the country most heavily impacted by these actions.[115] Both China and Russia are Member Countries of WTO, therefore, it is likely for them to bring a claim in the Dispute Settlement Body.[116] As will be addressed later, EU must amend the CBAM in order to offer differential treatment and avoid any challenges in this ground.[117] However, taking into consideration the latest approaches of the Dispute Settlement Body, the EU may be successful in defending EU CBAM by arguing against likeness based on their method of production and consumer taste.[118]

On the other hand, this measure could lead to some companies creating a parallel production of goods with different levels of emission if they consider this method feasible financially; while EU citizens will be produced with low-emission products, other countries without comparable policies will receive goods with higher carbon emission products. However, it is important to take into consideration that this theory depends heavily on the quantity of the products that the foreign company exports to the EU and whether their country of origin has implemented similar policies domestically. If such parallel production of good takes place, the emission within the EU region would reduce, while the emissions in the rest of the world will remain the same. Considering that climate change is a global matter, this will unlikely satisfy the EU's aspiration.

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112. Emily Benson et al., *Analyzing the European Union's Carbon Border Adjustment Mechanism*, CSIS (Feb. 17, 2023) https://www.csis.org/analysis/analyzing-european-unions-carbon-border-adjustment-mechanism.

113. Delbeke et al., *supra* note 111, at 6.

114. REUTERS, *supra* note 14, at 2.

115. Assous et al., *supra* note 13, at 45.

116. *Dispute Settlement Body*, WTO (Sept. 19, 2023), https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm.

117. *See* Section V.

118. These concepts and the likelihood for EU to defend the CBAM under WTO rules are elaborated later in this paper by taking into consideration precedents of the Dispute Settlement Body.

The practical implications of this measure depend heavily on the response of other prominent players in the global market; therefore, it is crucial to analyze the responses of other players. While this can have a global effect on the market, it could also have an adverse effect if other players do not cooperate, both internationally and through internal measures.

IV. THE CARBON BORDER TAX DIVIDE: WHO IS ON BOARD AND WHO IS PUSHING BACK AGAINST THE EU CBAM?

EU realized that having a domestic scheme for taxing carbon emissions through the EU ETS was not sufficient to achieve its policy aims.[119] Indeed, the EU ETS backfired against the EU economy due to carbon leakage concerns.[120] At first, the EU tried to rectify these adverse effects by issuing free emission certificates until it reluctantly admitted that climate change cannot be one region's job.[121] The EU CBAM was a significant step forward EU's climate goals but surprised many of EU's trade partners, most of which were unhappy with the EU issuing a policy that transcended geographic boundaries in this way, as discussed further below.[122] The move was also especially opposed by developing countries because they do not have sufficient resources to implement such a measure on their own.[123]

A. The Carbon Tax Shake-up: Where Do the Big Players Stand?

Two-third of global emissions come from top ten GHG emitters, while big trade players such as China, the United States, and India account for 42.6% total emissions.[124] Because they account for most of the emissions, actions to mitigate international trade carbon emissions by these countries would have the most impact.[125] Should these countries institute domestic measures to reduce emissions and offset the impact of the EU CBAM, they would also have to harmonize those measures with the EU ETS.[126]

EU trade partners have had various reactions to the CBAM.[127] The following section begins its analysis with the United States and China as leading international trade players, and then addresses the positions of other countries falling within the top five countries most affected by the EU CBAM.

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119. Benson et. al., *supra* note 112, at 4-5.

120. *Id.* at 3.

121. *Id.* at 1-2.

122. REUTERS, *supra* note 14, at 1.

123. Guilherme Magacho et al., *Impacts of CBAM on EU trade partners: consequences for developing countries*, EDITIONS AFD 3 (Mar. 2022), https://www.afd.fr/en/ressources/impacts-cbam-eu-trade-partners-consequences-developing-countries.

124. Johannes Friedrich et al., *This Interactive Chart Shows Changes in the World's Top 10 Emitters*, WORLD RES. INST. 3 (Mar. 2, 2023), https://www.wri.org/insights/interactive-chart-shows-changes-worlds-top-10-emitters.

125. *Id.*

126. *Carbon Border Adjustment Mechanism*, *supra* note 1, at 1. Initially it will affect only trade of goods from five heavy carbon emission sectors as elaborated above. However, as the EU CBAM expands to cover other sectors, it will affect the producers in other countries by creating a heavy burden on them. *Id.*

127. Ülgen, *supra* note 110, at 6.

1. Is U.S. Following EU's Lead with a Border Carbon Tax?

As the EU announced its plan to put a price on carbon for imported products, the reaction of the United States has been carefully watched.[128] The world was curious to know what will be the U.S.'s position regarding this mechanism.[129] This is no surprise because as the world's largest economy,[130] the U.S. has always played an important role in global trade.[131] Currently, the U.S. neither has a carbon border adjustment nor a domestic carbon price, and while there have been some prior legislative attempts to implement a carbon border adjustment,[132] there are no indications that such a measure will pass Congress.[133]

During the Leaders' Summit on Climate, President Biden announced the target for the U.S. to achieve a 50-52% reduction from 2005 levels in economy-wide net greenhouse gas pollution by 2030.[134] The U.S. has a long way to go in order to reach these ambitious goals. Currently, the U.S. is ranked second for global emissions and is among the top three GHG emitters, accounting for 42.6% of total emissions.[135] However, the U.S. is more carbon efficient compared to most of its trading partners. The U.S. is more carbon-efficient than the world average and its key competitors (3x China and 4x India).[136] The U.S. manufactured goods are 40% more carbon-efficient than the world average.[137] However, the U.S. imports 75% of its goods from countries less carbon-efficient, and that contributes to U.S. overall carbon emission.[138]

At least one research study shows that a carbon border adjustment would actually favor the U.S. by leveraging its carbon advantage and outcompeting foreign production.[139] The study's authors argue that by imposing a carbon tax on imported products, the U.S. would strengthen its competitive position, encourage other countries to implement comparable policies, and enable greater ambition in

128. Martin Dietrich et al., *Event Highlights: Carbon Border Adjustments in the EU, the U.S., and Beyond*, COLUM. CTR. ON SUSTAINABLE INV. 3 (Dec. 2021), https://ccsi.columbia.edu/content/event-highlights-carbon-border-adjustments-eu-us-and-beyond.

129. *Id.* at 10.

130. *Economy & Trade*, U.S. TRADE REP. 1, https://ustr.gov/issue-areas/economy-trade (last visited Sept. 30, 2023).

131. *Id.*

132. H.R. 4534, 117th Cong. 1 (2021).

133. *Id.*; *FAIR Transition and Competition Act*, CONGRESS, https://www.congress.gov/bill/117th-congress/house-bill/4534/actions (last visited Sept. 30, 2023).

134. *FACT SHEET: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies*, WHITE HOUSE (Apr. 22, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/.

135. Friedrich et al., *supra* note 124, at 4.

136. Catrina Rorke & Greg Bertelsen, *America's Carbon Advantage*, CLIMATE LEADERSHIP COUNCIL 1 (Sept. 2020), https://clcouncil.org/reports/americas-carbon-advantage.pdf.

137. *Id.*

138. *Id.* at 1, 6.

139. *Id.* at 1; Carbon Advantage refers to the U.S.'s goods producing less carbon emission compared to comparable goods of other countries. Rorke, *supra* note 136, at 8.

domestic climate action.[140] For example, considering that most of the imported products come from countries with less rigid policies, a U.S. carbon border adjustment would significantly advantage domestic products by shifting prices in their favor, and reduce reliance on goods imported from those countries.[141] Moreover, the influence of the U.S. and EU both implementing comparable policies to fulfill climate policies would motivate other countries to follow suit and take action to reduce their carbon emissions through similar approaches.[142] As the authors note, such a policy would also play a significant role in reducing overall carbon emissions and fulfilling the U.S.'s aspiration for a 50-52% reduction of greenhouse gas pollution by 2030.[143]

There has been some interest in the U.S. Congress in such a mechanism. Some U.S. policymakers have argued that a coordinated Border Carbon Adjustment (BCA) with the U.S. treaty allies could support the U.S. foreign policy and strategy against Russia and other countries who use mineral resources and energy as political weapons.[144] During the recent 117th Congress, several trade policy and carbon emission-related proposals were presented.[145] Some of the proposals would have imposed a tariff on carbon-intensive goods, while some others would have included a domestic carbon price combined with a carbon border adjustment.[146]

For example, on July 2021, Senator Chris Coons and Representative Scott Petters introduced a bill to create a carbon border tax on imported goods as part of the FAIR Transition and Competition Act.[147] Under this proposal, a border tax would be applied to carbon-intensive imported products such as natural gas, coal, petroleum, and products such as aluminum, steel, cement, and iron.[148] Under this proposal, imported products would bear the exact costs for carbon emission, as they would if the products were produced in the U.S.[149] In other words, the U.S. would calculate domestic environmental costs that producers have in order to comply with federal, state, and local laws.[150] Fifty percent of the revenue collected from this mechanism would be distributed as grants to states to support climate

140. Rorke, *supra* note 136, at 8.

141. *Id.* at 1, 8.

142. *Id.* at 8, 10.

143. *Id.* at 11.

144. Xan Fishman et al., *Understanding Border Carbon Adjustments—THE PROS AND CONS OF BCA POLICY DESIGNS*, BIPARTISAN POL'Y CTR. 2 (Nov. 2022), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2022/11/BPC_Energy-CBAM-Report_Final.pdf.

145. Tori K. Smith, *U.S. Carbon Border Adjustment Proposals and World Trade Organization Compliance*, Am. Action F. 3 (Feb. 8, 2023), https://www.americanactionforum.org/insight/u-s-carbon-border-adjustment-proposals-and-world-trade-organization-compliance/#_ftn9.

146. *Id.*

147. H.R. 4534, *supra* note 132, § 9904(a).

148. *Id.* § 9901(6), 9904(a).

149. *Id.* § 9904(a)(1).

150. *Id.* § 9902.

adoption policies, and the remaining fifty percent would be distributed for research and development on technologies to reduce carbon emissions.[151]

While there has been some bipartisan interest in a carbon border adjustment, the main political challenge has been a difference in views on the implementation of a domestic carbon tax together with a carbon border adjustment. Many economists, trade, and legal experts believe that a domestic carbon tax is necessary to ensure that the carbon border adjustment will not be challenged under the GATT rules that form the basis for the WTO.[152] However, some politicians object to a domestic carbon tax on the basis that it would create a burden on domestic producers.[153]

In summary, while there appears to be limited Congressional interest in a carbon border adjustment in recent years, the details of how such a mechanism would be implemented in the U.S. are still to be defined.

2. PRC's Position on the EU CBAM

China is currently the EU's biggest trading partner and the world's largest exporting country.[154] In 2020 exports from China to the EU accounted for approximately 15.1% of China's total exports.[155] While China's exports will be subject to the EU CBAM, the four industries affected by CBAM constitute only 1.8% of all EU imported goods from China in 2019.[156] This is because China's exports of these products are destined for the rest of the world. For example, only nine percent of China's aluminum exports go to the EU, and the remaining 91% are destined to other countries.[157] Sandbag's report[158] finds that CBAM will introduce net-costs for China around 150 to 200 million euro, which is only 0.04 to 0.06% of China's total EU exports.[159] Yet, while it seems that the EU CBAM will not

151. Alan H. Price et al., *Democrats Introduce Carbon Border Adjustment Legislation*, WILEY 2 (July 21, 2021), https://www.wiley.law/alert-Democrats-Introduce-Carbon-Border-Adjustment-Legislation.

152. The General Agreement on Tariffs and Trade art. 1-2, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. "The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production." *Id.* at 6.

153. Smith, *supra* note 145, at 3.

154. Christopher Kardish et al., *The EU Carbon Border Adjustment Mechanism (CBAM) and China: Unpacking Options on Policy Design, Potential Responses, and Possible Impacts*, ADELPHI 19 (2021), https://adelphi.de/en/system/files/mediathek/bilder/20210610%20PolicyPaperCBAM%20China_Final.pdf.

155. *Id.*

156. Isabel Hilton, *CBAM carbon levy will only hit a fraction of Chinese exports to EU*, CHINA DIALOGUE 2 (May 14, 2021), https://chinadialogue.net/en/climate/cbam-carbon-levy-will-only-hit-a-fraction-of-chinese-exports-to-eu/.

157. Chris Busch et al., *China and the EU's Carbon Border Adjustment Mechanism: Cultivating Mutual Benefits for the EU and China*, ENERGY INNOVATION: POL'Y & TECH. LLC 6 (Apr. 2022), https://energyinnovation.org/wp-content/uploads/2022/04/China-and-the-EUs-Carbon-Border-Adjustment-Mechanism.pdf.

158. Assous et al., *supra* note 13, at 7.

159. *Id.* at 9.

have a significant impact on China's overall economy, China is harshly opposed to it.[160]

China argues that the EU CBAM does not take into consideration developing countries and it is a unilateral protectionist measure.[161] EU CBAM has not created any exemption for developing countries.[162] Although China is the world's second-largest economy, it still considers itself a developing country because its GDP per capita is only approximately 15% to 30% of advanced economies[163] and China believes that it is not fair for it to be treated in the same way as other developed countries.[164] Secondly, China considers CBAM as a unilateral measure to protect EU producers.[165] In its view, this unilateral measure forces other countries to take action in regard to climate change and carbon emissions against their will, which it believes is inconsistent with the Paris Agreement's purpose of allowing signing Members to choose their own measures to reduce emissions.[166] China also argues that the EU gave very little notice to affected countries about the passage of this measure.[167] On April 2021, at the Summit on Climate, President Xi declared that "*China is committed to multilateralism and refrain from creating green barriers for developing countries."*[168]

While it is very likely that China will challenge this matter at the WTO as a protectionist measure violating the GATT, other potential responses from China include making export policy adjustments, continuing export emission-intensive production to countries with less rigid climate policies while selling less emission intensive products to the EU and expanding its emissions trading system (ETS) in order to match the EU CBAM.[169]

First, China could provide export tariff exemptions to reduce the adverse effects of the EU CBAM in specific sectors.[170] While export tariff exemptions may allow Chinese producers to remain competitive in the market without bearing the costs of EU CBAM, such a policy may be considered a disguised subsidy, and China could be challenged under the WTO's Agreement on Subsidies and Countervailing Measures.[171]

160. Kardish et al., *supra* note 154, at 18.

161. *Id.*

162. Lowe, *supra* note 11, at 6.

163. *EU-China Roundtable on Carbon Border Adjustment Mechanism*, AGORA ENERGIEWENDE 11 (May 26, 2021), https://static.agora-energiewende.de/fileadmin/Projekte/2021/2021-02_EU_Lead_markets/A-EW_222_EU-China_CBAM_WEB.pdf.

164. Kardish et al., *supra* note 154, at 20.

165. *Id.* at 16.

166. *Id.*

167. *Id.*

168. Kardish et al., *supra* note 154, at 16.

169. Hilton, *supra* note 156, at 2.

170. Kardish et al., *supra* note 154, at 18.

171. *Agreement on Subsidies and Countervailing Measures ("SCM Agreement")*, WTO 3 (Sept. 28, 2023), https://www.wto.org/english/tratop_e/scm_e/subs_e.htm.

Second, Chinese producers could continue to sell emission-intensive products to countries with less rigid climate policies while selling less emission intensive products to EU countries to reduce the fees that they would pay under the EU CBAM.[172]

Both of these measures would undermine the environmental benefits of EU CBAM, and they are unlikely to help China reach its goals for reducing carbon emissions.[173] China is currently the biggest carbon emitter globally, emitting more greenhouse gas than the entire developed world combined.[174] China has committed to take action in order to achieve Paris Agreement goals and is aspiring to reach peak carbon emissions before 2030 and carbon neutrality by 2060.[175] However, the International Energy Agency noted that China's emissions were relatively flat in 2022, declining only by 0.2%.[176] Moreover, the China Country Climate and Development Report (CCDR) conducted by the World Bank found that without adequate mitigation and adaptation efforts, climate risks will also constrain China's economic development by threatening to reverse its development gains.[177]

Finally, China could expand its national ETS to include EU CBAM requirements. China is implementing a national ETS, which started operation in 2021 and covers around 40% of China's carbon emissions in its initial phase.[178] However, prices in the ETS pilot are significantly lower than those included in the EU ETS.[179] Therefore, most researchers recommend that China adopt this option, as it would exclude China from EU CBAM and, at the same time, help China to reach its climate goals.[180]

3. The Decarbonization Landscape: Perspective from Other Key Players

Apart from China and the U.S., Sandbag reports that the remaining four of the top six countries most affected by the EU CBAM are Russia, Ukraine, Turkey, and South Korea.[181] Each of them has an important perspective in this analysis.

172. Hilton, *supra* note 156, at 2.

173. *Id.* at 7.

174. *Report: China Emissions Exceed All Developed Nations Combined*, BBC NEWS 1-2 (May 7, 2021), https://www.bbc.com/news/world-asia-57018837.

175. *Id.* at 3.

176. *CO2 Emissions In 2022*, INT'L ENERGY AGENCY 4 (2022), https://iea.blob.core.windows.net/assets/3c8fa115-35c4-4474-b237-1b00424c8844/CO2Emissionsin2022.pdf.

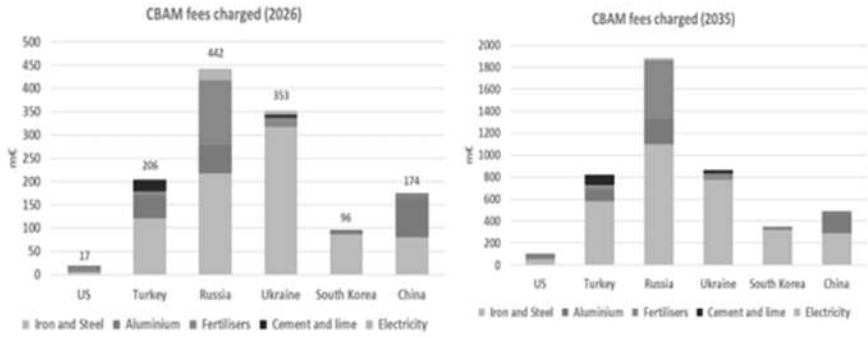
177. *Publication: China Country Climate and Development Report*, WORLD BANK GRP. 1 (Oct. 2022), https://www.worldbank.org/en/country/china/publication/china-country-climate-and-development-report.

178. Kardish et al., *supra* note 154, at 14.

179. *Id.*

180. *Id.* at 18.

181. Assous et al., *supra* note 13, at 46.



Source: Sandbag Report.[182]

First, Russia will be the country most affected by EU CBAM,[183] and has opposed this measure by arguing that it violates global trade rules and threatens the safety of energy supplies.[184] A Russian diplomat from the European Cooperation Department has stated that the CBAM is more about the EU economy and less about environmental protection.[185] Based on the recent rhetoric, it is very likely that Russia will challenge the CBAM at the WTO. Dispute Settlement Body for violation of GATT provisions[186] This is unsurprising because Russia does not have any carbon tax or emission trading policies in place, making it even more vulnerable to the CBAM than its trading partners.[187] In the near term, Russia's decision to act on the EU CBAM is likely impacted by other trade restrictions, including the recent trade restrictions imposed by the EU on Russia in response to its invasion of Ukraine.[188] For example, importation of Russian steel and iron products is currently banned by the European Union,[189] and until those trade restrictions are lifted, the EU CBAM is inapplicable to Russian steel and iron.[190]

182. *Id*. at 45.

183. *Id.*

184. REUTERS, *supra* note 14, at 1.

185. Assous et al., *supra* note 13, at 50.

186. Simola, *supra* note 16, at 7.

187. Jennifer L., *Russia Develops their own Carbon Credit Methodologies,* CARBON CREDITS 2 (Mar. 9, 2023) https://carboncredits.com/18-russian-carbon-credits-methodologiesareunderway/#:~:text=As%20Russia%20has%20no%20carbon,8%20billion%20euros%20each%20year; *Carbon Pricing in the Russian Federation,* OCED (2021) https://www.oecd.org/tax/tax-policy/carbon-pricing-russian-federation.pdf.

188. *EU sanctions against Russia explained*, CONSILIUM 1, https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/ (last visited July 27, 2023).

189. *Id.* at 6-7.

190. *Id.*

Next, the EU is the most important trade partner for Ukraine. In 2019, Ukraine's exports to the EU reached 41.5% of its total exports.[191] More than one-third of Ukraine's exports are subject to the EU CBAM and as a result, Ukraine is the second most affected country by the EU CBAM.[192] In 2020, Ukraine's exports to EU accounted for more than 40% of its total trade in goods.[193] Following the Russian invasion, Ukraine's exports to the EU have decreased, and while they recovered briefly in the beginning of 2022, they never returned to pre-Russian invasion levels.[194] Under the EU CBAM, Ukrainian business exporters will be expected to pay more than 1 billion euros in carbon tax.[195] Ukraine's leaders have expressed concerns over this cost, and they urge the EU to exempt Ukraine from the EU CBAM on two bases: first, Ukraine's current national carbon tax, which is significantly below carbon prices observed in the EU,[196] and second, the ongoing war with Russia, which has now lasted more than one year.[197] However, as of the date of publication, the EU has not responded to Ukraine's request.

Turkey is another country that considers the EU as its most important trade partner.[198] EU CBAM's effect on Turkey is expected to be around 690 million Euro or 14% of the total value of the EU CBAM for imports from Turkey,[199] so Turkey considers this measure a significant threat to its economy.[200] Therefore, following the EU's announcement of this measure, Turkey decided to take immediate measures by ratifying the Paris Climate Accord.[201] Turkey's chief negotiator at the COP26 climate summit explained that EU CBAM was a reason for its decision, and announced Turkey's intention to introduce a carbon price to avoid the negative impact of CBAM.[202]

South Korea is the fifth most affected country by the EU CBAM.[203] Currently, South Korea has an Emission Trading Scheme, which covers a range of

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191. Iryna Holovko et al., *The Role of the EU CBAM in Raising Climate Policy Ambition in Trade Partners: The Case of Ukraine*, INST. FOR ADVANCED SUSTAINABILITY STUDIES 10 (2021), https://publications.iass-potsdam.de/rest/items/item_6001279_2/component/file_6001289/content#:~:text=EU%20CBAM%20can%20promote%20a,for%20the%20affected%20interest%20groups.

192. *Id.*

193. Simola, *supra* note 16, at 9.

194. *EU Trade with Ukraine – Latest Development*, EUROSTAT 1 (Aug. 2023), https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=583762#Latest_developments.

195. Holovko et al. *supra* note 191, at 8.

196. *Id.* at 5.

197. *Ukraine to Discuss Some Rules on CBAM Participation with EU*, GMK CTR. 1 (2022), https://gmk.center/en/news/ukraine-intends-to-discuss-with-the-eu-certain-rules-for-its-participation-in-cbam/; "Regarding CBAM and all other mechanisms – (we have) an ongoing discussion with the European Commissioner for the Environment Virginijus Sinkevicius. If I manage to get to Prague for a meeting of all ministers of ecology next Wednesday, July 13, I am sure that one of the cases that we will discuss is some rules for Ukraine's participation in CBAM, given the war." *Id.*

198. Simola, *supra* note 16, at 8.

199. *Id* at 10.

200. *Id*.

201. Zia Weise, *EU's looming carbon tax nudged Turkey toward Paris climate accord*, POLITICO 2 (Nov. 6, 2021, 5:38PM), https://www.politico.eu/article/eu-carbon-border-adjustment-mechanism-turkey-paris-accord-climate-change/.

202. *Id*.

203. Assous et al., *supra* note 13, at 44.

sectors, and it has declared that they will enter into negotiations with the EU about the CBAM.[204] Specifically, South Korea wants the EU to recognize its scheme as equivalent to EU CBAM and exempt South Korean goods from the CBAM.[205] Because Korea's national carbon tax varies from the EU, it is unlikely that the EU will agree to exclude Korea's production from the CBAM especially when it comes to steel. Currently, the steel industry is subject to free allocation, therefore, as EU reduces the number of industries that are subject to free allocation this will increase export costs of steel.[206] One policy option is for South Korea to gradually reduce the proportion of free allocations and modify its carbon tax in order to make it equivalent to EU ETS.[207] This way, South Korea would take the proceeds from the carbon tax and use them towards supporting its producers in long-term decarbonization efforts.[208]

Although Russia, Ukraine, Turkey, and South Korea are significantly affected by the EU CBAM, they will respond to the measure in different ways. While countries who already have a national carbon tax in place will try to negotiate with the EU to recognize their domestic carbon tax framework and exempt them from CBAM, other countries who do not have such a domestic policy will oppose the EU CBAM by applying counter-measures and challenging the CBAM at the WTO.[209] If these strategies are unsuccessful, the next best choice for many of these countries would be to modify their domestic carbon taxes or emission policies in order to achieve EU ETS equivalency.[210] With those additional domestic revenue, these countries could continue a virtuous cycle by incentivizing environmentally friendly technologies and bringing the world closer to neutralizing carbon emissions.[211]

B. Climate Justice for All: Understanding Developing Countries' Concerns

Article 3 of the United Nations Framework Convention on Climate Change (UNFCCC), enshrines the principle of common but differentiated responsibilities.[212] Under this principle, while all countries have responsibility for protecting the climate, they may have different responsibilities and capabilities.[213] The

204. Tomas Gutierrez, *South Korea to Negotiate CBAM Recognition*, KALLANISH (Oct. 2022), https://www.kallanish.com/en/news/steel/market-reports/article-details/south-korea-to-negotiate-cbam-recognition-1022/

205. *Id*.

206. *CBAM and Revised EU ETS: Implications for the Steel Industry*, SHERMAN & STERLING 5-6 (Aug. 10, 2021), https://www.shearman.com/en/perspectives/2021/08/cbam-and-revised-eu-ets-implications-for-the-steel-industry.

207. Lee Sulki, *Will EU Cbam Hurt Korean Mfr? An Empirical Analysis with Implications for Pol'y*, 27 KIET INDUS. ECON. REV. 45, 45-54 (Dec. 30, 2022), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4315042_code5356721.pdf?abstractid=4315042&mirid=1.

208. *Id.*

209. *Id.*

210. *Id.* at 2.

211. Sulki, *supra* note 207, at 1.

212. United Nations Framework Convention on Climate Change art. 3, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107.

213. *Id.* at 4.

UNFCCC divides countries into "developed" and "developing" and gives the leading responsibility on climate change matters to developed countries.[214] Other international agreements and agreements that have developed from the UNFCCC framework include provisions recognizing the needs of developing nations. For example, the Paris Agreement provides that "climate change actions, responses, and impacts have equitable access to sustainable development and eradication of poverty."[215] Similarly, the WTO recognizes under the principle of differentiation that developing countries should receive preferential treatment when implementing measures by taking into consideration their relative lack of infrastructure.[216]

Based on these international agreements, developing countries have expressed concern that the EU CBAM does not provide any exemption for them.[217] Some of these countries believe failing to include an exemption for developing countries is a violation of GATT.[218] Developing nations have argued that the lack of an exemption can further increase the gap between developed and developing countries because they have less access to the financing and technology needed to reduce emissions.[219] While most of the developing countries already have domestic carbon taxes or similar policies and will be impacted to a lesser extent, the impact will be significant for developing countries that lack any similar domestic policy.[220]

Even though the EU does not exclude developing nations from the EU CBAM today, two types of differing treatment for developing nations are possible in theory and could be adopted by the EU in the future: excluding developing countries from the EU CBAM altogether,[221] or continue to apply the EU CBAM to developing nations and direct its proceeds to benefit them or offset their costs, e.g., to accelerate the establishment of cleaner technology in developing countries.[222]

First, the EU could exclude developing countries from EU CBAM altogether. The EU already relies on the WTO's enabling clause to grant some of the developing countries preferential access to its market, and they could exclude the same countries from their CBAM.[223] At least one report shows that carbon emissions from developing countries' imports only account for a small portion of total imports into the EU.[224] In particular, only 3% of all EU imports for goods initially

214. *Id.* at 1.

215. *Id.*

216. Paris Agreement, *supra* note 8, at 1.

217. Agreement on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Nov. 28, 1979, T.R.A. L/4903.

218. Hufbauer et al., *supra* note 75, at 10.

219. *Id*. at 8.

220. Byeongho Lim et al., *Pitfalls of the EU's Carbon Border Adjustment Mechanism*, 14 MDPI: ENERGIES 1, 3 (2021), https://www.mdpi.com/1996-1073/14/21/7303.

221. *Id.*

222. Lowe, *supra* note 11, at 9-10.

223. Sigit Perdana & Marc Vielle, *Making EU Carbon Border Adjustment Mechanism Acceptable and Climate Friendly for Least Dev. Countries*, 170 ENERGY POL'Y 1, 3 (2022).

224. Lowe, *supra* note 11*,* at 9.

covered by the CBAM proposal come from least developed countries.[225] Arguably, the exclusion of these countries may not materially undermine the EU's overall carbon reduction efforts.[226] However, from the EU's perspective, excluding developing nations from the CBAM could create an economic advantage for them and would risk production-shifting to countries with less strict domestic greenhouse gas regulations.[227]

Second, the EU could continue to apply the EU CBAM towards developing countries but use all or a portion of the revenues to establish a fund dedicated in supporting developing countries in their climate change mitigation efforts. This might be a mutually beneficial solution for all involved because it would further the EU's effort to reduce carbon emissions but would not create an economic advantage for developing countries or risk carbon leakage.[228] On the contrary, this option could help developing countries advance environmentally-friendly technologies and build the infrastructure needed to reduce their carbon emissions, contributing to the overall goals of the Paris Agreement.[229]

V. EU CBAM FROM THE GATT POINT OF VIEW

While countries are free to decide which policy measures they will use in the fight against climate change, all WTO members, including the EU, are obliged to abide by its trade rules and principles.[230] The EU argued that it designed the CBAM to comply with the GATT and other WTO agreements.[231] However, as discussed above, it is very likely the EU CBAM will be challenged under the WTO rules.[232] The following section discusses potential GATT claims and the EU's potential defenses.

The policy impact that the EU CBAM will have depends on whether it can withstand challenges before the WTO's Dispute Settlement Body (DSB).[233] A successful defense of the EU CBAM would likely encourage other countries, particularly EU's trade partners, to follow suit.[234] However, a negative outcome would require the EU to change its CBAM regulations and potentially undermine its broader policy effort to set stricter rules for carbon emissions.[235]

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225. Perdana & Vielle, *supra* note 223, at 3.

226. *Id.* at 2.

227. *Id.* at 3.

228. *Id.* at 8.

229. Perdana & Vielle, *supra* note 223, at 6.

230. *Id.* at 9.

231. CBAM Memo, *supra* note 59, at 1.

232. Towards a WTO Compatible EU Carbon Border Adjustment, EUR. PARL. (REP A9-0019/2021) 10 (Feb. 15, 2021) https://www.europarl.europa.eu/doceo/document/A-9-2021-0019_EN.html.

233. Simola, *supra* note 16, at 7 (taking into consideration that countries as China and Russia opposing this measure on the grounds of GATT violations, they are both WTO Member Countries, we can easily assume that one of them is likely to bring a dispute before Dispute Settlement Body).

234. *Dispute Settlement Body*, *supra* note 116, at 1 (Dispute Settlement Body has authority to deal with disputes between Member Countries of the WTO).

235. *A unique contribution*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Sept. 28, 2023).

WTO members who want to challenge the EU CBAM have several legal options.[236] Some potential claims under the GATT include potential violations of (1) Most-Favored-Nation treatment (Article I), (2) Tariff Schedules (Article II), and (3) National Treatment (Article III).[237] If the DSB finds that the EU has violated any of these provisions, the EU might still seek an exemption or defense for its CBAM measure under GATT's General Exceptions (Article XX) by claiming that EU CBAM is (1) a measure necessary to protect human, animal or plant life or health (Article XX(b)) or (2) relates to the conservation of exhaustible natural resources (Article XX(g)).[238]

A. Most-Favored-Nation Treatment

Article I of the GATT enshrined the most-favored-nation principle (MFN).[239] Under this principle, countries should refrain from discriminating among their trading partners.[240] Therefore, any advantage given to the imported products of one WTO member must be given immediately and unconditionally to the like products of other WTO members.[241] Alleged violations of this principle are evaluated under a three-prong test: (1) does this measure confer an advantage upon imported or exported products?[242] (2) are the products concerned 'like'? (Japan-Alcoholic Beverages,[243] Spain unroasted coffee)[244] and (3) was the same advantage granted 'immediately and unconditionally' to like products concerned? (Canada-Autos[245] US Certain EC Products).[246] The same three-prong test would be applied to the EU CBAM if challenged.[247]

Under the first prong of the test, a challenger would have to allege that the EU CBAM imposes an advantage to imported or exported products. The challenger could argue that the EU CBAM has created disparate treatment among contracting members (CM) by implementing varying standards in its application. The EU, on the other hand, could argue that no advantage was conferred because the

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236. *Id.*

237. *Id.* at 1; In the World Trade Organization (WTO), only member countries, which are also known as member states, have the right to bring claims. They can bring claims against other member countries if they believe that their trade rights under the WTO agreements are being violated or if they have disputes related to trade issues. *Whose WTO is it anyway?*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm (last visited Oct. 8, 2023).

238. GATT, *supra* note 152, at 2-4, 6.

239. *Id.* at 37-38.

240. *Id.* at 2.

241. *Id.*

242. GATT, *supra* note 152, at 2.

243. Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 68, 207, WTO Doc. WT/DS27/AB/R (adopted Sept. 25, 1997).

244. Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WTO Doc. WT/DS10/AB/R § H(1)(a), (adopted Nov. 1, 1996).

245. Panel Report, *Spain – Tariff Treatment of Unroasted Coffee*, ¶ 3.4, WTO Doc. BISD/28S/102 (adopted June 11, 1981).

246. Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶ 64, WTO Doc. WT/DS139/AB/R (adopted May 31, 2000).

247. Appellate Body Report, *United States – Countervailing Duties on Certain Products from the European Communities*, ¶ 96, WTO Doc. WT/DS212/AB/R (adopted Jan. 8, 2003).

same standards apply to all countries depending on whether they have adopted a measure equivalent to the EU ETS. Panels have given a broad definition to the term 'advantage' by interpreting it to cover a wide variety of measures,[248] therefore, it is likely that the Panel will decide that the EU CBAM confers an advantage to particular countries, which are not being subject to the EU CBAM, regardless of whether they have a similar measure domestically.[249]

One expert, James Bacchus, former chair of the WTO's Appellate Body, has argued recently that the EU, by self-judging other WTO members and deciding which of them will have to buy emissions certificates and how many they will have to buy under, is discriminating among WTO members.[250] Putting aside this individual opinion, the EU has also considered this first prong.[251] Under the briefing prepared upon the request of the European Parliament's Committee on international trade by the police department for external relations, it is said that whatever the classification of the EU CBAM is, it cannot discriminate between like products of different members, e.g., aluminum from the U.S. versus aluminum from Canada or electricity from Russia versus electricity of another WTO member.[252]

As for the second prong of the test, the WTO Dispute Settlement Body prefers to evaluate "likeness" of products on a case-by-case basis.[253] In prior cases, some of the elements that have considered in the analysis include the characteristics of the products, their end-uses, and the tariff regimes of other countries.[254] Here, as an example, if the EU treated aluminum from the U.S. versus aluminum from Canada differently on the basis of their carbon intensity, the EU would have to prove that they are not "like" products, in order for its action not to be considered a violation of the MFN principle.

The Center for Strategic and International Studies (CSIS) argues that whether the EU can successfully challenge the likeness of the products may vary by product.[255] For example, CSIS finds that it may be easier for the EU to challenge likeness for a product like steel rather aluminum because the manufacturing processes vary for steel and producers may sometimes use completely different technologies (e.g., some manufacturers may use blast furnaces, which are high-emitting, and

248. Smith, *supra* note 151, at 4.

249. Panel Report, *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, ¶ 6.9, WTO Doc. BISD 39S/128 (adopted June 19, 1992).

250. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products,* ¶¶ 3-4, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001) [hereinafter WTO Doc. WT/DS135/AB/R].

251. James Bacchus, *Legal Issues with the European Carbon Border Adjustment Mechanism* 3, CATO INST. (Aug. 9, 2021), https://www.cato.org/briefing-paper/legal-issues-european-carbon-border-adjustment-mechanism.

252. *Id.*

253. Briefing on Trade Related Aspects of a Carbon Border Adjustment Mechanism – A Legal Assessment, Eur. Parl. Doc. (PE 603.502) 1.2.1 (Apr. 14, 2020), https://www.europarl.europa.eu/cms-data/210514/EXPO_BRI(2020)603502_EN.pdf.

254. WTO Doc. BISD/28S/102, *supra* note 245, ¶ 3.5.

255. WTO Doc. WT/DS135/AB/R, *supra* note 250.

others may use scrap-based electric arc furnaces, which are lower emitting).[256] On the other hand, aluminum manufacturing processes are more similar across all producers.[257] Such an argument would require the review panel to take into consideration process and production methods when assessing likeness, in addition to other elements that have been taken into consideration in previous cases.

More generally, an industry's process and production methods may make all the difference for its relative impact on climate change.[258] I argue that it is important that the Panel takes into consideration process and production method when deciding likeness. There are already indications from Dispute Settlement Body that process and production methods are indirectly considered in assessing the "likeness."[259] One of the elements that is taken into consideration in order to assess if two products are "like" is consumer taste.[260] Today's consumer taste is impacted by the production process, due to their awareness of climate change impacts and customer taste may be an indication that products are not considered "like" when they have different process and production methods.[261] For example, in the case of *EC-Asbestos*, the Appellate Body found that the presence of a carcinogen in one of the products will influence consumers' taste, and refused to find the products as "like."[262] Similarly, in the case of *Canada – Renewable Energy*, the Appellate Body indicated that inputs and process and production methods may be taken into account for assessing the existence of a competitive relationship between products.[263] While it is difficult to predict whether the Panel would consider different process and production methods in mitigating carbon emissions when evaluating "like" products covered by the EU CBAM, *Canada – Renewable Energy* suggests that a panel may be willing to consider process and production method when assessing the likeness.

The third test would include assessing whether the advantage has been conferred 'immediately and unconditionally' to other countries. If the Panel finds that the first two elements have been fulfilled by the complainant, they will most likely decide that such advantage has not been given 'immediately and unconditionally' to other countries.

B. Tariff Schedules

Article II of the GATT establishes Tariff Concessions in Schedules, which refers to commitments that Member Countries of WTO made regarding the tariffs that will apply to imported goods.[264] Article II attempts to put a ceiling on the

256. Benson et al., *supra* note 112, at 4.

257. *Id.*

258. *Id.*

259. Thomas Cottier, *Strengthening the Global Trade and Investment System for Sustainable Development*, INT'L CTR. FOR TRADE AND SUSTAINABLE DEV. 1 (Aug. 2015).

260. *Id*. at 1.

261. *Id*. at 4.

262. *Id*. at 2-3.

263. Cottier, *supra* note 259, at 3.

264. Appellate Body Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, ¶ 5.63, WT/DS412/AB/R (May 6, 2013).

level of customs duties that can be applied to certain products.[265] Every member is bound by a Schedule of Concessions, which is attached as an integral part of the GATT.[266] The EU is also bound to these Schedules, and if the EU CBAM imposes a tariff in excess of the ceiling for the imported goods, it can be challenged as inconsistent with Article II.[267]

Bacchus, in his paper about legal issues with the EU CBAM, predicted that the EU will argue that the CBAM is not a border measure but instead an internal measure.[268] However, in anticipation of this argument, he argues that because the EU CBAM is triggered by the *importation* of goods, the EU will have some difficulty claiming that the CBAM is purely a domestic measure.[269] Bacchus's analysis is compelling and if EU CBAM exceeds the ceiling provided in GATT Schedule as per Article II, EU CBAM would likely be considered a violation of the GATT.[270]

C. National Treatment

Next, challengers to the EU CBAM may rely on Article III:4 of the GATT, which provides that WTO Members may not discriminate against imported products once they have entered the domestic market; in other words, imported products may not be treated less favorably than 'like' domestic products.[271] In order to establish a potential violation of Article III:4, the complainant must meet three-prong test: 1) the measure at issue must be a "law, regulation or requirement affecting their international sale, offering for sale, purchase, transportation, distribution or use" of a particular product, (2) the imported and domestic products at issue must be 'like products,' and (3) the imported products must be given 'less favorable' treatment than that given to domestic products.[272]

While the EU attempted to ensure that the EU CBAM is equivalent to EU ETS to establish a case that both domestic and imported products are accorded equal treatment,[273] complexities may still arise with this argument. For example, the EU may have to explain whether the free emissions allowances that have been issued and will continue to be issued to domestic users violate the National Treatment principle.[274] Arguably, these legacy emission allowances would give EU producers an advantage compared to foreign imported products, likely triggering Article III:4.

Therefore, in order for the EU to avoid violation of Article III:4, EU CBAM should avoid the issuance of the free allowances to the domestic producers once

265. GATT, *supra* note 152, 3, 5.
266. *Id.*
267. *Id.*
268. Bacchus, *supra* note 251, at 4.
269. *Id.* at 5 (discussing European businesses concern on higher carbon price in the EU).
270. *Id.* at 5-6.
271. GATT, *supra* note 152, 6.
272. *Id.*
273. *Id.*
274. Perdana & Vielle, *supra* note 223, at 2.

CBAM applies to imports; otherwise, it would be according 'less favorable' treatment to like domestic products.[275]

D. EU's Defenses

While the EU CBAM may be challenged as a violation of Articles I, II, and/or III, the measure can still be excused if the EU can successfully assert the "general exceptions" provided for in GATT Article XX.[276] Specifically, the EU could argue that even if the EU CBAM violated other provisions of the GATT, the violations are exempted under Article XX(b) and/or Article XX(g), which provides exceptions for measures which are necessary to protect human, animal, or plant life or health or/and related to the conservation of exhaustible natural resources, respectively.[277]

First, the EU can claim that the CBAM is necessary to protect human, animal or plant life or health under Article XX(b).[278] To successfully make this claim, the EU must establish that the CBAM is designed to protect human, animal or plant life or health; or that the measure is necessary to fulfill the policy objective.[279] While the EU can argue that this measure has been taken in response to climate change concerns which endanger humans, animals, and plant life, it may be difficult for the EU to meet the 'necessity' requirement. In the case of *Thailand-Cigarettes*, for example, the Panel found that a measure is considered necessary only if there are no alternative measures or less inconsistent measures that a member could implement to achieve its objectives.[280] Here, Bacchus argues that the EU will not be able to prove that there were no other alternatives because there was at least one other alternative that would be able to reach the EU's desired level of protection, which is a carbon tax.[281] While the EU might have had been able to adopt other alternative measures as suggested by Bacchus, EU can still argue that those measures would not achieve the end sought by the EU. In the case of *EC-Asbestos*, the Appellate Body concluded that while France could have chosen another measure, it would have prevented it from achieving its chosen level of health protection.[282] Furthermore, *Korea-Beef* has approached a similar view by taking into consideration whether the alternative measure would contribute to the realization of the end pursued.[283]

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275. Benson et al., *supra* note 112, at 7.

276. *Id.* at 5.

277. GATT, *supra* note 152, at 55.

278. *Id.* at. 37-38.

279. *Id.* at 37.

280. *Id.*; Secretariat Note, *GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d), and (g)*, ¶ 13, WTO Doc. WT/CTE/W/203 (Mar. 8, 2002).

281. Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines,* WTO Doc. WT/DS371/R (adopted Jul. 15, 2011); Panel Report, *Thailand—Restriction on Importation of and Internal Taxes on Cigarettes*, ¶ 23, WTO Doc. DS10/R-37S/200 (adopted Nov. 7, 1990).

282. Bacchus, *supra* note 251, at 4.

283. WTO Doc. WT/DS135/AB/R, *supra* note 250, ¶ 168. "In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibers. The value pursued is both vital and important in the highest degree. The remaining question, then, is whether there is an alternative measure that would achieve the same end

Second, the EU can argue that the CBAM is related to the conservation of exhaustible natural resources[284] if such a measure is made effective in conjunction with restrictions on domestic production or consumption. In order to satisfy this provision, the EU must prove that the measure relates to the conservation of exhaustible natural resources; and is made effective in conjunction with restrictions on domestic production or consumption.[285]

For the EU to qualify for an exemption under either Article XX(b) or XX(g), it must also meet the tests of the Chapeau of Article XX.[286] Under the Chapeau, the EU should prove that the CBAM was not applied in a manner that would constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade.[287] This has historically been a difficult test to meet. In the *US-Gasoline* case, when assessing if the U.S. has fulfilled the Chapeau with its measures, the Appellate Body found that U.S.'s measure constituted unjustifiable discrimination and disguised restrictions by taking into consideration the lack of cooperation from the U.S.'s side with Venezuela and Brazil.[288] The Appellate Body found that discrimination is not only determined by the measure at issue, but also the manner in which it is applied.[289] On the *US-Shrimp,*[290] the Appellate Body found that while a government can apply a measure to its citizens, it cannot use an economic embargo to *require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members*. [291]

In determining whether the application of a measure constitutes an arbitrary or unjustifiable discrimination, it should be assessed if the measure is discriminatory, if the discrimination is arbitrary and unjustifiable, and if it occurs between countries where the same conditions prevail.

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and that is less restrictive of trade than a prohibition. . . . In our view, France could not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to "halt". Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection. On the basis of the scientific evidence before it, the Panel found that, in general, the efficacy of "controlled use" remains to be demonstrated. Moreover, even in cases where "controlled use" practices are applied "with greater certainty", the scientific evidence suggests that the level of exposure can, in some circumstances, still be high enough for there to be a 'significant residual risk of developing asbestos-related diseases.' The Panel found too that the efficacy of 'controlled use' is particularly doubtful for the building industry and for DIY enthusiasts, which are the most important users of cement- based products containing chrysotile asbestos. Given these factual findings by the Panel, we believe that 'con-trolled use' would not allow France to achieve its chosen level of health protection by halting the spread of asbestos- related health risks. 'Controlled use' would, thus, not be an alternative measure that would achieve the end sought by France." *Id.* ¶¶ 172, 174.

284. Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 163, WTO Doc. WT/DS161/AB/R (adopted Jan. 10, 2001).

285. GATT, *supra* note 159, at 38.

286. *Id.*

287. *Id.*

288. *WTO rules and environmental policies: GATT exceptions*, WTO 1, https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm (last visited on Oct. 8, 2023) [hereinafter *GATT exceptions*].

289. *Id.*

290. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 10, WTO Doc. WT/DS2/9 (adopted May 20, 1996) [hereinafter WTO Doc. WT/DS2/9].

291. *Id.*

The "arbitrary and unjustifiable discrimination" analysis will depend on several factors.[292] There have been criticisms of the EU CBAM in regard to the EU's lack of effort to engage in a multilateral approach,[293] as well as the EU's attempt to impose ETS regulations on other trade partners.[294] The way EU CBAM is designed, the EU's trade partners would be subject to EU CBAM, even if they have a carbon tax in-house, if the tax system is not equivalent to the EU ETS.[295] Therefore, the challenging countries could argue that the EU is attempting to force other countries to apply the same measures as the EU. The EU, on the other hand, can argue that it has taken all the necessary actions to comply with this provision. The EU announced the measure two years prior to its implementation.[296] Additionally, the measure has a three-year transition period and initially it applies only to some carbon-intensive goods, to be gradually phased in a period of almost ten years.[297]

The second part of the chapeau prevents disguised restrictions on international trade.[298] In *US-Gasoline*, the Panel found that this portion of the chapeau should be read side-by-side with "the arbitrary and unjustifiable discrimination" language.[299] As such, the same criteria would likely apply in finding a disguised restriction.[300]

In summary, should the EU CBAM be challenged under WTO rules, two of the most difficult elements for the EU to prove will be the lack of "likeness" of the covered products and the applicability of exclusions under Article XX. The EU may be able to argue that different methods of production for reducing carbon emission have an impact on consumers' tastes, which could be taken into consideration for evaluating "likeness," but it is not a clear case. The exceptions under Article XX will also be challenging to prove based on past precedent like *US-Shrimp* and the restrictive language contained in the chapeau.

Taking into consideration that the Appellate Body in WTO is currently not functional,[301] if one of the Member Countries chooses to appeal the decision of the Panel, they would have to resolve their dispute through consultations, arbitration or other alternative mechanisms.[302]

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292. *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm (last visited Oct. 8, 2023).

293. *GATT exceptions*, *supra* note 288, at 4.

294. Kardish et al., *supra* note 154, at 16.

295. *Id.* at 8.

296. *Id.* at 4.

297. *Id.*

298. *Carbon Border Adjustment Mechanism*, *supra* note 1, at 3.

299. GATT, *supra* note 152, at 37-38.

300. WTO Doc. WT/DS2/9, *supra* note 290, at 28.

301. *Id.* at 25.

302. *Dispute Settlement: Appellate Body*, WTO 1, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited Oct. 8, 2023); *DG Azevedo to launch intensive consultations on resolving Appellate Body impasse*, WTO 2 (Dec. 9, 2019), https://www.wto.org/english/news_e/news19_e/gc_09dec19_e.htm#:~:text=Director%2DGeneral%20Roberto%20Azevêdo%20told,appointment%20of%20Appellate%20Body%20members.

VI. CONCLUSION

The urgency of addressing climate change necessitates global collaboration, but the lack of such cooperation has led EU members to enact unilateral measures like the EU CBAM. This progressive initiative could inspire other nations to adopt a scheme similar to the EU ETS, which will allow them to pay a comparable tax domestically rather than to the EU institutions. The revenue generated from such taxes can be used to incentivize environmentally friendly technologies and investments and increase the competitiveness of their economy internationally.

Moreover, the EU and other countries, as per their commitments under the Paris Agreement, should aid least developing nations in establishing similar measures. However, the EU CBAM may face WTO challenges, and its success hinges on robust arguments against the "likeness" of products with varying carbon emissions due to different PPMs influencing consumer preferences and that its measure is crucial for health and the environment, with no viable alternatives to achieve the EU's targeted carbon emission reductions. Cooperative efforts with other nations during the transition phase can mitigate potential challenges, while distinguishing between economies and supporting developing nations can further bolster the CBAM's legitimacy. If successfully implemented, the EU's CBAM could catalyze global action on climate change and potentially lead to a harmonized global carbon tax or ETS measures, especially among influential trade players like the U.S. and China. In sum, the EU's proactive stance on climate change through the CBAM has the potential to set a precedent for other nations, instigating a collective response to climate challenges.

MUSINGS FROM BEHIND-THE-METER: A 20TH CENTURY MODEL FOR A 21ST CENTURY WORLD?

Douglas M. Roe[*]

Synopsis: At the altar of cost causation and cost allocation lies a century old debate concerning the term "demand charges." The primary question posed by this article is whether demand charges (i.e., the predominant rate design mechanism used to allocate the fixed costs of the transmission system) will prove sustainable and resilient in the face of the many new challenges affecting the electric transmission system. While it's true that most of these mechanisms have already survived and overcome decades of operational and institutional challenges, it is increasingly unclear whether these century-old rate design mechanisms will be able to sustain themselves for the next wave of transition facing the industry.

The proper calibration of demand charges is largely a question of rate design. At its core, rate design describes the way in which a utility recovers the costs of providing a service. There is a certain ebb and flow – an art and science – to ratemaking. Almost universally, the rate charged to a customer should be a reflection of the actual, steel-in-the-ground costs of providing that service along with a reasonable rate of return. That's the science – there is an ascertainable amount of costs incurred to provide the service. The art, however, of rate design is a far more nuanced way of allocating those real costs to different customer groups. Much like an artist blends colors together to negotiate a new color, rate design often blends competing interests and objectives together to develop a rate that serves as a compromise among the negotiated interests. Demand charges are no exception.

In the case of electric transmission, the issue with assigning costs to customers is that the transmission system is far more complex than producing one product and selling that one product; the same machinery is used to provide a variety of different services to a diverse population of customers. Adding a layer of complexity to an already complex problem, the industry is trending towards a far more interactive and engaged demand-side of the supply-demand balancing equation. It is quite likely that this new dynamic will require inventive forms of rate regulation. Is a rate design sourced in the late 1800s nimble or sturdy enough to adapt to the realities of 21st century electric systems? Probably not. Even though we currently lack great answers to these questions, we are not without tools to guide us through

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this thought process. This article seeks to determine whether there are any bread-crumbs or, better yet, a map and compass that might guide us through the transition.

I. INTRODUCTION

While my inclination is to dive head-first into what a demand charge is and the methods for deriving one, it would feel foolish to do so without first setting the stage for the next decade or two worth of changes coming to the industry.[1]

None of this will come as a surprise to anyone even remotely invested in the industry, but we are, yet again, at the crossroads – or intersection – of a major moment in the evolution of policy and technology. And while this industry is no stranger to existential crossroads (the past century of electric regulation represents a so-called "fast-changing regulatory world"[2] marked by regulatory dynamism),[3] this new set of changes will forever transform the way that transmission customers[4] engage and interface with their utility.[5] In fact, this particular crossroads represents one of the largest changes to electric service – an exercise not merely dressed in hypotheticals and buzzy industry jargon.[6]

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1. It's worth acknowledging that, as it relates to the provision of electric service, the context and backdrop for this Article is an industry premised on infrastructure that also happens to be an underlying element of the economy. *See* Hon. Richard D. Cudahy, *Retail Wheeling: Is This Revolution Necessary?*, 25 ENERGY L.J. 351, 353 (1994).

2. Paul B. Mohler, *Experiments at the FERC – In Search of a Hypothesis*, 19 ENERGY L.J. 281, 305 (1998).

3. Hon. Curt L. Hebert, Jr., *The Quest for an Inventive Utility Regulatory Agenda*, 19 ENERGY L.J. 1, 3 (1998).

4. Throughout this article, the term "customer" is intended to apply to transmission customers, such as Network Customers or Load-Serving Entities. Customer, unless specifically identified, is not intended to apply to retail customers, even if much of this thought exercise could apply to retail and distribution grid concepts.

5. The idea of a new wave of resources (such as energy efficiency and qualifying facilities) upending existing paradigms is nothing new. *See, e.g.*, Michael D. Hornstein & J.S. Gebhart Stoermer, *The Energy Policy Act of 2005: PURPA Reform, The Amendments and Their Implications,* 27 ENERGY L.J. 25, 26 (2006).

6. We are in the midst of another significant moment in the industry – words often uttered, but *this* time, it feels real. For a rather complete and insightful tallying of events surrounding the energy transition, *see* Rich Glick & Matthew Christiansen, *FERC and Climate Change*, 40 ENERGY L.J. 1, 10-11, 19-20 (2019). In their

Public policy in the year 2023 is trending towards low- or no-carbon generation solutions.[7] The so-called "energy transition" is at our doorsteps, if not already with two feet in the door. And while most of these ambitious objectives (especially the carbon-eliminating kind) are decades away from realization and achievement, this evolution would represent an even more significant revision to the industry than how open access transformed the electric industry and the ways in which the transmission system was used.[8]

The changes contemplated by the so-called "energy transition" are fairly expansive in nature and include, but are not limited to: (1) advances in offshore

article, they describe the rapid series of events that have occurred in recent years, ranging from customers becoming more sophisticated to an electrification of everything. They even hinted at the idea of flattening or shifting peaks based on the prevalence of electric storage resources.

7. *See* Ari Peskoe, *Easing Jurisdictional Tensions by Integrating Public Policy in Wholesale Electricity Markets*, 38 ENERGY L.J. 1 (2017) (discussing public policy issues involving zero-emission and carbon-pricing issues).

8. In just the past two decades, the infrastructure of electric service has transformed from one that was rooted almost entirely in the use of fossil fueled resources to a far more diverse resource mix. This resource mix is as diverse as ever, with just a sampling of those resources including coal, natural gas steam, natural gas combustion turbine, oil steam, oil combustion turbine, nuclear, solar, wind, hydro, storage, and demand response. *See, e.g., PJM's Evolving Resource Mix and System Reliability*, PJM 3, 9 (Mar. 30, 2017), https://www.pjm.com/~/media/library/reports-notices/special-reports/20170330-pjms-evolving-resource-mix-and-system-reliability.ashx.

wind;[9] (2) newer metering technologies and strategies;[10] (3) an increased prevalence and penetration of solar PV;[11] (4) an increasing electrification of just about everything;[12] and (5) electric vehicles.[13] It's . . . *a lot*.[14]

More fundamentally relevant to the issues presented in this article, it is the concept and notion of demand-side resources (such as behind the meter storage, electric vehicles, and solar PV) transforming the way the transmission system is used[15] and, as a consequence, the rates associated with that changed usage.[16] In

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9. For example, it's not a question of if offshore wind will make its grand appearance but rather when (and how). The federal government has outlined a path for nearly 30 gigawatts of offshore wind installations by the year 2030. *See, e.g.*, *Energy Secretary Granholm Announces Ambitious New 30GW Offshore Wind Deployment Target by 2030*, DEPT. OF ENERGY 1 (Mar. 29, 2021), https://www.energy.gov/articles/energy-secretary-granholm-announces-ambitious-new-30gw-offshore-wind-deployment-target; *see also, e.g.*, *PJM Interconnection*, 179 FERC ¶ 61,024 at P 3 (2022). One of the stickier issues is who pays for the projects – including the transmission build-out. In PJM, at least, New Jersey has elected to pursue a hard-wired approach under the tariff to building out and funding the build-out.

10. Elin Swanson Katz & Tim Schneider, *The Increasingly Complex Role of the Utility Consumer Advocate*, 41 ENERGY L.J. 1, 4 (May 4, 2020).

11. One example of this is the recent proliferation of solar (i.e., 107 gigawatts of nameplate solar), with another 25 worth of gigawatts in various interconnection queues. *See* Ryan Kennedy, *Over 25 GW of solar is actively being constructed in the U.S.*, PV MAG. USA 1-2 (Feb. 17, 2023), https://pv-magazine-usa.com/2023/02/17/over-25-gw-of-solar-is-actively-being-constructed-in-the-u-s/; *see also* Paul Ciampoli, *U.S. Microgrid Market Develops at Rapid Pace, With Capacity Reaching 10 GW in Q3 of 2022*, AM. PUB. POWER ASS'N (Feb. 14, 2023), https://www.publicpower.org/periodical/article/us-microgrid-market-develops-rapid-pace-with-capacity-reaching-10-gw-q3-2022.

12. The idea of "electrifying everything" has become a short-hand name referring to the idea of transitioning appliances or technology that rely on fuel to electricity (e.g., transitioning natural gas furnaces to electric heat pumps; *see generally, e.g.*, Nathan Reck, *Electric Vehicles, Infrastructure Electrification and the Urban-Rural Divide*, 23 SMU SCI. & TECH. L. REV. 77 (2020).

13. Although these resources reside on the distribution side of the system and would historically have been considered more apt for managing demand on the distribution system, the Commission's issuance of Order No. 2222 will foster and enable an even greater degree of participation among what's called "DER Aggregators." Distributed energy resources (DERs) are resources that seek to participate in either the retail or wholesale market (or, potentially, both) – aggregators pool those resources, which include storage, solar PV systems, and electric vehicles, together. *See, e.g., FERC Order No. 2222: Fact Sheet*, FERC 1-2 (Sep. 17, 2020), https://ferc.gov/media/ferc-order-no-2222-fact-sheet); *see also* James M. Van Nostrand, *Quantifying Resilience Value Distributed Energy Resources*, 35 J. LAND USE & ENV'T L. 15, 16-18 (2019) (For a discussion of the relative value offered by distributed energy resources and a glimpse of potential uses with respect to the ideas of resilience and grid hardening).

14. In addition to the introduction of new technologies (i.e., the changing resource mix), the proportions of those resources have changed dramatically and rapidly – for example, in just a ten-year period, coal fell by 52%, whereas the generation sourced from renewables (such as wind, utility-scale solar, and hydropower) increased by 72%. *See* Lauren Bauer et al., *Ten economic facts about electricity and the clean energy transition*, BROOKINGS 1 (Apr. 27,2023), https://www.brookings.edu/articles/ten-economic-facts-about-electricity-and-the-clean-energy-transition; *see also, e.g., Renewable generation surpassed coal and nuclear in the U.S. electric power sector in 2022*, EIA 1 (Mar. 27, 2023), https://www.eia.gov/todayinenergy/detail.php?id=55960.

15. System, for the purposes of this discussion, is specific to the bulk electric transmission system. To be sure, there are more dramatic impacts that may occur on the distribution system, but the lack of harmony between the wholesale grid and the retail grid enables this discussion to speak exclusively to impacts on the bulk electric transmission system. *See, e.g., Ch. 3: Demand-Side Resources*, DEPT. OF ENERGY 10 (Dec. 9, 2008), https://www.energy.gov/sites/prod/files/oeprod/DocumentsandMedia/Chapter_3_-_Demand-Side_Resources_12-9-08.pdf.

16. In some ways, the present debates regarding a customer's ability to utilize its own generation resembles the debates at the inception of the industry; *see* Tapan Munroe, *Electric Utility Competition: Lessons from*

many ways, this category of resources and technologies is going to present the most challenges.[17] Even though behind-the-meter technology is not necessarily a new topic, what is new is the variety and volume that exponentially complicates the existing dynamic.[18] For customers, it could very well represent the best thing since sliced bread (though tough questions persist, such as how much bread to make and how big to make those slices). More effectively than in the past, behind-the-meter generation is poised to be one of the biggest "game-changers" as affecting not only load shapes and usage patterns, but introducing an opportunity for a bi-directional[19] exchange of energy.[20]

This sea change is not accidental, however. In the driver's seat of this particular rocket ship, the Federal Energy Regulatory Commission (Commission) has overseen wholesale market rules that are adapting and adjusting at a significant pace. For example, the Commission has overseen a changing of the guard from rules that were once designed to meet the needs of a thermal, fully dispatchable, and synchronous system to a "hybrid" system featuring far more diversity of resources than the rate designs of today envisioned or contemplated. Not only does the Commission have a strong backhand (i.e., the majority of the agency's actions are reactions to the filings it receives), the Commission also has a powerful serve – taking careful, deliberate, and proactive steps in its journey of promoting and ensuring efficient access and pricing under the tariff (i.e., smashing down barriers). In the name of removing the barriers imposed on different technologies and resource types,[21] the Commission has been no passive bystander to progress and

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Others, 12 J. ENERGY & DEV. 203, 204 (1987) (citing "[h]istorically, competition is not new to utilities. Competition for industrial loads from self-generation was present at the turn of this century."); *see also Ch. 3: Demand-Side Resources*, *supra* note 15, at 13.

17. The investment decisions, particularly with renewables, is, at best, complicated. *See, e.g.*, Harvey L. Reiter, *America's Energy Future: So Who Are the Good Guys?,* FORTNIGHTLY MAG. 3 (Oct. 16, 2013), https://www.fortnightly.com/fortnightly/2013/10/america's-energy-future-so-who-are-good-guys.

18. *See, e.g.*, David E. Dismukes, *Current Trends and Issues Reforming State-Level Solar Net Energy Metering Policies*, 8 LSU J. ENERGY L. & RES. 419, 423 (Sept. 22, 2020).

19. This is also referred to as the so-called "prosumer." *See, e.g.*, Burcin Unel et. al., *Advancing Energy Policy*, 28 N.Y.U. ENVTL. L.J. 17, 19 (2020) (holding that "[i]ncreasing deployment of these resources disrupts both the traditional electric grid, which has been relying on one-directional power flow from large, centralized generators to end-users, and traditional utility regulation, which has been designed around a core assumption that only utilities could provide certain electric services.").

20. There is a plentiful bounty of literature on the potential impact that solar and storage can have on the electric industry. The literature reveals that there is an indeterminate impact of solar and storage being more prevalent and integrated than they are today. *See, e.g.*, Dismukes, *supra* note 18, at 419-20; s*ee also, e.g.*, Jon Wellinghoff & David L. Morenoff, *Recognizing the Importance of Demand Response: The Second Half of the Wholesale Electric Market Equation*, 28 ENERGY L.J. 389, 393 (2007). At the risk of overgeneralizing the matter, the demand side of the energy balancing equation was pretty darn inelastic in the past decade or so. That dynamic is set to change, and quickly. For example, while solar generation might peak earlier in the day – sooner than the system's evening peak – storage could have the effect of either broadening or blunting the peak; *see also, e.g.*, Nick Schlag & Zach Ming, *Practical Considerations for Application of Effective Load Carrying Capability*, ENERGY + ENV'T ECON. 7 (Aug. 7, 2020), https://www.pjm.com/-/media/committees-groups/task-forces/ccstf/2020/20200807/20200807-item-04-e3-allocating-elccmw-from-portfolio-to-classes.ashx.

21. Glick & Christiansen, *supra* note 6, at 15 (citing, for example, "[e]liminating barriers to competition and unduly discriminatory market rules has been a cornerstone of the Commission's implementation of the FPA.").

instead, has proactively issued a variety of rulemakings that acknowledge and reflect the reality of advanced technologies and their capabilities (a representative example including Order Nos. 745,[22] 755,[23] 841,[24] and 2222).[25] These orders, in particular, enable resources on the distribution side[26] of the equation to participate competitively in wholesale markets.[27] The Commission's rulemakings not only laid the foundation for a more dynamic experience between utilities and customers, but it has directly enabled it.[28] To be sure, there is an appreciable lag to many of the momentous rulemakings the Commission has issued in recent years, as it takes years for an industry, especially one as capital intensive as the electric industry, to adjust and adapt.[29] Even so, we have already seen meaningful, and in some cases exponential, distributed energy resources (DER) penetration.[30] The open, yet to be answered, question is how these changes will interact with the existing methods for allocating the demand costs of the transmission system. We are only at the beginning of understanding how these new resources will affect the fragile ecosystem and balancing of network transmission costs, though, as we cover later – the breadcrumbs reveal a path whereby the existing mechanisms are being stress-tested in real-time.

Prior to the moment we find ourselves in, the way that load-serving entities interacted with the transmission system changed slowly, but steadily.[31] The traditional paradigm of electric service has evolved steadily; through a steady drip of

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22. *See generally* Order No. 745, *Demand Response Compensation in Organized Wholesale Energy Markets*, 134 FERC ¶ 61,187 (2011).

23. *See generally* Order No. 755, *Frequency Regulation Compensation in the Organized Wholesale Power Markets*, 137 FERC ¶ 61,064 (2011).

24. *See generally* Order No. 841, *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 162 FERC ¶ 61,127 (2018).

25. *See generally* Order No. 2222, *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 172 FERC ¶ 61,247 (2020).

26. Richard P. Bonnifield & Ronald L. Drewnowski, *Transmission at a Crossroads*, 21 ENERGY L.J. 447, 448 (2000) ("Over a century ago in the United States, electrifying a town meant building a power plant and stringing "distribution" wires on poles. Distribution wires are the 'local streets' of electricity delivery, while transmission wires are the 'highways.'").

27. *See generally* Udi Helman et al., *The Design of US Wholesale Energy and Ancillary Service Auction Markets: Theory and Practice*, *in Competitive Electricity Markets*, JOHN HOPKINS UNIV. (2007), https://hobbsgroup.johnshopkins.edu/docs/papers/Helman%20Hobbs%20Oneill%20edits%20Ch05.pdf.

28. Glick & Chirstiansen, *supra* note 6, at 17 (citing "[o]ver the last 30 years, the Commission has issued a series of orders eliminating barriers that prevented resources from participating fully in wholesale electricity markets.").

29. As a fairly basic indicator that we are not yet at a point of understanding DER deployment and implementation, utilities are suffering from a lack of visibility into the unregistered DERs. *See, e.g.,* David Kathan, *Assessment of Current Demand Response and DER Data Collection Tools*, KATHAN ENERGY CONSULTING 2 (June 8, 2023), https://www.energy.gov/sites/default/files/2023-06/Assessment%20of%20Current%20Demand%20Response%20and%20DER%20Data%20Collection%20Tools.pdf.

30. Kelsey Horowitz et al., *An Overview of Distributed Energy Resource (DER) Interconnection: Current Practices and Emerging Solutions*, NREL 1 (Apr. 2019), https://www.nrel.gov/docs/fy19osti/72102.pdf.

31. *See generally*, Jeff Winmill, *Electric Utilities and Distributed Energy Resources – Opportunities and Challenges*, 6 SAN DIEGO J. OF CLIMATE & ENERGY L. 199 (2015); *see also* James M. Van Nostrand, *Quantifying the Resilience Value of Distributed Energy Resources*, 35 W. VA. UNIV. COLL. OF L. 15 (2019).

progress, technological and policy advancements have rendered outdated the previous modes of demand-side management (such as curtailment and interruptible methods of demand management). Currently, and now more than ever, transmission customers are better equipped to manage their contributions using demand response and demand-side resources, as but two examples of demand becoming more elastic.[32] With that deployment comes the agency possessed by network customers to engage with their electric needs more than ever before.

To be clear, some of this is new and some of it is not necessarily new.[33] On the latter, the idea of load flattening is *certainly* not new.[34] In short, load flattening – or flattening demand – assumes a reduction in the difference between the "peaks and troughs" in usage in an attempt to lessen the deviation when compared to average usage.[35] What is new, however, is that more advanced and sophisticated demand-side actors have begun testing and challenging the tried-and-true methods for assigning costs. A few recent accounts reveal just how they did this – we get into that later.

Our problem statement – one that does not appear to have an on-the-shelf solution – is whether the principles and policies of old are enough to shepherd customers, utilities, and regulators alike through the next phase of the industry. Technological innovations can enable a smarter, more precise rate design that marries two important concepts: first, the utility to better understand the future needs of its system and second, customers to better understand its own purchasing decisions.[36] As the circumstances underlying the provision of electric service are changing under our very feet, the shifting sands of time will force the industry to confront this question.[37]

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32. Ahmad Faruqui & Robert Earle, *Demand Response and Advanced Metering*, CRA INT'L 24, 27 (2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=898201.

33. To be clear, the concept of load-flattening is not new. The present-day issue has more to do with customers having more ability, and flexibility, to flatten their load *particularly* in contrast to certain customers that cannot shift their load. *See*, *e.g.*, Richard D. Cudahy & J. Robert Malko, *Electric Peak-Load Pricing: Madison Gas and Beyond*, 1976 WIS. L. REV. 47, 75 (1976).

34. Distributed generation has long been used in an attempt to offset wholesale electric charges – the previously predominant method mostly involving on-site internal combustion engines or gas turbines; *see, e.g.,* Matthew Christiansen & Ann Jaworski, *The Dark Side of DG: Addressing the Environmental Impacts of Dirty Distributed Generation*, 25 NYU ENV'T L. REV. 1, 4, 7, 10 (2016).

35. *See generally*, J. Neubauer & M. Simpson, *Deployment of Behind-The-Meter Energy Storage for Demand Charge Reduction*, NREL (2015), https://www.nrel.gov/docs/fy15osti/63162.pdf.

36. Travis Kavulla, *Why Is the Smart Grid So Dumb? Missing Incentives in Regulatory Policy for an Active Demand Side in the Electricity Sector*, ENERGY SYS. INTEGRATION GRP. 1, n.3 (2023), https://www.esig.energy/wp-content/uploads/2023/01/Why-Is-the-Smart-Grid-So-Dumb-Missing-Incentives-in-Regulatory-Policy-for-an-Active-Demand-Side-in-the-Electricity-Sector.pdf (citing Statement of Comm'r Robert F. Powelson, Pa. Pub. Util's Comm'n, Implementation of Act 129 of 2008 – Relating to Smart Meter Procurement and Installation (Jun. 18, 2009)).

37. It is worth acknowledging that the evolutionary arc is a slow but bendy one. Even in the context of retail wheeling, some of the prominent authorities around the moment of open access insisted that the electric power industry maintained enough natural monopoly characteristics to make it uneconomic to effectively unbundle the industry in the pursuit of competition. *See* Cudahy, *supra* note 1, at 358.

Compounding all of this uncertainty is the fact that ratemaking and rate design is *difficult*.[38] That difficulty necessitates a pit stop prior to getting into the meat of the inquiry; we must first set the stage and explain what a rate is and how rates have evolved. Stated differently, we need to figure out where we are and how we got here. We do so next.

II. FUNDAMENTALS OF RATES

The presentation of this policy conundrum begins with its first stop – rate design.[39] Boiled down to its essence, rate design is a sophisticated way of describing how a utility recovers the costs of providing a service.[40] In theory, rate design could be considered an arcane exercise devoted to adding (and subtracting) costs and then invoicing those costs to its customers – *theoretically*, as simple as arithmetic.[41] In reality, rate design is far more difficult and nuanced than simple arithmetic – not only is simple arithmetic not sufficient in such a capital-intensive industry, but rates are often the result of compromises (sometimes messy) made among parties with different, if not competing, interests and incentives.[42] Transmission is no exception, as one piece of equipment can be used to provide multiple

38. Pub. Serv. Comm'n of Ky. v. FERC, 397 F.3d 1004, 1006 (D.C. Cir. 2005) (quoting Time Warner Entm't Co. v. Fed. Commc'n Comm'n, 56 F.3d 151, 163 (D.C. Cir. 1995)) (first citing Ass'n of Oil Pipe Lines v. FERC, 83 F.3d 1424, 1431 (D.C. Cir. 1996); then citing Norwood v. FERC, 962 F.2d 20, 22 (D.C. Cir. 1992)) ("For our part, we have recognized that "agency ratemaking is far from an exact science," and that it involves 'complex industry analyses,' and '[i]ssues of rate design [that] are fairly technical.'"); Time Warner, 56 F.3d at 163 (For these reasons, and because ratemaking 'involves policy determinations in which the agency is acknowledged to have expertise, our review thereof is particularly deferential.").

39. The term "rate design" enjoys many definitions and characterizations. *See*, *e.g.*, David A. Lander, *Public Utility Rate Design: The Cost of Service Method of Pricing*, 19 ST. LOUIS UNIV. L.J. 36, 40-41 (1974) ("The basic principle of law involved in rate design is that the tariffs must be free from undue discrimination against customer classes. Discrimination is lawful as long as it is reasonable, but the standards for measuring reasonableness are vague.").

40. *See, e.g.,* Michael E. Small, *A FERC Electric Rate Primer,* 5 ENERGY L.J. 108 (1984) ("Cost allocation assigns a specific amount of demand, energy, and customer related costs to each customer class. The rates or the unit charges are then determined through a process called 'rate design.' In deriving the demand charge, the estimated billing demand for the class will be divided into the total demand costs assigned to the class. This will result in a $/kW demand charge. In deriving the energy charge, the estimated energy usage or kWh's for the class will be divided into the total energy dollars assigned to the class in order to derive the energy charge in $/kWh. In addition, the allocated customer costs will often be used to derive a customer charge."); *see also* D. Shields, *Rate Design and Building Decarbonization in California: The Essentials*, GRIDWORKS 1 (Sept. 18, 2019), https://gridworks.org/2019/09/rate-design-and-building-decarbonization-in-california-the-essentials/ (for an overview of the terminology related to rate design).

41. Lander, *supra* note 39, at 36-40.

42. *See, e.g.*, Mark C. Christie, *It's Time to Reconsider Single-Clearing Price Mechanisms U.S. Energy Markets*, 44 ENERGY L.J. 1, 4 (2023) (acknowledging a real world full of "conflicting policies and politics.").

services to a diverse universe of customers.[43] This negotiated effort – the proverbial tug-of-war between utilities and customers – is a decades old practice[44] that has, largely speaking, tried to adapt with the times. This adaptation has mostly come in the form of mere variants owing, at least in part, to the fact that the fundamental characteristics of the transmission system have not changed much either.[45]

Even so, efficient rate design sits somewhere in the spectrum between art and science.[46] Almost universally, the rate charged to a customer should be a reflection of the actual, steel-in-the-ground costs of providing that service along with a reasonable rate of return.[47] That's the science – there is a factual amount of costs incurred to provide the service. The art, however, of rate design is a far more nuanced way of allocating those real costs to different customer groups (often melding or fusing together well-established theoretical principles that drive rate design decisions).[48] Much like an artist blends colors together to negotiate a new color, rate design often blends competing interests[49] and objectives together to develop a rate that serves as a compromise among the negotiated interests.[50] As unique as each ratemaking canvas might aspire to be, the science often controls, as the utility has actual infrastructure costs that it needs to recover.

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43. As Alfred Kahn put it, "[w]hen . . . the products are truly joint, in that they can be economically produced only in foxed proportions, neither of them has a genuine, separate incremental cost function, as far as the joint part of their production process is concerned." ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 79 (MIT Press Books 1988), https://utulsa.summon.serialssolutions.com/#!/search/document?ho=t&include.ft.matches=f&l=en&q=Alfred%20E.%20Kahn,%20The%20Economics%20of%20Regulation:%20Principles%20and%20Institutions&id=FETCHMERGED-utulsa_catalog_b151916552.

44. Valery Yakubovich et al., *Electric Charges: The social construction of rate systems*, 34 THEORY AND SOC'Y 579, 585 (2005).

45. As much as the fundamental characteristics have not changed, the underlying difficulty of calibrating demand charges is part and parcel of a larger issue associated with allocating the costs of jointly-used machinery. This machinery has also been described as, "[w]henever someone turns on her lights, a complex technological and regulatory apparatus allows electricity to flow instantaneously into her home." *See* Joshua C. Macey & Jackson Salovaara, *Rate Regulation Redux*, 168 UNIV. PA. L. REV. 1181, 1194 (2020).

46. Where exactly it falls within the spectrum is a bit of an open question, but it certainly does not reside at either bookend of the extremes; "ratemaking . . . is not a science." *See* Bos. Edison Co. v. FERC, 885 F.2d 962, 969-70 (1st Cir. 1989).

47. Traditionally, costs on a network are allocated "when demand is at its zenith" – or the so-called system peak. The revenue pie is divided among the different customers based on their usage of the system at the time of system peak. *See* Cogeneration Ass'n of Cal. v. FERC, 525 F.3d 1279, 1281 (2008).

48. While this article discusses, at possibly too great a length, the many economic principles and theories underlying rate design, one of the first principles in setting just and reasonable rates is to ensure that, effectively, the regulated rate serves as a substitute for an otherwise competitive product. *See, e.g.*, William R. Hughes & George R. Hall, *Substituting Competition for Regulation*, 11 ENERGY L.J. 243, 244 (1990).

49. *See, e.g.*, J. A. Nordin, *Allocating Demand Costs*, J. LAND & PUB. UTIL. ECON. 163, 163 (1946) ("There are two objectives in allocating an electric power plant's demand costs among its customers. The first is to improve the system consumption pattern, and the second is to do justice among customers.").

50. At the most basic level, these interests are fairly simple in nature – a consumer of a product wants to pay as little as possible whereas a producer of that product wants to sell it for as high of a price as possible. The competing objectives, as they relate to electric transmission, increase exponentially from there. The courts have not only acknowledged the presence of competing objectives, but the complexity requiring the Commission making "on balance" determinations that weigh and balance competing policy goals. *See, e.g.*, Sacramento Mun. Util. Dist. v. FERC, 616 F.3d 520, 541-42 (D.C. Cir. 2010).

While the end-result of ratemaking is a fairly straight-forward one (e.g., the utility "just" needs to recover enough of its costs to do business), the objective function is considerably more complex. A rate must not only provide the utility with sufficient revenues, but must also, for example, send appropriate signals to the customer, fit within accepted regulatory frameworks, and thread the needle between backwards-looking recovery and forward-looking investments.[51] Most rates are a patchwork of quirky compromises reached along the way between utilities and customers, memorialized by regulators – these compromises do not necessarily lend themselves to mathematical precision, but instead, reflect the complexity of negotiating between competing objectives.[52]

Although each rate is an attempt to strike some balance between the respective interests of the utility and customer, rates are also premised on recovering the total cost of providing electric service. Generally, this encompasses two types of costs – variable energy costs and fixed plant costs.[53] The subject of this article rests on how utilities recover the latter category – the fixed costs of the system,[54] which is often used interchangeably with the phrase demand costs, and "has made a nightmare of utility cost analysis."[55]

At the most basic level, modern day rate design in wholesale electric markets appears to be almost entirely premised on the notion of a "thermal" system[56] used to meet demand at its zenith. However, as technologies emerge and evolve, as they are currently,[57] it may not be terribly long before we see a change not just to the thermal nature of the system, but to a fundamentally different way in which

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51. Lander, *supra* note 39, at 40.

52. *See generally Sacramento Mun. Util. Dist.*, *supra* note 50.

53. It's worth acknowledging that, as indicated in Bonbright, treating energy costs as an entirely separate cost function suffers from the shortcoming that the costs of producing any amount of energy is not independent of the costs related to a system's capability (demand costs). *See* JAMES C. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES 349-50 (Colum. Univ. Press 1961), https://www.raponline.org/wp-content/uploads/2016/05/powellgoldstein-bonbright-principlesofpublicutilityrates-1960-10-10.pdf.

54. As a point of clarification, there is a fair degree of controversy surrounding whether there should be a separate charge for demand costs. On the retail side of the meter, many homeowners in the United States, as an example, pay for the fixed costs of the distribution system through a volumetric rate. The subject of this article is focused entirely on wholesale transmission costs and while some of the principles very well may apply to the retail side of the equation, the discussion is narrowly confined to considering the future use and value of demand charges in the wholesale context.

55. BONBRIGHT, *supra* note 53, at 350, n.10. Curiously, Bonbright cited both domestic and international journals as the foundation for that statement, suggesting that, even 70 years after the so-called "discovery" of demand charges, their use was still being debated almost universally.

56. *See, e.g.*, Winmill, *supra* note 31, at 203 ("[T]he electric industry 'gradually converged around gigawatt-scale thermal power plants located far from urban centers."). (The notion of a thermal system, at the risk of providing an overly simplistic worldview, is embedded as the peaking units identified by RTOs and ISOs when they design their demand curve are fossil-fueled generators. This makes sense for a number of reasons, but it exemplifies the "thermal" nature of the system. To the author's knowledge, we have yet to see a different technology (renewable, storage, or otherwise) serve as the reference peaking unit. For example, ISO-NE used a simple-cycle combustion turbine as its peaking unit when it considered its demand curve parameters for its Forward Capacity Auctions). *ISO New England Inc.*, 175 FERC ¶ 61,172 at P 17 (2021).

57. *See, e.g.*, Amandeep Kaur, *Batteries + Storage: Implications Integrating Battery Energy Storage System into Renewable Energy Power Purchase Agreements*, 7 OIL & GAS, NATURAL RES. ENERGY L.J. 911 (2022).

the system is used.[58] As this article aims to address, this changing landscape frustrates an already fragile framework, as the exercise of slicing the fixed-cost pie already presents "theoretical and practical problems"[59] and the frustrations will only continue as the industry slowly transitions.

III. UNDERSTANDING DEMAND COSTS

It is fair to ask how we got here – the answer is pretty surprising, actually. The origin of demand cost allocation goes back to Christmas vacation – no, not the Clark Griswold version of *Christmas Vacation* (that would make this entire exercise a lot less dry) – of 1894. So the story goes, the pricing at issue in this article has origins dating back to a Christmas vacation in 1894, where Samuel Insull (yes, *that* Samuel Insull)[60] and an engineer named Arthur Wright essentially envisioned the concept of having two distinct elements to the provision of electric service – the fixed costs element (i.e., the infrastructure) and the variable costs (i.e., operating costs, fuel costs, and so forth).[61]

The industry struggled in the 1890s with many of the same issues confronting us today.[62] At that time, there were two prominent working theories of pricing: the so-called "Wright" system (e.g., demand charges) and the so-called "Barstow" system (e.g., time-of-use charges). The Wright system emerged as the prevailing rate and one that is embodied and embedded in a wide variety of tariffs today.[63] Although the pricing theories were developed in the late 1800s, it took another

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58. *See generally* Richard L. Revesz & Burcin Unel, *Managing the Future of the Electricity Grid: Distributed Generation and Net Metering*, 41 HARV. ENV'T L. REV. 43 (2017).

59. Cities of Batavia v. FERC, 672 F.2d 64, 80 (D.C. Cir. 1982). In its opinion, the court explained that, because each utility is uniquely structured, the Commission has endorsed a flexible approach, as no single method of cost allocation is considered appropriate for all systems. The court acknowledged the difficulty of the task, citing Bonbright in the process.

60. Many credit Insull as being responsible for the electric industry as it is constructed and designed today (including, relevant here, the presence of demand charges). *See, e.g.*, Richard D. Cudahy & William D. Henderson, *From Insull to Enron: Corporate (Re)Regulation after Rise and Fall Two Energy Icons*, 26 ENERGY L.J. 35 (2005); *see generally* Macey & Salovaara, *supra* note 45.

61. Arthur Wright, *Some Principles Underlying the Profitable Sale of Electricity*, 31 PROC. INST. ELEC. ENG'R 155 (1902).

62. Winmill, *supra* note 31, at 203 ("[I]n the 19th and early 20th centuries, most electricity was produced in close proximity to where it was ultimately consumed.").

63. Demand charges are by no means uniform and, rather, come in many shapes, sizes, and varieties. *See, e.g.*, Order on Initial Decision, *Idaho Power Co.*, 126 FERC ¶ 61,044 at P 50 (2009) (citing *Ariz. Pub. Serv. Co.*, 23 FERC ¶ 61,419 at p. 61,931 (1983)), *aff'd* sub nom; Papago Tribal Util. Auth. v. FERC, 773 F.2d 1056 (9th Cir. 1985); *Commonwealth Edison Co.*, 15 FERC ¶ 63,048 (1981), *aff'd* in relevant part, 23 FERC ¶ 61,219, at p. 61,473, n.18 (1983); *Kan. Gas & Elec. Co.*, 28 FERC ¶ 63,004, at p. 65,015 (1984), *aff'd* in relevant part, 31 FERC ¶ 61,012, at p. 61,023 (1985); *Fla. Power & Light Co*., 66 FERC ¶ 61,227, at p. 61,529 (1994); Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21,540 (1996) (codified at 18 C.F.R. pts 35, 385); *see also Ind. & Mich. Elec. Co.*, 4 FERC ¶ 63,010 at p. 65,076-77 (1977), *settlement approved*, 4 FERC ¶ 62,007 (1978); *Pub. Serv. Co. of N.M.*, 10 FERC ¶ 63,020, at p. 65,130 (1980), *settlement approved*, 14 FERC ¶ 61,087 (1981)). *See also* Small*, supra* note 40, at 135 ("The allocation of demand costs is a complex and often litigated issue. Issues that are usually litigated include: (1) which coincident peak demand allocation method (1 CP, 3 CP, 4 CP, or 12 CP) should be adopted; (2) whether the numerator and/or denominator (total system demands) in the demand allocator have been properly projected; and (3) whether transmission costs should be rolled-in and allocated on the same basis.").

twenty to thirty years prior to being realized in the United States. Wright's theories were eventually adopted and implemented by an engineer named John Hopkinson – giving rise, as we'll get to later, the idea of a two-part rate.[64] Under his theory, Hopkinson advocated for fixed charges because electricity could not be stored and therefore the utility was required to produce and supply, instantaneously, whenever and whatever the customer demands.[65]

The pricing dilemma then centered on the uncertainty about the efficiency and fairness of specific pricing policies that limited the key actors' ability to rationally choose the optimal scheme.[66] For that reason, early ratemaking methodologies were developed pragmatically rather than theoretically – in 1881, Thomas Edison designed what we'd deem a "contract system," which appears to have been the first-of-its-kind fixed charge per lamp installed.[67] To the author, this looks and feels awfully like the way point-to-point transmission is priced (largely speaking, on a reservation basis).

So the theory goes, central station managers, in the late 1800s, justified pricing schemes with the "rhetoric of economic efficiency" but an after-the-fact analysis revealed that the justifications had little to do with strategic thinking and more to do with actors behaving myopically.[68] Accompanying this theory is a pretty significant strand of research suggesting that pricing is a little less about economic theory and a little more sociological[69] (meaning, in plainer terms, that "money prices are the product of conflicts of interest and compromises").[70]

Our inquiry into demand costs, and thus demand charges, continues on, moving next to a fairly oversimplified explanation of demand costs and how they are allocated.[71] As a practical matter, in order to recover any costs, utilities must have

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64. *See* Michael R. Veall, *Industrial electricity demand and the Hopkinson rate: an application of the extreme value distribution,* 14 BELL J. ECON. 427, 427 (1983) ("The Hopkinson rate consists of an energy charge for total kilowatt hour consumption plus an additional demand charge based on the maximum usage by the plant during any quarter-hour period.").

65. The authors go on to explain that the rationale for demand charges – or at least the idea of a "standby" rate is that service starts as soon as the equipment is ready to operate, not when the actual consumption occurs. Yakubovich, *supra* note 44, at 588 ("Charges for fixed costs . . . were assessed according to 'connected load' – the amount of equipment that the customer had connected.").

66. *Id.* at 585; the authors also argue that "if the Insull circle had not succeeded politically in dominating both trade groups, the industry would have developed in much less homogenous ways." *Id*. at 592.

67. *Id.* at 586.

68. Yakubovich, *supra* note 44, at 581.

69. *Id.* at 583 ("We distinguish between outcomes and institutions. Prices are . . . an 'outcome,' emerging from the aggregation of transactions; what is 'institutional' is not the prices themselves, but the rules, norms, habits, and conventions underlying and supporting them.").

70. MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIOLOGY 1 (Univ. of Cal. Press new ed. 1968). The author of that article went on to articulate that prices also result "from power constellations" and that the "price system is a struggle of man against man" with prices being expressions of the struggle.

71. As Bonbright phrased it, the problem with demand charges is "that of imputing joint costs to joint products or by-products, and not merely that of distributing those common but non joint costs which vary more or less continuously with number of consumers or with rates of output. Here, . . . there is no general agreement as to what items or portions of total costs should be included among the demand-related costs, perhaps because cost functions are far too complex to be reflected by the arbitrary, three-way classification of customer, energy, and demand." BONBRIGHT, *supra* note 53, at 350.

on file a tariff that enables the utility to recover those costs.[72] Therefore, rate filings, and by extension the tariffs on file, must feature a method, or mechanism, through which customers are allocated the fixed costs of the system.[73] Based on several decades of literature, coupled with several decades of practice, the predominant means of allocating demand costs steadies itself upon the concept "coincident peak."[74] Coincident peak,[75] simply, reflects a customer's peak as it coincides with the utility's peak – stated slightly differently, what coincident peak tries to do is understand how much of the system a customer is using when the system is demanded the most.[76] The utility uses this information (e.g., what is the peak and who is using the system at the time of system peak) to build out its system. From there, the utility can then allocate the costs of its system to customers on a proportional basis. The utility often will identify a specific period of time when demand for electricity is at its highest (presumably either during the hottest days of the summer, the coldest days of the winter, or some combination of both).

Why is the demand charge so important? The demand charge is critical because it needs to be designed in a way that enables the utility to collect enough revenue to be reimbursed for upgrading and maintaining the system to meet peak demand, whenever that moment comes (i.e., standing ready).[77] Allocating demand costs requires the utility to allocate the cost of infrastructure that is common to

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72. Roughly speaking, Order No. 888 carved into stone the idea that public utilities must have tariffs on file that provide two basic transmission services-network and point-to-point. As part of that effort to memorialize and standardize a minimum suite of rules and practices surrounding transmission service, the Commission also explained that utilities may stray or deviate from this minimum threshold, only so long as the utility can demonstrate that those terms are consistent with or superior to the minimum standard. For a fuller, more in-depth discussion of open access, *see, e.g.*, Cynthia A. Marlette, *FERC Open Access Transmission Rule and Utility Bypass Cases*, 37 NAT. RES. J. 125 (1997).

73. Arguably, the objective function with any pricing methodology should be to induce or mimic what would otherwise look like a competitive outcome. The transmission pricing methods approved by the Commission represent the means of accomplishing the objective function and "translating" transmission costs into transmission charges. *See, e.g.*, Baseem Khan & Ganga Agnihotri, *A Comprehensive Review of Embedded Transmission Pricing Methods Based on Power Flow Tracing Technology*, CHINESE J. ENG'G 1 (2013).

74. In an order from 2013, the Commission explained that it "typically allocates demand costs using a [coincident peak] method, through which demand costs are allocated based on each customer class's load at the time of (or coincident with) the system peak load." *Sw. Pub. Serv. Co.,* 144 FERC ¶ 61,133 at P 2 (2013).

75. Under a coincident peak construct, the utility will determine the hour of the year that system-wide usage was at the highest level. From there, the utility will measure each customer's relative usage of the system at that same time (i.e., the *coincident* peak) to determine the customer's contribution to the total system peak compared to other customers. This contribution serves as the basis for the demand charges. The Commission has also defined coincident peak as "the customer's usage of the transmission system at the time of the transmission provider's maximum (i.e., 'peak') demand, while a transmission customer's 'usage' is its scheduled demands. Coincident peak demands are calculated monthly, and their average over the course of a 12-month period is known as the transmission customer's '12 coincident peak demands.'" See *Idaho Power Co.,* 137 FERC ¶ 61,235 at P 7, n.14 (2011).

76. The Commission has a long history of approving the use of coincident peak as a demand allocator. Even rarer, however, are the instances in which the Commission did not rely on coincident peak to determine a demand charge. *See, e.g.*, *Houlton v. Me. Pub. Serv. Co.,* 62 FERC ¶ 63,023, at p. 65,092 (1993).

77. *See, e.g*, KAHN, *supra* note 43, at 95 ("[T]he demand or capacity charge – is a charge for the utility's readiness to serve, on demand. This readiness to serve is made possible by the installation of capacity: the demand charge, therefore, distributes the costs of providing the capacity—the fixed, capital costs—on the basis of the respective causal responsibilities of various buyers for them.").

multiple customers, customers, and uses.[78] Though this method comes with certain warts, as we will discuss, this rate design is battle-tested, has withstood the test of time, and is often scrutinized yet almost always sustained.[79]

Though demand charges were largely a feature of requirements contracts, they are not just a vestige of the past but instead a centerpiece of modern-day tariffs. In fact, demand charges are as common in the United States as baseball and fireworks in July.[80] Not only are they prominently featured in the tariffs of vertically integrated utilities, but they're also featured in RTO/ISO tariffs – for example, both the PJM and ISO-New England tariffs utilize coincident peak to allocate transmission costs within their regions.[81] In PJM, each transmission owner is given its "slice of the pie" and then the utility allocates that pie within its service territory. All of the transmission owners utilize the coincident peak method, with the only variance being the number of peaks used.[82] Though slightly different in New England, as the transmission owners have separate rates for "Regional" versus "Local" transmission service, the costs of the regional system are allocated using the coincident peak demand allocator.[83]

While some of these issues feel new and shiny, it's not clear that the crossroads the industry finds itself is necessarily unchartered territory. In the years leading up to Order No. 888,[84] utilities, regulators, and customers alike were confronted with the challenge of identifying new pricing paradigms as the industry was evolving from the vertically integrated "bundled product" utility model to a functionally unbundled one. The question seems less a matter of whether we will need to adapt, but instead, how and when.

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78. BONBRIGHT, *supra* note 53, at 350 (citing "[h]ere, as with the other two categories of cost, there is no general agreement as to what items or portions of total costs should be included among the demand-related costs, perhaps because cost functions are far too complex to be reflected by the arbitrary, three-way classification of customer, energy, and demand."); *see also id.* at 354 (citing "[b]ut what, then, makes capacity cost allocation or apportionment such a highly controversial problem? The answer lies in the fact that capacity costs, instead of being ordinary overhead costs, common to different kinds of amounts of service, are *joint* costs-the costs of producing services which are joint products when they are rendered at different periods of time.").

79. The Commission has expressed its general policy as allocating "demand costs on the basis of peak responsibility as is demonstrated by the overwhelming majority of decided cases." *See, e.g.*, 62 FERC ¶ 63,023, at 65,092.

80. *See, e.g.*, *Idaho Power Co*., 137 FERC ¶ 61,235 (2011); *Entergy Ark., Inc.,* 171 FERC ¶ 61,037 (2020); *S. Co. Services, Inc*., 129 FERC ¶ 61,253 (2009); *Pac. Gas and Elec. Co.*, 113 FERC ¶ 61,084 (2005); *New England Power Co.,* 52 FERC ¶ 61, 090 (1990); *Cleco Power,* 139 FERC ¶ 61,166 (2012); *N. States Power Co.,* 143 FERC ¶ 61,220 (2013); *see also* Small *supra* note 40, at 135.

81. It is worth acknowledging that, in PJM as an example, the tariff allocates generation capacity costs, as well, on the basis of five coincidental peaks in order to calculate the Peak Load Contributions (PLC) and Network Service Peak Load (NSPL). *See, e.g.*, *PJM Manual 27: Open Access Transmission of Tariff Accounting*, PJM 29 (2023), https://www.pjm.com/-/media/documents/manuals/m27-redline.ashx.

82. *See, e.g.*, *eTariff – Tariff Browser*, FERC, https://etariff.ferc.gov/TariffBrowser.aspx?tid=1731 (last visited Nov. 1, 2023) (The Attachment M-2s are used to allocate demand costs within the respective transmission owner zones).

83. *See, e.g.*, ISO-New England's Internal Market Monitor, *Spring 2020 Quarterly Markets Report*, ISO-NE 17 (Aug. 17, 2020), https://www.iso-ne.com/static-assets/documents/2020/07/2020-spring-quarterly-markets-report.pdf.

84. *See generally* Order No. 888, *supra* note 63.

IV. ECONOMIC THEORY, AS IT APPLIES TO DEMAND CHARGES

From a theoretical perspective, there are three dominant, classical methods of pricing—marginal cost, incremental cost, and embedded cost. Marginal cost studies look at the cost of building a new utility system[85] and are more difficult to determine than incremental cost and embedded cost, both of which are methods anchored by the costs of the existing system.[86] Whereas embedded cost is essentially a "slice of the system," incremental cost represents what it would take to build onto the existing system to accommodate the new service. Because of their simplicity and relative efficiency, incremental costs and embedded costs are two dominant methods for cost allocation.[87]

As it relates to demand costs, as we touched on briefly, the idea of coincident peak allocation has origins that date back to the so-called "Hopkinson-type" rate schedule (with a specific emphasis on the provision of a two-part rate).[88] The first part of the rate consists of the energy charge (e.g., the variable costs of providing the service).[89] The second part of the rate, the subject of this Article, is the demand charge that seeks to recover the fixed capacity costs of the system.[90] While the variable costs – being driven mostly by fuel costs – are easier to calculate and identify, a customer's use of the system, and the system's capacity, is not as easily calculated or determined.

Notwithstanding the difficulty of the task, nearly every earnest inquiry into pricing starts with the question of how to align prices with the costs being charged.[91] Although it is not necessarily the industry standard, the use of marginal cost pricing has long been considered the preferred approach. Considered a bedrock principle by the prominent authorities on the matter, using marginal costs as a gravitational anchor gives the utility the appropriate investment decisions and the customer the appropriate usage decisions.[92] The argument for marginal costs

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85. Jim Lazar, *Dividing the Pie: Cost Allocation, the First Step in the Rate Design Process*, REGUL. ASSISTANCE PROJECT A-2 (2015), https://www.raponline.org/wp-content/uploads/2016/05/appendix-a-smart-rate-design-2015-aug-31.pdf.

86. The Commission has long touted the benefits of incremental cost pricing, acknowledging that "customers must face prices that reflect their supplier's incremental costs in order for them to make efficient investment decisions and efficient choices when seeking alternative supply sources." *Norwood*, *supra* note 38, at 23.

87. The Commission has a historical preference for the use of embedded, rolled-in costs. *See, e.g.*, *S. Co. Sers., Inc.*, 116 FERC ¶ 61,247 at P 17 (2006) ("Rolled-in pricing is appropriate when the relevant facilities are integrated into the transmission network. This pricing is appropriate because it spreads the cost of network facilities across the entire network; as part of the network, the added facilities benefit all users of the network and thus their costs should be shared among all users of the network. In contrast, rolling in facilities not integrated with the network inappropriately forces all users to subsidize facilities that benefit only one user.").

88. *See, e.g.*, Alfred Lewis, *Two-Part Tariff*, 8 ECONOMICA 249, 251 (1941).

89. *See, e.g.*, KAHN, *supra* note 43, at 65 (defining marginal costs as "producing one more unit; it can equally be envisioned as the cost that would be saved by producing one less unit.").

90. Nordin, *supra* note 49, at 164 ("Capacity is to be understood as fixed equipment used in production, and it is to be measured in terms of the number of KW of demand that can be satisfied.").

91. There is, of course, a give-and-take between the notion that prices should align with costs, but also that prices align with competitive forces. *See, e.g.*, Harvey L. Reiter, *Competition between Public and Private Distributors in a Restructured Power Industry*, 19 ENERGY L.J. 333, 338 (1998).

92. For example, one of the leading authorities argued that "marginal cost must play a major and even a dominant role in the elaboration of any scheme of rates or prices that seriously pretends to have as a major motive the efficient utilization of available resources and facilities." William Vickrey, *Some Implications of Marginal*

is fairly well-known at this point.[93] That said, the theoretically pristine model – or idea – of marginal cost pricing may not easily translate to a highly capital-intensive industry like the electric industry.[94] For starters, marginal cost pricing may be difficult to apply because, given the totality of the fixed expenditures, the marginal cost of a kilowatt of electricity can be less than the average cost, which could lead to losses.[95] It's also entirely possible that long-run marginal cost pricing could result in something resembling monopoly pricing[96] – hence what amounts to a cap at embedded cost. That dynamic could very well be why marginal cost pricing feels more mythical – a unicorn of sorts – than realistic and practical.

As desirable as marginal cost pricing may be, two related items on the menu – embedded cost pricing and load-ratio pricing – are the most frequently ordered.[97] While load-ratio pricing can take many forms, embedded cost pricing takes more of a historical approach to developing rate design. Embedded cost pricing, broadly speaking, is a little more in line with the idea that the utility has sunk costs that it has incurred as part of trying to provide service at some point in the future. With respect to demand allocation, the answer is almost always a reflection of slicing and dicing historical, embedded costs among the different users of the system. Although these costs are essentially sunk, it is these (slowly depreciating) investments that the utility must be reimbursed for in order to continue providing service. To a large extent, these costs were incurred to provide service for years, and even decades, into the future. However, the price signal being sent – a price signal that focuses on past investments – does not necessarily align well with either future customer uses (or usage) and the investments necessary to serve those customers. Is this necessarily indicative of a problem? No, not necessarily – this speaks directly to the concept of how ratemaking is part science, part art and the difficulty of allocating costs in such a capital-intensive industry.

Cost Pricing for Public Utilities, 45 AM. ECON. ASS'N, 605, 605 (1955), *reprinted in* JAMES C. BONBRIGHT ET AL., *supra* note 53, at ch. 17.

93. *Electric Utility Cost Allocation Manual*, NARUC 147 (1992), https://pubs.naruc.org/pub/53A3986F-2354-D714-51BD-23412BCFEDFD (citing "Major reason for allocating costs using marginal cost principles is to promote economic efficiency and societal welfare by simulating the pricing structure and resulting resource allocation of a competitive market.").

94. As a related point, theory alone does not control. The court remanded a matter back to the Commission for reconsideration because, in the court's view, the Commission relied too narrowly on the theory of marginal cost pricing. The court found that the "mere invocation" of the theory was an insufficient substitute for substantial evidence and reasoned explanations, particularly where the theory had been "severely compromised by the revenue constraint." Elec. Consumers Res. Council v. FERC, 747 F.2d 1511, 1513-17 (D.C. Cir. 1984).

95. STEPHEN BROWN AND DAVID SIBLEY, THE THEORY OF PUBLIC UTILITY PRICING 34-37 (Cambridge Univ. Press 1986); *see also*, Severin Borenstein, *The Economics of Fixed Recovery by Utilities.*, 29 ELEC. J. 5 (2016) (citing "[e]conomics provides policymakers guidance when they must depart from efficient pricing (equal to societal marginal cost) to cover an electric utility profit shortfall.").

96. Economic theory suggests that a monopolistic firm will maximize profits by aligning marginal revenue and marginal costs. *See, e.g.*, Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 3 (1989) (standing, roughly speaking, for the proposition that, in perfect competition, a firm will set price equal to marginal cost, but in the context of a monopoly, the firm will find the point at which marginal cost equals marginal revenue). *See also* James I. Serota, *Monopoly Pricing in Time Shortage*, 33 LOY. U. CHI. L. J. 791, 795 (2002).

97. Load-ratio pricing refers to the idea that customers of the transmission system pay on the basis of the ratio of its load to the transmission provider's entire load on its system. *See, e.g.*, Fla. Mun. Power Agency v FERC, 315 F.3d 362 (D.C. Cir. 2003).

At its core, these two concepts represent the sturdy, fundamental pillars of electric pricing. Moreover, these two concepts effectively embody the objective underlying peak pricing (i.e., how to allocate the embedded costs of the system to each of the users of the system on a proportional basis). Under "peak pricing," the peak price is levied on a customer's entire consumption during a specific moment in time (again, the concept of a load ratio share).[98] The "peanut butter and jelly" of assigning capacity costs – or demand costs – is on the basis of coincident peaks.[99] Under a coincident peak pricing approach, demand costs are allocated based on the customer's usage of the utility's system during the coincident peak (or, as is the case in many instances, *peaks*).[100] One of the more common methods is known as the "12-CP" coincident peak.[101] Under this method, demand costs are allocated by taking the hour of highest total usage (the coincident peak) during each of the preceding twelve months, determining the percentage of peak usage drawn by each customer class during each of the twelve months, and averaging the resulting percentages for each customer class.[102]

The emphasis on good rate design is one that seeks to balance, offset, or optimize the different incentives at issue. Inherent in any rate design choice will be decisions on how to balance competing objectives and incentives among the utility and its customers.[103] Using the 1-CP methodology as an example, for a moment, we can quickly identify the push and pull involved with this particular rate design. While the 1-CP methodology makes sense, rationally, for the utility to base its rates (i.e., a rate based on the highest, coincident usage on its system), that methodology only provides a meaningful incentive shave load during the peak moment.[104] And while that peak-shaving is desirable from a reliability perspective, peak-shaving does not occur in a vacuum.[105] When the Commission accepted Do-

98. *Id.*

99. *See* Small*, supra* note 40, at 135 (citing "Demand costs are generally allocated in proportion to a customer's load coincident with the system peak load."). The author goes on to explain that the Commission does not necessarily have a set policy, but instead relies on a host of factors that, collectively, attempt to account for a full range of the utility's operating realities.

100. *Id.*

101. *See, e.g.,* Order No. 888 at 21,599 (citing "We are reaffirming the use of a twelve monthly coincident peak (12 CP) allocation method because we believe the majority of utilities plan their systems to meet their twelve monthly peaks.").

102. Second Taxing Dist. Of Norwalk v. FERC, 683 F.2d 477, 480 (D.C. Cir. 1982).

103. There is, at the heart of the matter, an issue of competing incentives that is pretty difficult to balance. *See, e.g.*, Joel B. Eisen, *Demand Response's Three Generations: Market Pathways and Challenges in the Modern Electric Grid*, 18 N.C. J. OF L. & TECH. 351, 358 (2017) ("There is no organic demand for using less electricity. Progress to more demand-side participation . . . can be derailed by those adversely affected by incentives for demand response.").

104. Under a 1-CP method, the incentive to shave or manage load is muffled – if not lost altogether – during all other hours of the year.

105. Though we get into a full menu of ideas later, it was at this point in drafting that the author wondered whether, in an attempt to align the different incentives, there should be a "standard" demand charge based on average usage throughout a year, with a "plus or minus" penalty or bonus for either shaving load or exceeding your baseline average. *See, e.g.*, Nordin, *supra* note 49, at 163-64 ("[T]he influence of the schedule should be directed toward inducing customers to move consumption from the station peaks to the station troughs. Therefore, hourly demand cost rates should vary directly with the amount of the hourly demand.").

minion's proposal to move from a 1-CP method to a 12-CP method, the Commission was forced to address concerns that the proposal reduced the customer's incentive, and ability, to peak shave.[106] The proposal was effectively being wedged between two competing policy objectives – the first, to promote efficient use of the system and the second, to promote fair and just pricing (so that one party is not subsidizing another).[107] The Commission navigated this dispute by finding that the load reductions at issue were "discretionary" as the load being shaved was not controllable by PJM and thus the utility had no way of avoiding costs (meaning that Dominion must build out its system to serve the customer's entire load, not its load net of any discretionary peak shaving).[108] This is an important theme that will come up again, soon, when we discuss how behind-the-meter generation has affected the demand charge dynamic.

V. OPEN ACCESS & PRICING AROUND THE TIME OF ORDER NO. 888

Any discussion of transmission would be incomplete without a proper acknowledgement of Order No. 888, open access,[109] and the idea that you cannot modify transmission service without considering modifying the pricing associated with that service.[110] We start there – the pricing bit – first because there is a unique set of orders that continues to serve as the guardrails for subsequent pricing proposals.

Prior to the Commission's issuance of Order No. 888, the Commission was confronted with requests to resolve the tension between old and new.[111] The old way of pricing service – the bundled and vertically integrated kind – was not terribly compatible with the demand for new uses of the system (i.e., new incremental demands for either network or point-to-point transmission service). In a series of orders that changed the landscape of what pricing means under the open access

106. *PJM Interconnection et al.*, 172 FERC ¶ 61,054 at PP 42-43 (2020).

107. The concept of cross-subsidization is also referred to as a "rate tilt" – both of which aspire to explain when a customer's charge is out of alignment. *See, e.g.*, *Norwood*, *supra* note 38, at 25.

108. 172 FERC ¶ 61,054, at PP 65-68.

109. Open access was "designed to create a level playing field for new market-entrants who could piggyback on previously created infrastructure at competitive rates. These reforms, known as electricity deregulation or restructuring, promised consumers a true choice in their electricity provide and with it a new era of electricity competition." *See* Joseph P. Tomain, *Electricity and Ideology,* 7 J. ENERGY L. & POL'Y 315 (1986).

110. Order No. 888 has been referred to as the "single largest step" to introduce greater competition into wholesale markets. *See* Gregory N. Basheda et al., *FERC, Stranded Cost Recovery, and Municipalization*, 19 ENERGY L.J. 351, 351-52 (1998).

111. *See, e.g.*, Joshua Z. Rokach, *Transmission Pricing Under the Federal Power Act: Applying a Market Screen*, 14 ENERGY L. J. 95, 101-02 (1993) [hereinafter *Transmission Pricing Under FPA*].

paradigm,[112] the Commission set the stage for how the Commission would evaluate future pricing proposals.[113] These three orders, all issued prior to the Commission's landmark Order No. 888 ruling, would enable the Commission to proceed fearlessly with the "barrier-smashing" concept of open access.[114]

The first – *Northeast Utilities Service Company* – is where the Commission established three central principles in evaluating the justness and reasonableness of different pricing mechanisms.[115] These principles[116] are to: (1) hold native load customers harmless, (2) provide the lowest reasonable cost-based price to third-party firm transmission customers, and (3) prevent the collection of monopoly rents by transmission owners and promote efficient transmission decisions.[117]

Around the time same, the Commission issued another order that established yet another key principle that would soon become weaved into the fabric of modern-day pricing policy. This order – involving Pennsylvania Electric Company ("Penelec")[118] – established the "or" pricing policy, which has come to be understood that a utility can choose to charge one type of rate (e.g., embedded cost) or another (e.g., incremental cost), but not both. To put a little more color on the canvas, this order drastically changed the way we think about transmission pricing. The origin of the initial filing goes back to 1991 when Penelec entered into an agreement with a customer, Penntech Papers, Inc ("Penntech").[119] The agreement provided that Penntech would pay a rate that featured three core elements: 1) the embedded cost rate; 2) an "increased energy cost component" rate designed to compensate native load for lost savings, or opportunity cost; and 3) administrative

112. *See Ne. Utils. Serv. Co. (Re: Public Service Company of New Hampshire)*, 58 FERC ¶ 61,070 (1992), *reh'g denied*, 59 FERC ¶ 61,042 (1992), Order Granting Motion to Vacate and Dismissing Request For Reh'g, 59 FERC ¶ 61,089 (1992), *aff'd in part and remanded in part sub nom*; Ne. Utils. Serv. Co. v. FERC, 993 F.2d 937 (1st Cir. 1993), *order on remand*, 66 FERC ¶ 61,332 (1994), *reh'g denied*, 68 FERC ¶ 61,041 (1994) (1st Cir. Sept. 6, 1994); *Mass. Elec. Co.*, 58 FERC ¶ 61,278 (1992), *reh'g denied* and pricing policy clarified, 60 FERC ¶ 61,034 (1992), *reh'g denied*, 60 FERC ¶ 61,244 (1992), affirmed sub nom, Pa. Elec. Co. v. FERC, 11 F.3d 207 (D.C. Cir. 1993).

113. In Order No. 888, the Commission did not up-end, or even really touch for that matter, pricing for transmission service. As a practical matter, the Commission did not declare a singular just and reasonable approach to pricing in Order No. 888. Instead, the Commission acknowledged that such unbundling could not be implemented in a vacuum without understanding the impact that unbundling would have on pricing. Specifically, the Commission emphasized that the many "non-price" terms and conditions related to functional bundling could not be modified independent of pricing and cost recovery considerations. *See* Order No. 888, *supra* note 63, at 291.

114. Marlette, *supra* note 72, at 125.

115. Just and reasonable is defined under Federal Power Act (FPA) of 2018 at 16 U.S.C. § 824d(a) (2023); *see also* 16 U.S.C. § 824e(a) (2023); *see also*, Matthew R. Christiansen & Joshua C. Macey, *Long Live the Federal Power Act's Bright Line*, 134 HARV. L. REV. 1360, 1368, 1389, 1400 (2021).

116. "A principle is induced from a line of specific reasoned decisions and, once identified, becomes the major premise from which a conclusion may be deduced in the cause at hand." RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 33 (3rd ed. 1989).

117. These principles are fairly consistent with what it means to regulate a firm holding a natural monopoly. *See* STEPHEN G. BREYER, REGULATION AND ITS REFORM 15 (1982) ("[T]he most traditional and persistent rationale for government regulation of a firm's prices and profits is the existence of a 'natural monopoly.'").

118. *Pa. Elec. Co.*, 58 FERC ¶ 61,278 (1992), *reh'g denied* and pricing policy clarified, 60 FERC ¶ 61,034 (1992), *reh'g denied*, 60 FERC ¶ 61,244 (1992), *affirmed* sub nom; Pa. Elec. Co. v. FERC, 11 F.3d 207 (D.C. Cir. 1993).

119. *Pa. Elec. Co.*, 11 F.3d at 208.

and other costs.[120] While the customer was willing to pay the "and" rate at the time the parties executed the agreement, the Commission essentially rejected the agreement and expressly prohibited "and" pricing through this order (and ever since, of course). Relevant to the issues presented in this Article, this order represents the Commission's attempt of "right-sizing" pricing to costs.

Finally, the third musketeer, though possibly the mightiest of this batch of seminal orders is: *AEP*.[121] In *AEP*, the Commission established a "golden rule" of transmission access and transmission pricing, an articulation of a standard that would effectively become what's known as the "open access" requirement.[122] If anything, the "golden rule" established in *AEP* kicked down the door to open access, with the policy ossifying, officially, in Order No. 888.[123] It was in this case that the Commission was required to address whether access was considered open or not – in doing so, the Commission stated that an "open access tariff that is not unduly discriminatory or anticompetitive should offer third parties access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider's uses of its system."[124] In slightly less jargony terms, the "golden rule" means treating others as you would treat yourself (with such treatment serving as a binding, forcing mechanism for what might be considered a permissible pricing mechanism).[125] This concept of comparability, attended by the "golden rule" metaphor, bleeds directly into pricing, as a utility should charge itself in a manner that is comparable, if not the same, with what it would charge others.[126]

Building on the momentum of these three orders, the Commission decided to weave them together as the working, going-forward theories of transmission pricing, and announced the broad framework in the so-called "Transmission Pricing Policy Statement."[127] In essence, the policy statement codified all of the things the Commission was saying, but put them in one central location as a guidepost

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120. *Id.* at 208-09.

121. *Am. Elec. Power Serv. Corp*., 67 FERC 61,168 (1994) ("*AEP*").

122. *Id.*

123. Harvey Reiter, *The Contrasting Policies of the FCC and FERC Regarding Importance of Open Transmission Networks in Downstream Competitive Markets.*, 57 FED. COMM. L.J. 243, 257 (2005).

124. *Am. Elec. Power Serv. Corp*., 67 FERC 61,168 (1994).

125. One of the issues of comparability includes a requirement that a utility must provide all services it can provide – not just the ones it provides itself. WILBUR C. EARLY, COMPETITION IN THE ELECTRIC INDUSTRY: EMERGING ISSUES, OPPORTUNITIES, AND RISKS FOR FACILITY OPERATORS (Nat'l Academies Press 1996).

126. The Commission further articulated this standard in a case that established the relationship between the price and quality of service (and establishing, in particular, the idea that a higher level of service costs more and therefore demands a higher rate). This concept was borne through the precedent established in *Fla. Mun. Power Agency v. Fla. Power & Light Co*., 67 FERC ¶ 61,167, at p. 61,482 (1994). As the author understands it, the fundamental elements of the golden rule include, first, the idea that cost must be allocated between customers in a consistent way – meaning that cost responsibility should be fairly equalized. Second, that when the utility uses its own transmission system to make off-system sales, it should do so at a price that it would otherwise charge third parties for that same service. Again, the theme of "right-sizing."

127. *Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act, Policy Statement,* FERC Stats. & Regs. ¶ 31,005 (1994), *clarified,* 71 FERC ¶ 61,195 (1995) [hereafter referred to as *Pricing Policy Statement*]; *see* 18 C.F.R. § 2.22(1994).

for the future pricing proposals.[128] The ideas the Commission shared back in 1994 sound awfully like the language we hear and use today – namely, the idea that, with the revenue requirement as a backstop, the Commission can approve a mechanism that allocates costs among customers in a manner commensurate with the costs they cause to be incurred.[129] That "roughly commensurate" standard is complemented by the notion that there is no single preferred or favored ratemaking method – a working legal standard that has been in effect for decades, well before any of these notable pricing orders.[130] This policy statement has not been updated in over 30 years, a testament first to the durability of the pricing mechanisms, but also a signal that – *maybe* – pricing mechanisms are due to be revisited to assess their continued durability at a time when the industry is undergoing another wave of significant change.

Pricing really followed everything else the Commission was thinking and doing at the time of Order No. 888 and open access. Open access, simply stated, fundamentally and forever changed the way customers interfaced with utilities and the ways in which those customers utilized the utility's system. Whereas customers were previously "bundled" entirely, the unbundling of transmission from generation forced the industry to develop new methods for pricing transmission usage. New rate designs were needed then to accommodate that transition (i.e., how do you price incremental transmission transactions). The Commission acknowledged as much in Order No. 888, when it espoused the need for innovative pricing that would need to keep pace to match the corresponding evolution of transmission service.[131] We find ourselves at a similar crossroads yet again, though the streets have changed and the lamp posts are solar powered.[132]

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128. *See* 18 C.F.R. § 2.22. In addition to the principles established in *Penelec, Northeast,* and *AEP*, the Commission grounded transmission pricing by clarifying that there exists an upper-bound on any pricing mechanism – the binding properties of the revenue requirement. The revenue requirement, roughly speaking, represents the total cost of service. Typically, the revenue requirement is developed based on a particular test year, often a 12-month period that is most representative of the actual costs of providing service. A cost-of-service study would assist in not only developing the requirement but then, more relevantly, understanding and determining how to design a rate that can recover the costs of providing service under the tariff. This one is a little bit more straight-forward than the first: the price for transmission should be based on the costs of providing that service (as a means of not recovering more than your costs).

129. FPC v. Hope Nat. Gas Co., 320 U.S. 591, 601 (1944). *Hope* still represents a certain flexibility in ratemaking practices in an attempt to allow an equitable exchange of value. *See also* James J. Hoecker, *Used and Useful: Autopsy of a Ratemaking Policy*, 8 ENERGY L.J. 303, 321, 324 (1987).

130. *See, e.g., Duquense Light Co. v. Barasch*, 488 U.S. 299, 316 (1989). Summing the parts together, it appears that the revenue requirement backstop continues to function as a means of preserving the regulatory compact and balancing act that customers pay a just and reasonable price and utility retains its ability to be appropriately and adequately compensated.

131. Order No. 888-A, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 62 Fed. Reg. 12,274, at p. 12,320 (1997) (to be codified at 18 C.F.R. part 35).

132. The need for innovation is probably stronger today than it was in the mid-90s. *See, e.g.*, Eisen, *supra* note 103, at 358 (holding that "Progress has always depended upon the presence of visionary state and federal regulators who see the need for innovation.").

That "pretty similar" crossroads the Commission found itself in 1994 constituted the push and pull between old and new.[133] Even though transmission was, and continues to be, considered a natural monopoly,[134] the gravitational pull of competition moved the industry towards open and competitive wholesale power markets.

How does this all relate to demand charges? For starters, the idea of demand charges is very much embodied in the *pro forma* tariff – the baseline or minimum standard for terms and conditions related to transmission service – adopted by the Commission.[135] The Commission, through Order No. 888, required that public utilities have on file a tariff that features network and point-to-point transmission services that third parties, as well as the utilities themselves, would take under the tariff.[136] The *pro forma* tariff offers two primary types of transmission service – network and point-to-point.[137] Under the network model, a customer's entire needs are served by the transmission provider.[138] Network service is the more flexible of the two services,[139] as the customer pays for what it uses of the system (load, often coincident, will determine the ultimate price for network service). In

133. It is certainly debatable regarding the "pace of play" with respect to regulatory innovation and evolution. In certain ways, the changes feel glacial, while in other ways, the pace feels rapid. *See* Joseph T. Kelliher & Maria Farinella, *The Changing Landscape of Federal Energy Law*, 61 ADMIN L. REV. 611, 612 (2009).

134. *See* Sidharth Sinha, *Introducing Competition in the Power Sector: Open Access and Cross Subsidies*, 40 ECON. AND POL. WEEKLY 631, 631 (2005).

135. *Preventing Undue Discrimination and Preference in Transmission Service*, 123 FERC ¶ 61,299 at P 173.

136. Using ISO-NE and its tariff as an example, "Regional Network Service" is considered the network transmission product. The customer pays a monthly transmission rate that features geographical attributes (in that the monthly transmission rate is based on the load of the local network. The local network, in this example, is considered the transmission facilities of the transmission owner in that particular zone or area. ISO-NE takes these revenues and allocates them among the transmission owners under Schedule 9 of its tariff. Under that section of the tariff, the rate for Regional Network Service is developed by combining the revenue requirements of the individual transmission owners' revenue requirements. *See, e.g.,* EARLY, *supra* note 125, at 10.

137. *Id*. at 10. A brief review of different tariffs reveals that these constructs are largely enshrined in the tariffs of different RTOs and ISOs, though in different ways. *See also Sw. Power Pool,* 149 FERC ¶ 61,113 (2014); *ISO New England Inc*., 178 FERC ¶ 61,086 (2022); *Midcontinent Indep. Sys. Operator, Inc.,* 180 FERC ¶ 61,141 (2022); and *California Independent System Operator Corp.,* 111 FERC ¶ 61,337 (2005).

138. The transmission customer is able to utilize the transmission provider's systems to serve all of its needs (through the process of designating network load and network resources). The Commission defined network service as permitting "a transmission customer to integrate and economically dispatch its resources to serve its load in a manner comparable to the way that the transmission provider uses the transmission system to integrate its generating resources to serve its native load. Because network service is load based, it is reasonable to allocate costs on the basis of load for purposes of pricing network service. This method is familiar to all utilities, is based on readily available data, and will quickly advance the industry on the path to nondiscrimination." Order No. 888-A, *supra* note 131, at 296.

139. *See* Fla. Mun. Power Agency v. FERC, 411 F.3d 287 (D.C. Cir. 2005) (first citing "[n]etwork service permits a utility company using another utility's transmission system to fully integrate load [*i.e.,* the aggregate demand for service on the system at any given time,] and resources on an instantaneous basis in a manner similar to the transmission owner's integration of its own load and resources.") (then citing "We recognized in TAPS that 'network service, as the Commission defined it, means that network customers can call upon the transmission provider to supply not just some, but all of their load at any given moment, when for instance they experience blackouts or brownouts.'"). *See also* Transmission Access Pol'y Study Grp. v. FERC, 225 F.3d 667, 724-25 (D.C. Cir. 2000), *aff'd sub nom.* New York v. FERC, 535 U.S. 1, (2002).

other words, pricing for network service is based on a tried-and-true basis of load-ratio pricing.[140]

As is most relevant to the issues raised here, the Commission outlined in Order No. 888 its policy on whether, and how, a customer could use its own resources to offset its peak demand.[141] More specifically, in Order No. 888, the Commission found that the definition of Network Load would not allow a customer to leverage behind-the-meter resources to lower its peak demand.[142] The Commission went on to re-affirm this policy in Order No. 890, but explained that it would review deviations, or exceptions, to this policy on a case-by-case basis.[143]

Meanwhile, point-to-point transmission service is the less-flexible of the two products, but by far, the most predictable. This approach is based on the contract-path model of transmission service.[144] Contract path pricing is a remarkably efficient method for pricing transmission as, for pricing purposes, the rate for a "contract path" is premised on the costs of providing service along the path – customers pay for service from designated points of receipt to designated points of delivery.[145] A customer must reserve a certain amount of capacity to be used and the price it pays is based entirely on the reservation and not the actual load.[146] Thus,

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140. Under load ratio pricing, the costs of the transmission system are allocated on the basis of the ratio of the network customer's load to the transmission provider's entire load on its transmission system. *See* 315 F.3d 362, *supra* note 97, at 363.

141. Order No. 888, *supra* note 63, at 21,599.

142. The Commission reinforced these findings further through Order No. 888-A when it found that the definition of network load in the *pro forma* OATT does not allow for the use of BTM generation to lower a network customer's coincident peak demand. It provided for the exception whereby BTM generation could be excluded. *See* Order No. 888-A, *supra* note 131, at 12,320 (citing "[c]ustomers that elect to do so . . . must seek alternative transmission service for any such load that has not been designated as network load for network service. This option is also available to customers with load served by 'behind the meter' generation that seek to eliminate the load from their network load ratio calculation.").

143. Order No. 890, *Preventing Undue Discrimination & Preference in Transmission Service*, 118 FERC ¶ 61,119 at P 1,619 (2007) ("The Commission is not persuaded to require transmission providers to allow netting of behind the meter generation against transmission service charges to the extent customers do not rely on the transmission system to meet their energy needs. Commenters in this proceeding have not provided any different arguments that were not fully considered and addressed in Order No. 888, *et al*. The existing *pro forma* OATT already permits transmission customers to exclude the entirety of a discrete load from network service and serve such load with the customer's behind the meter generation and through any needed point-to-point transmission service, thereby reducing the network customer's load ratio share. Therefore, the Commission's existing policy already provides customers with the opportunity to reduce network service costs to the extent a customer is not relying on the transmission system to meet its energy needs. As the Commission concluded in Order No. 888-A, transmission customers ultimately must evaluate the financial advantages and risks and choose to use either network integration or firm point-to-point transmission service to serve load. We believe it is most appropriate to continue to review alternative transmission provider proposals for behind the meter generation treatment on a case-by-case basis, as the Commission did in the PJM proceeding cited by the commenters.").

144. For a more detailed history of contract path pricing and its alternatives, *see* Michael A. Cannella et al., *Beyond Contract Path: A Realistic Approach to Transmission Pricing*, 9 ELEC. J. 26 (1996); *see also* William W. Hogan, *Path Dependent Transmission Access*, HARV. UNIV. (2006), https://hepg.hks.harvard.edu/files/hepg/files/hogan_oatt_060906.pdf.

145. *See, e.g.,* Transmission Access Pol'y Study Grp. v. FERC, 225 F.3 667, 725 n.12 (D.C. Cir. 2000).

146. For example, assume there are two customers, one network and another point-to-point. The network customer will pay a charge based on its actual load during the coincident peak moment (say, 30 MW, even if its load is otherwise higher during the non-coincident peak moments). The point-to-point transmission customer

point-to-point transmission customers pay for the fixed costs of the transmission system based on its reservations unlike network customers that pay fixed costs on the basis of its actual usage (e.g., coincident peak load). However, as has been well documented, power flows do not necessarily respect contractual boundaries[147] making contract path pricing a decent-at-best proxy for the actual costs of the facilities used to accommodate a transmission service request. In contrast, "[n]etwork service allows more flexibility by allowing a transmission customer to use the entire transmission network to provide generation service for specified resources and specified loads without having to pay multiple charges for each resource-load pairing."[148]

Although the Commission did not prescribe a universal method for pricing, the Commission did the next best thing which was to outline two clear paths – the first path, which included a reaffirmation that most utilities plan their systems to meet twelve monthly peaks, therefore reinforcing the continued use of the "12-CP" method for allocating network system costs.[149] Alongside that endorsement came the second path (in the form of an invitation) that utilities were free to file another method so long as the utility could draw a connection to its transmission system planning.[150] This serves as the foundation for the section to follow.

VI. THE SUSTAINABILITY OF UTILIZING PEAK PRICING

A ratemaking method is arguably successful in so far as it is able to align what it charges a customer with the actual costs that the customer causes (or at least does so on a reasonably consistent basis).[151] The coincident peak method is, if nothing else, a battle-tested method for allocating the demand-related costs of the system. The battles reveal that the coincident peak method is not without challenges – not just from the perspective of new challenges (the premise of this Article), but from a basic design standpoint (the decision points inherent in designing a reasonably good demand charge). The existing design challenges are fairly well known and include, for example, the inherent variability of usage, ever-changing

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will always pay for, and receive, the full amount of its reservation, regardless of whether it uses or needs the entire reservation.

147. In reality, power flows are rarely confined to a designated contract path. Rather, power flows over multiple parallel paths that may be owned by several utilities that are not on the contract path. The actual power flow is controlled by the laws of physics which cause power being transmitted from one utility to another to travel along multiple parallel paths. This parallel path flow is sometimes called "loop flow." *See Ind. Mich. Power Co. & Ohio Power Co.*, 64 FERC ¶ 61,184, at p. 62,545 (1993).

148. Order No. 888, *supra* note 63, at 21,547 n.65.

149. *Id.* at 21,599.

150. *Id.* The Commission also spoke to rate discounts, explaining that discounts could be justified on the basis that the discount is offered on the same unconstrained path to any customer that wants to take advantage of the discount. Order Nos. 888 and 888-A provided an express pathway towards providing discounts on transmission service. It did so, of course, under precise conditions. *See* Order No. 888-A, *supra* note 131, at 12,332.

151. To be sure, and as is a major theme of this article, ratemaking – and by extension, rates – is a fabric weaved together by multiple threads in an attempt to capture and balance the different interests. One possible means of weaving together a new rate is through settlement. The idea of settlement can be formal or informal, with competition from other utilities potentially driving rate concessions for customers. *See generally* Nordin, *supra* note 49.

weather patterns (along with more extreme weather events) and its ability to navigate new technologies. We touch on these issues briefly.

Regarding the natural and inherent variability, peaks, as a baseline, and a customer's coincident peak, will naturally fluctuate.[152] This certain unpredictability represents one of the difficulties faced by the utility in designing a coincident peak method that appropriately captures how the system peaks and how its customers use the system during that peak (i.e., the difficulty of hitting a moving target).[153] Predicting customer behavior is a challenge for the utility because, while the rate design signals an incentive for customers to shave their peak load, it is not an event the utility can rely upon with exact precision. Adding a layer of complexity is that most (if not all) coincident peak methods on file, by design, are backwards looking[154] and may not prove to be a good proxy for usage in the future.[155]

Regarding new technologies and new uses, this is the space that has grabbed our attention. Although energy efficiency is hardly the most representative example, let's use it as one for the sake of discussion (particularly, in the context of the question as to the compatibility of the coincident peak method with energy efficiency measures).[156] The principle question posed here asks whether coincident peak pricing is able to provide or sustain the appropriate incentives for customers to employ behind-the-meter constructs, which would include energy efficiency measures.[157] A simplified version of this analysis yields a scenario whereby energy efficiency fails to capture its intended effect. For example, customers that invest in energy-efficiency measures may not yield the desired benefits of their investments; even if they may be successful in lowering non-coincident peak demand, coincident peak demand may still be proportionally high enough to yield

152. As Alfred Kahn put it, "[i]n the real world, costs and demands are constantly changing over time." KAHN, *supra* note 43, at 103.

153. Traditionally speaking, what this looks like is a utility identifying the number of peaks its system has (often choosing between 1, 3, 5, or 12, though any proposed number must be backed and supported by actual evidence demonstrating how the system peaks).

154. There are, of course, forward-looking formula rates that attempt to project costs one year into the future (a concept borrowing heavily on the Commission's Part I and Part II cost-of-service regulations). Even so, the vast majority of the costs at issue are sunk and historical.

155. KAHN, *supra* note 43, at 109 (citing "[m]ost of the time and energy expended in regulatory proceedings is taken up with recomputing aggregate company revenue requirements, with a view toward adjusting the general rate level to changes in total costs. There is no question of economic principle about the necessity for these efforts: ideally, prices should reflect marginal cost at the time of the sale – not at some time in the past.").

156. To be clear, energy efficiency continues to suffer from its own inefficiencies, which obscure the analysis just a smidge. Even though energy efficiency is "a bit like motherhood and apple pie" – things that are considered ostensibly good – the features and flaws of the design and implementation of those programs have led to mixed results. *See, e.g.*, Heather Payne, *Electrifying Efficiency*, 40 STAN. ENVTL. L.J. 57 (2021).

157. Potentially complicating our discussion of incentives is the role that subsidies (e.g., tax incentives) play. This article takes no position on the impact that subsidies will have on this dynamic, though plenty of articles have attempted to do so. *See, e.g.*, David B. Raskin, *The Regulatory Challenge of Distributed Generation*, 4 HARV. BUS. L. REV. ONLINE 38 (2013).

little reduction in their demand charges.[158] Stated slightly differently, their contribution to (and investment in) lowering their usage during non-coincident peak moments may not guarantee any reduction in their coincident peak demand charges.

Those are not the only design challenges with relying on coincident peak. One issue – maybe even a blind spot – of the coincident peak method is that it is merely a snapshot. It is a single moment in time that may not be fully representative of how the customer uses the system throughout a calendar year. Therefore, the concept of a snapshot introduces a potential flaw of the coincident peak method, which is its inability to mitigate (or account for) the difference between a customer's usage during the peak moment and that customer's usage during the other moments.[159] One possible construction of this argument is that the coincident peak method focuses solely at one moment at the expense of, essentially, all other moments. This issue is not merely theoretical, as we will soon explore, but rather a practical implication of a utility's choice to use one moment, or a few moments, to serve as representative of a customer's demand of the system. This is where administrative efficiency clashes with mathematical precision.

For the sake of example let's assume that a utility has: (1) a peak load of 100 MW; (2) four customers; and (3) a "1-CP" tariff. During the 1-CP moment, the four customers use the system as follows, on a relative basis: customer one demands 25%, customer two demands 20%, customer three demands 5%, and customer four demands 50%. However, during the non-coincident peak moments, the same four customers use the system, on a relative basis as follows: customer one demands 30%, customer two demands 25%, customer three demands 20%, and customer four demands 25%.[160] While this scenario is for illustrative purposes, it demonstrates the possibility that one customer could curtail its usage significantly below the amount that it otherwise would use (arguably, in a manner that is not representative of its usage during the remaining 8,759 hours of the year).[161] In a vacuum, that curtailment and conservation is meaningful and valuable to the system, but for the purposes of allocating demand costs, the end result is that customer three pays significantly less than it otherwise should and, because of the proportional nature of the coincident peak allocation, the remaining customers pay a larger share. These cost shifts speak to the potential for issues with (relying solely on) peak-load pricing – utilities are taking into consideration investment during non-coincident peak moments (i.e., building out a system to account for solar that typically peaks hours well before the transmission system peaks later

158. This holds true if you subscribe to the belief that peaks are becoming more extreme (or that we're trending towards setting new and higher peak demands).

159. It's entirely possible that, when you look at how Kahn referred to demand charges, it seemed to be assumed that demand was far more inelastic than it is today – and, certainly, than it will be a decade from now). For example, most of Kahn's arguments regarding demand charges focused on the discrepancy between average cost pricing and marginal cost pricing. In particular, Kahn took issue with the "[M]ajor discrepancy between the economist's prescription for optimal pricing and the traditional and still generally followed approach of public utility regulation." KAHN, *supra* note 43, at 88-89.

160. The issues presented here become magnified when certain customers have a greater ability to reduce their consumption and others don't. One possible argument is that the coincident peak method assumes that customers are similar in their elasticity of their demand.

161. Meaning, for planning purposes, the utility cannot ignore demands during non-coincident peak periods.

in the day). Indeed, there is some recent literature indicating that, at least on the distribution side, peak costs may not necessarily be the primary driver of infrastructure costs.[162]

While the above example is theoretical, the following example is not and points to the limitations and future pressure points that may emerge between the existing coincident peak methods and the new uses of the system, including behind-the-meter generation (with the hypothesis being tested that the coincident peak method is only as valuable as its ability to properly and genuinely allocate costs among customers in a way that is representative of how those customers use the system across the duration of a calendar year).

In 2017, Virginia Electric and Power Company (otherwise known as Dominion) filed proposed changes – a new average demand calculation – that would effectively establish a backstop to its then-current coincident peak methodology.[163] The problem presented by Dominion was that, under the then-existing method, certain customers would be able to forecast the annual peak and intentionally reduce their load to avoid certain charges. Dominion's method at the time relied on what's known as a "1-CP" method – effectively a single snapshot, the one highest peak hour across all hours of the year.[164] As Dominion argued, the proposed backstop would reduce a transmission customer's incentive to avoid consumption during the system peak because, as a result of that avoided consumption, costs will begin shifting disproportionally to other customers.[165] The argument presented by Dominion, and the one illustrated in the example using the four transmission customers above, is that, under the current paradigm, discretionary load reduction can have the effect of shifting costs onto other customers. Dominion's argument was that the then-existing method was sending the wrong incentives.

Arguably, that's true, but it is a design choice and reflective of the fact that one rate design cannot wholly fulfill the incentives and desires of both the utility and the customer.[166] Therefore, we have not just an incentives issues but also one involving mechanics and mitigation.[167] One viewpoint is that reducing consumption at the time of system peak is a good thing, but the failure of the 1-CP method is that it is unable to protect or shield other customers from bearing a disproportionate amount of costs (effectively picking up the tab for the customer, or customers, that successfully reduced their load at the time of system peak, as the utility cannot avoid building its system to meet demand during non-coincident

162. In one strand of research – though narrowed to the field of distribution system capacity – one study revealed that only 10% of a utility's capital investments in the distribution system went towards system capacity. *See* Noah Rauschkolb, et al., *Estimating electricity distribution costs using historical data*, 73 UTILS. POL'Y (2021).

163. *PJM Interconnection, Inc. et al,* 162 FERC ¶ 61,136 at P 1 (2018).

164. *Id.* at PP 1-2.

165. *Id.* at PP 1, 4.

166. As alluded to previously, policy is often a series of messy compromises cobbled together – while there may be a mathematically optimal and elegant solution to these problems, any policy decision must balance several competing objectives.

167. As relevant to this article, I use the term "mitigation" to mean the ability of the mechanism to protect against unnecessary or undue harm or preference to the particular users of that mechanism. *See, e.g.*, Nordin, *supra* note 49, at 164 (holding that "[i]n assessing charges for demand costs, justice among customers must be thought of in terms of the fairness of hourly charges.").

moments). This issue is significantly more acute when you consider the fact that not all customers are created equal, with some being able to shift their load (or more easily, at least[168]) and others being unable to shift it whatsoever.[169]

In order to address this concern, Dominion proposed to incorporate an average demand calculation to its existing coincident peak methodology – in essence, a minimum charge for access to the transmission system.[170] Under the proposal, Dominion would calculate each customers' average demand by dividing its total hourly load during the relevant twelve-month period. Under the proposal, Dominion would effectively use the higher of its average demand or the customers' coincident peak demand when it came time to determine demand charges.[171] This served as Dominion's attempt to build in a mechanism that could mitigate the cost-shifting in a way that accounted for and reflected its customers usage during all periods – not just peak periods.[172] As Dominion described it, a transmission customer could have load on the transmission system in all hours besides the one coincident peak hour and yet not pay any network system charges.[173] And, according to Dominion, even though the transmission customer reduced its demand at the time of the coincident peak, that reduction does not mean Dominion can avoid building its system to meet this customer's needs (i.e. as Dominion must continue serving that load in the remaining 8,759 hours).[174]

168. Ethan Howland, *Data centers, EVs drive PJM's long-term load growth forecast, but it expects some utilities to see declines*, UTIL. DIVE (Jan. 4, 2022), https://www.utilitydive.com/news/data-centers-evs-drive-pjm-load-growth-forecast-capacity-market/616584/.

169. At the risk of undermining my own statement, it would seem that the very existence of customers being able to shift their load at the time of system peak means that the customers needing the system the most at the time of system peak should pay the most. The task of apportioning joint costs on a jointly-used system is not simple, especially when a utility must plan and build its system to meet a customer's needs at all hours – not just the coincident peak. Even to Kahn this analysis wasn't terribly straight-forward. As he put it, "the economic principle here is absolutely clear: if the same type of capacity serves all users, capacity costs as such should be levied only on utilization at the peak." Immediately after making that statement, however, Kahn acknowledged that while "the principle is clear . . . it is more complicated than might appear." KAHN, *supra* note 43, at 89. What isn't clear is whether the methods for allocating demand costs made certain assumptions about the elasticity of demand that may not hold true in today's environment.

170. 162 FERC ¶ 61,136, at P 1, 4 (citing "[s]pecifically, Dominion's proposed changes incorporate a new average demand calculation that would serve as a backstop to the current annual coincident peak demand methodology in order to reduce a transmission customer's incentive to avoid consumption during the system peak, and thereby shift transmission costs to other transmission customers."). The Commission did not accept the proposal, but it is discussed here to illustrate the challenges with properly calibrating demand charges.

171. A literature review reveals the relative use and benefits of an average demand. *See, e.g.*, Carolyn Brancato, *New Approaches to Current Problems in Electric Utility Rate Design*, COLUM. J. ENVTL. L. 1989, at 40.

172. 162 FERC ¶ 61,136, at P 4 (citing "Dominion states that, absent its proposal, a transmission customer could have load on the transmission system in all hours (including those hours during which emergency conditions are occurring) besides the coincident peak, yet pay no Network Service charge.").

173. *Id.*

174. *Id*.

The cost-shifting issue is a serious one,[175] and likely to be stressed further with the progression of demand-side tools that will soon be cheaper and more accessible.[176] If load reductions are causing or enabling cost-shifting in a way that disrupts the delicate cost causation ecosystem that exists among different network customers, then it seems entirely possible that the rate design provides neither the appropriate incentives nor the appropriate cost-shifting mitigation.[177] Stated differently, if one customer is able to avoid costs in a way that causes a different customer to pay a higher share than their proportional use, it is entirely possible that such a cost-shift could violate the Commission's cost causation policy.[178]

While this case presented the Commission with an opportunity to speak to the different competing objectives – and possible infirmities – with the coincident peak method, it did not need to speak to those issues. Ultimately, the Commission determined that it was not able to accept Dominion's proposal – not because of an issue with the merits, but rather that Dominion had not fully supported its proposed approach.[179] The Commission acknowledged that Dominion relied solely on a hypothetical scenario – a bug of the existing pricing paradigm[180] – without evidence that any customer had, or was likely to, cause costs to be shifted. The Commission declared that it could not determine something to be just and reasonable, in this regard, given the lack of evidence.[181] It was near the end of the determination, however, that the Commission gave a breadcrumb as to how it would look at the use of a customer's average demand – the Commission explained that it was

175. In Order No. 888-A, the Commission spoke directly to this concern – the idea of cross-subsidization – and the concern that "any cost responsibility evaded by a network customer in this manner would be borne by the remaining network customers and native load." Order No. 888-A, *supra* note 131, at 248.

176. *See, e.g.*, *Spring 2020 Quarterly Markets Report*, *supra* note 83, § 3.2.3. In that report, the Internal Market Monitor raised concerns that certain "[n]etwork customers [we]re avoiding paying their share of the costs of the transmission network." In addition, the Internal Market Monitor observed that "unreported" behind-the-meter generation was leading to a higher network transmission service rate for all network customers. In particular, the report argued that "with the significant growth in small scale distributed generation in New England, notably photovoltaic and energy storage devices, the wider and future impact of the proposed change should be considered from the perspective of equitable cost allocation and impacts on wholesale markets. For instance, consideration should be given to any adverse impacts on bulk system reliability and market efficiency of potentially large amounts of non-centrally dispatchable and unpriced generation choosing to be behind-the-meter (given the proposed transmission savings to the associated load) when otherwise they might participate in the wholesale market based on a demonstrated equitable allocation of transmission costs." *See Comments of the Internal Market Monitor on the Proposal to Exclude Behind-the-Meter Generation from Transmission Cost Allocation*, FERC Docket No. ER21-2337-000 (July 22, 2021).

177. We have, at the heart of this thing, an incentives problem. *See* Kavulla, *supra* note 36, at 19.

178. *See, e.g.*, *Occidental Chemical Corp. v. PJM Interconnection et al.*, 102 FERC ¶ 61,275 at P 14 (2003). ("Access charges for use of PJM's transmission system should be allocated to network customers based on a network customer's actual use of PJM's system, consistent with the principle of cost causation.").

179. *Id.* at P 18.

180. A bug, in part, because going-forward rates should reflect going-forward costs. *See, e.g.*, KAHN, *supra* note 43, at 63-86. Instead, the coincident peak mechanism charges customers on a prospective basis based primarily on historical load – load that may or may not be representative of the future.

181. 162 FERC ¶ 61,136, at P 25 (citing "[t]he Commission cannot determine the justness and reasonableness of Dominion's proposal given the lack of evidence to support the existence of the problem and the solution to the potential problem.").

unsure, at best, of how average demand would align with how transmission customers pay for their use of the system.[182] The linkage between how a utility plans its system and the ultimate billing is the strongest thread we have.

The concerns associated with cost-shifting are not new, either. In Order No. 888, the Commission spoke to concerns regarding the potential for cost-shifting among Network Customers (and to be precise, cost-shifts driven by load reductions).[183] As relevant to cost-shifts, the Commission emphasized the idea that any cost responsibility evaded by one customer would necessarily mean that another customer would need to assume that cost responsibility, in addition to its own.[184] We are only at the beginning of understanding these interactions, but behind-the-meter generation may prove a successful challenger to the coincident peak method, if it is successful in prompting the concerns raised by the Commission (i.e., evading and/or shifting cost responsibility). Relevant to that answer is the degree to which a customer's behind-the-meter generation enables the utility to avoid incurring costs to serve that customer. We turn next to a few cases that provoked those questions.

VII. LESSONS FROM BEHIND-THE-METER, A CASE STUDY OF SORTS

The idea of behind-the-meter generation is not necessarily new,[185] but its use is set to become nearly ubiquitous.[186] The problem statement posed here, however, is the compatibility of the current coincident peak method with the increased use of behind-the-meter generation. There are a few cases that inform our thinking on this, or at least begin the process for thinking about this issue more holistically. These cases speak more to confirming the problem statement's existence, as opposed to presenting ready-made solutions.

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182. *Id.*

183. *See* Order No. 888, *supra* note 63, *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at p. 30,259-60, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997) [hereinafter Order No. 888-B], *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998) [hereinafter Order No. 888-C], *aff'd in relevant part sub nom*. Transmission Access Pol'y Study Grp. v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom*. New York v. FERC, 535 U.S. 1 (2002) ("For example, if at the time of the monthly system peak the FMPA member city generates more than 40 MW (or takes short-term firm transmission service (or a combination of the two), it may be able to lower its monthly coincident peak load for network billing purposes, and thereby reducing if not eliminating its load-ratio cost responsibility for network service. Because network and native load customers bear any residual system costs on a load-ratio basis, any cost responsibility evaded by a network customer in this manner would be borne by the remaining network customers and native load.").

184. Order No. 888, *supra* note 63, at 491-92.

185. In fact, what we'd called behind-the-meter generation today largely looks like the "self-generation" from an "isolated plant" that was previously the dominant source of electricity at the turn of the 20th century. John L. Neufeld, *Price Discrimination and the Adoption of the Electricity Demand Charge*, 47 J. ECON. HIST. 693, 693–709 (1987). That article also went on to argue that "[m]any, if not all, of the electricity pricing structures, which continue to be used and considered today were explored then, and lively exchanges occurred between advocates of demand-charge rate structures and advocates of time-of-day structures."

186. There is, to be sure, a direct relationship between assets *behind-the-meter* and the concept of net-metering, though this Article does not explore that relationship. Net-metering, in short, is a retail billing mechanism that treats excess output from a behind-the-meter asset as a credit against a homeowner's consumption of electricity. *See, e.g.*, Order No. 2003-A, *Standardization of Generator Interconnection Agreements and Procedures,* FERC Stats. & Regs. ¶ 31,160, 68 Fed. Reg. 69,599 at P 744 (2004) (codified at C.F.R. pt. 35).

In 2004, PJM filed, and the Commission accepted, a proposal that would allow market participants to net their behind-the-meter generation against load (at the same electrical location) for the purposes of calculating demand charges in PJM.[187] There were two critical components to that proposal – the first being that the generation needed to be at the same electrical location as load and second, that PJM needed to have the ability to require the generation to run in the event of a capacity shortage.[188] Several municipal entities raised issues with the proposal because they could not take advantage of the netting rules as a result of having several load points – PJM argued, in response that those uses would not qualify, as that particular behind-the-meter generation configuration would make use of the transmission system.[189] In accepting the 2004 filing, the Commission required several status reports – the Commission would eventually use those status reports to initiate a section 206 proceeding[190] that ultimately resulted in a settlement.[191] The final resting spot for this issue involved tariff language that permitted netting, but so long as the behind-the-meter generation does not use the transmission system.[192]

Picking up again on the theme of reliance on the transmission system, the Commission also explored this issue in a dispute between Amtrak and PPL.[193] Amtrak sought to utilize and leverage the power from one of its resources – a hydro resource – as a means of netting out its network transmission charges.[194] The Commission rejected this request, however, finding instead that Amtrak's request cuts against the very nature of network service.[195] Amtrak insisted that, on the basis of cost causation, it should only pay for transmission costs when the facility (which happened to be behind-the-meter) failed to provide enough power to meet Amtrak's demand.[196]

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187. *PJM Interconnection*, 107 FERC ¶ 61,113 at P 8 (2004) (citing "[f]inally, PJM emphasizes that the intent of its proposal is to limit the netting of behind the meter generation to only entities that directly serve load by generating resources that are located at the same site or "single electrical location.").

188. As a point of emphasis, the Commission emphasized the idea of a "qualified" resource. *See id.* at P 29 (citing "[a]s proposed, PJM's market rules will provide a benefit to qualifying behind the meter generation that contributes to network load reductions by allocating a fairer share of transmission system and other operating costs.").

189. *Id.* at P 30 (citing "[f]or instance, unlike industrial generators, the municipal generators have failed to show that their generation does not make use of the transmission system, such that they should be relieved of paying the applicable charges.").

190. *PJM Interconnection,* 112 FERC ¶ 61,034 at P 17 (2005) (citing concerns that "PJM has not satisfactorily shown that BTM generation that is connected to load through a distribution system should be excluded from the netting program.").

191. *PJM Interconnection*, 113 FERC ¶ 61,279 at P 4 (2005) (citing that the "settlement provides an opportunity for generators connected to a distribution system to qualify for the BTMG netting provisions.").

192. *Id.*

193. *Nat'l R.R. Passenger Corp. v. PPL Elec. Utils. Corp.,* 171 FERC ¶ 61,237 at P 1 (2020), *reh'g*, 173 FERC ¶ 61,043 at P 1 (2020).

194. 171 FERC ¶ 61,237, at P 2.

195. 173 FERC ¶ 61,043*,* at n.34 (citing "[t]o the extent Amtrak believes it is not relying on PPL to meet its transmission needs, it should modify the type of transmission service it uses.").

196. *Id.* at P 9.

In response to these arguments, the Commission explained that Amtrak's service was not reservation based (i.e., point-to-point transmission), but instead network based[197] – meaning that Amtrak could "'call upon the transmission provider to supply not just some, but all of their load at any given moment, when for instance they experience blackouts or brownouts.'"[198] Under this dynamic, the Commission found that the bargain struck under network service is that a customer can call upon the system to meet all of its load at any given moment – making network service something of an "all or nothing" proposition.[199]

This issue appeared again in the context of behind-the-meter generation in ISO-NE.[200] The issue presented there was a little less narrow and a little more holistic. The question, primarily, was how to treat behind-the-meter generation when the Transmission Owner goes to determine the peak load (and peak load responsibility).[201] The Commission was left with a fairly difficult task – squaring away the treatment of these newer technologies with these bread-and-butter transmission products.[202] Ultimately, the answer came down to old-school open access fundamentals.[203] The Commission's answer in this proceeding also hinged on a distinction with a significant difference – specifically, the idea that not all behind-the-meter generation resources are created equally.[204] Even though there was a significant amount of installed behind-the-meter generation, not all of it was es-

197. *Id.* at P 12 (citing "[w]hat Amtrak seeks to do is carve out from network service charges the power supplied by Safe Harbor. Such an outcome is impermissible under the PJM Tariff and inconsistent with the nature of NITS.").

198. *See Fla. Mun. Power*, 411 F.3d at 289. (The Commission made this statement, relying on precedent established in this case). The Commission also explained that "Amtrak's cost causation arguments similarly fail because the assessment of NITS is not based on actual use over a particular transmission path, but rather based on the network customer's right to use the entire system." 173 FERC ¶ 61,043, at P 14.

199. *Fla. Mun. Power*, 411 F.3d at 289.

200. 178 FERC ¶ 61,086, at P 49 (citing "[w]e find that the proposed revisions, which exclude from the Monthly RNL load served by unregistered behind-the-meter generation, along with the portion of the output of a Generator Asset that serves load located behind the same retail customer meter as the Generator Asset, reasonably reflect each Network Customer's usage of the transmission system and assigns the cost of providing Regional Network Service accordingly.").

201. *Id.* at PP 1, 4-5.

202. *Id.* at P 56.

203. *Id.* at P 51 (citing, in response to whether the proposal was consistent with the policy articulated in Order No. 888, "[h]ere, such an approach is just and reasonable because each Network Customer's net load is a reasonable approximation of its use of the transmission system: unregistered behind-the-meter generation reduces the Network Customer's load that must be served from the transmission system.").

204. The distinction made in the filing revolved around the idea of "registered" versus "unregistered" behind-the-meter generation. 178 FERC ¶ 61,086, at PP 1, 51, n.78 (citing "*see* 107 FERC ¶ 61,113, at PP 1, 28 (accepting proposal to allow market participants to net operating behind-the-meter generation against load at the same electrical location for the purposes of calculating a variety of applicable PJM charges, including transmission service charges, because the proposal appropriately allocated operating costs of the transmission system, among other reasons); *see also Occidental Chemical Corp. v. PJM Interconnection*, 102 FERC ¶ 61,275 at P 14 (rejecting PJM's proposal to add back curtailed load for purposes of calculating network charges, finding that while PJM's consideration of curtailed loads may be one of many factors that is appropriate to consider for transmission planning purposes, its inclusion as an allocation factor for network charges was not justified.").

sentially registered as a resource with ISO-NE (and thus not available to be committed or dispatched in a reliably predictive manner).[205] Therefore, in this case, the Commission put a bit of a finer point on its stance on utilizing behind-the-meter generation to offset a customer's coincident peak load.[206]

VIII. THE WAY FORWARD & POTENTIAL MODIFICATIONS TO THE COINCIDENT PEAK METHOD

This Article takes the position that demand charges – as they are predominantly comprised today – are not enshrined in wholesale tariffs because they are necessarily the *best* at what they do.[207] Instead, they seem to exist because of their ability to accommodate a compromise of competing interests. The case law outlined above indicates that maybe the compromise is being renegotiated in real-time. If history is to yield any clues, it is that the solution that bridges the competing interests together will likely be a fact- and case-specific solution.[208]

As we embark on a search for a potential solution, we are not at a complete loss for tools; we have an adequate compass and map. First, the compass, our north star: we have a statutory framework and second, a map consisting of several decades worth of case law that may help guide, and inform the way we look at these issues in the future.

First, the compass. We have the framework under section 205 of the Federal Power Act ("section 205") as the ultimate guidepost,[209] as any proposal will need

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205. 178 FERC ¶ 61,086, at P 54 (citing "[w]e find that behind-the-meter Generator Assets and unregistered behind-the-meter generators are not similarly situated for the purposes of the inquiry at hand, namely the Monthly RNL calculation and corresponding charges for Regional Network Service, which is the focus of the proposed Tariff revisions.").

206. *Id.* at P 55 (citing "[a]s a result, we find that unregistered behind-the-meter generation is not similarly situated to Generator Assets for purposes of calculating the Monthly RNL; the electricity that a Generator Asset produces to serve load is metered as Filing Parties explain with robust telemetering equipment or revenue grade metering, while the electricity that an unregistered behind-the-meter generation produces is not.").

207. The doubt presented here is not new and dates back several decades, if not to the origin story of demand charges. In particular, the two quintessential "Godfathers" of regulatory policy – Kahn and Bonbright – have cast doubt on demand charges, with Alfred Kahn deeming them "illogical." *See, e.g.*, KAHN, *supra* note 43, at 96; *see also*, Borenstein, *supra* note 95, at 10 (citing "[i]t is unclear why demand charges still exist. Charging customers for their peak usage during a billing period has been supported as an approximation to a customer's demand during system peak periods, but it was never a very good approximation, as the customer's peak may not be coincident with the system peak. Furthermore, the single highest consumption hour of the billing period is not the only, and may not even be the primary, determinant of the customer's overall contribution to the need for generation, transmission, and distribution capacity.").

208. *See, e.g.*, 172 FERC ¶ 61,054, at P 72 (citing "[a]s to the fact that other PJM transmission owners utilize the 5-CP method, the Commission explained in the Coincident Peak Order that this is irrelevant for purposes of our determination here. Order No. 888 allows transmission providers to adopt a different allocation method than the 1-CP, and the fact that other transmission providers have justified the 5-CP does not detract from the fact that Dominion has demonstrated that the 12-CP method reflects Dominion's planning to accommodate the unique features of its transmission system. For example, Dominion explained how the increase in high-load data centers affects load even during shoulder months and is more conducive to utilizing monthly coincident peaks for cost allocation.").

209. Under § 205 of the Federal Power Act, rates "for or in connection with transmission or sale of electricity subject to the jurisdiction of the Commission . . . shall be just and reasonable." *See* Joshua Z. Rokach, *FERC's Jurisdiction under Section 205 of the Federal Power Act*, 15 ENERGY L.J. 83, 99 (1994).

to be proven just and reasonable.[210] As is relevant to the pricing of demand costs, there are really two main ideas that guide our thinking. The first is that there is no single theory of ratemaking meaning, for our purposes, that there is no one way to slice and dice costs and allocate those to customers.[211] Particularly illuminating for our purposes is what the court said in *Duquense*.[212] There, the Court said that the "designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors."[213] The second idea is, as a result of the first, that the utility must carry its burden, prior to the Commission determining that a particular rate is just and reasonable,[214] to demonstrate that its proposed allocation is just and reasonable.[215]

The immediate question then becomes what is possible, or even permissible, under the existing statutory framework (i.e., the map). That's where the case law becomes singularly relevant.[216] At our fingertips exists several decades worth of Commission precedent on how to allocate demand costs and the appropriate rate design that enables the Commission to approve a rate as being just and reasonable.[217] A reading of that precedent reveals that there really is no one way to allocate demand charges. While that statement is true – a fact-of-life acknowledged by both the Commission and courts[218] – it is nevertheless somewhat *odd* to the author. In the age of fairly advanced metering, a customer's demand of the system – at all hours and moments – is known and yet the appropriate method for allocating costs to that customer is seemingly a little bit art and a little bit science. In

210. Christiansen & Macey, *supra* note 115, at 1368.

211. *Pricing Policy Statement*, *supra* note 127, at 9 (citing "[w]hile many of the comments expressed dissatisfaction with the Commission's current pricing policy, the comments indicated no consensus for any one alternative pricing method.").

212. Duquense Light Co. v. Barasch, 488 U.S. 299, 316 (1989) ("The designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors.").

213. *Id.*

214. *See, e.g.,* Advanced Energy Mgmt. All. v. FERC, 860 F.3d 656, 662 (D.C. Cir. 2017) ("When acting on a public utility's rate filing under section 205, the Commission undertakes an essentially passive and reactive role and restricts itself to evaluating the confined proposal.").

215. Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 602 (1944).

216. The answer to that question in the context of rate design seems to vary. *See Norwood*, *supra* note 38, at 22 ("Issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission.").

217. This process begins, truly, with functionalization – the process by which the utility separates costs among the production, transmission, distribution, and customer service functions. From there, the utility classifies costs as being either fixed or variable costs. The final step in the process is to allocate the functionalized and classified costs among customers causing those costs. As it relates to the issues presented in this article, the transmission revenue requirement enables the utility to allocate a proportional share of costs to individual customers using, in almost every case, coincident peaks (typically a number of peaks based on the load and peaking profile of the utility). *See, e.g., Guide to the Class Cost of Service Study (CCOSS)*, XCEL ENERGY 2, 5, 7, https://puc.sd.gov/commission/dockets/electric/2014/EL14-058/volume2/jpg1schedule2.pdf (last visited Oct. 19, 2023).

218. The courts have previously found that a utility is required only to demonstrate and establish that its proposed rate design is reasonable – not, necessarily, that it is better than any or all alternatives. *See, e.g.,* City of Bethany v. FERC, 727 F.2d 1131, 1136 (D.C. Cir. 1984); *see also*, Batavia, v. FERC, 672 F.2d 64, 84 (D.C. Cir. 1982) ("[B]illing design need only be reasonable, not theoretically perfect.").

other words, why, when advanced metering exists, do we still rely on rough approximations instead?[219] It is *this* squishy, fungible thing that we intend to explore fully.

One of the possible reasons for this is the relative "squishiness" of what "benefits" really means, how to define those benefits,[220] and as a result, how to charge a customer for their receipt of those benefits.[221] While metered demand is a known quantity, the benefits that a customer draws from the grid are not precisely measurable and thus, a decent proxy is utilizing coincident peak to gauge how much a customer demands, and therefore benefits, from the grid. Although the utility plans its system to meet its peak, it also plans a system to provide reliability for all 7,658 hours of the year. As reasonable as any method might be, they remain proxies and approximations of the benefits derived by the customer. While there is no one method that the Commission has accepted to the exclusion of others,[222] in order to understand how future proposals would be considered,[223] we will need to rely on the compass and map we have as the only tools to guide us through the moment.

The compass and map illuminate the presence of neither a singular destination nor a singular path. Instead, the compass and map reveal that the Commission has a preference for "right-sizing," meaning a demand allocation method rooted in choosing a number of coincident peaks consistent with how the utility peaks (with the determinative factor being how many peaks does the utility have across a 12-month period).[224] The Commission has utilized a variety of tests for arriving at that determination (sometimes, for example, looking at the extent to which peak demands in non-peak months exceed the peak demands in the alleged peak

219. The simple answer is that section 205 does not demand exact precision. *See, e.g., Transmission Pricing Under FPA*, *supra* note 111, at 99.

220. For example, not all kWh are created equal.

221. In other words, cost allocation does not need to be perfect. *See* Ill. Com. Comm'n v. FERC, 576 F.3d 470, 477 (7th Cir. 2009) ("We do not suggest that the Commission has to calculate benefits to the last penny, or for that matter to the last million or ten million or perhaps hundred million dollars."); s*ee also* Midwest ISO Transmission Owners v. FERC, 373 F.3d 1361, 1368 (D.C. Cir. 2004) ("We have never required a ratemaking agency to allocate costs with exacting precision.").

222. *See, e.g.*, *Delmarva Power & Light Co.*, 17 FERC ¶ 63,044 (1981).

223. Relatively recent filings show the existing paradigm being stress-tested, as evidenced by Florida Power and Light's (FPL) proposed Variable Energy Resource Wheeling Transmission Service. Under FPL's proposal, FPL introduced the idea of modifying the point-to-point transmission pricing paradigm – where pricing is determined based on reservation – to consider usage to determine pricing for a product typically priced based on a reservation basis. As is a prominent theme of this article, real-world solutions will likely dominate the textbook solutions, and this filing was no exception, as it represented an effort between a utility and potential customers to meld existing tariff offerings to meet the needs and demands of current-day electric systems.

224. In most cases, the Commission has accepted a few flavors and varieties – mostly surrounding 1-CP, 3-CP, 4-CP, 5-CP, and, most frequently, 12 CP. Under a 1-CP method, the allocator for a particular wholesale class will be developed by dividing the wholesale class's CP for the peak month by the total company system peak. Similarly, for any other alternative, the numerator would consist of the average of the wholesale class's coincident peaks for each of the peak months, while the denominator would consist of the average of the total system peaks for each of the peak months. *See*, *e.g., PJM Interconnection*, 169 FERC ¶ 61,041 at PP 1-8 (2019).

months).[225] The case law is rich with litigation[226] – a testament to the difficulty of tailoring the right answer. What does all of this mean? One version of this story – the potential takeaway – is that, while a few methods (such as embedded cost pricing) have predominantly been used by utilities, no one pricing mechanism is perfect and without its shortcomings – a mechanism that features administrative efficiency may not be the most accurate.[227]

In its policy statement, the Commission spoke directly to the most basic task inherent in rate design: solving the tension between a rate that is precise and a rate that is simple to administer and understand.[228] Inherently, this is the threshold decision point involved in any allocation method – administrative simplicity versus accuracy. Around the time of Order No. 888, the tension revolved around the debate between the simpler, traditional methods (such as contract path pricing and postage stamp pricing) with newer methods that produced more accurate signals at the expense of more complexity (such as distance-sensitive and flow-based rates). The Commission never chose a path,[229] instead yielding to an approach enabling flexibility – a natural posture given the (1) trade-offs between more precise price signals and administratively efficient and simple methods and (2) the permissiveness of the just and reasonable standard.[230]

As a global matter, while the Commission has outlined parameters for designing rates, it has also articulated that, once a particular method is established for a particular company, those methods persist short of a supervening change in circumstances or Commission policy.[231] In the case of Dominion, the Commission very clearly rejected a proposal in the name of "you can't file something for the

225. *See, e.g.*, *Sw. Pub. Serv. Co*., 18 FERC ¶ 63,007, at p. 65,034 (1988) (monthly peak in any non-peaking month exceeded the monthly peak in peak month only once and 3 CP adopted).

226. Inherent in any potential filing is a balancing of the costs and benefits of potential litigation, possibly one of the reasons "progress" with respect to new rates has been relatively slow. *See, e.g.,* Stephen C. Pearson, *Innovations in FERC Hearing Procedures*, 41 ENERGY L.J. 23, 24-25 (2020).

227. In one case, a utility switched from a 12-CP methodology to a 3-CP methodology. City of Bethany v. FERC, 727 F.2d 1131, 1135 (D.C. Cir. 1984).

228. *Pricing Policy Statement*, *supra* note 127, at 13-14 (citing "[T]he Commission believes that improving price signals is an important goal, but recognizes that trade-offs between improved price signals and simplicity are inevitable. On one hand, transmission service is typically a small component of the total cost of electric service and, therefore, arguably does not merit overly complex pricing methods. On the other hand, in many cases transmission capacity is a scarce and valuable resource, and its pricing can send signals that promote the efficient siting of generation facilities and efficient decisions as to the dispatch of generation. . . . We therefore must balance the sometimes competing goals of better price signals and simplicity when evaluating any new pricing methodologies.").

229. Prior to the issuance of Order No. 888, the predominant method of transmission pricing was one that boasted both simplicity and administrative efficiency – essentially a single price for using the transmission system (e.g., a postage stamp pricing). *See, e.g*., 64 FERC ¶ 61,184, at 62,545.

230. There is, of course, the possibility of incorporating non-price factors, so long as they are justified. *See* Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1501 (D.C. Cir. 1984); Consumers Union v. FPC, 510 F.2d 656, 660 (D.C. Cir. 1974) (stating that "[r]eliance on non-cost factors has been endorsed by the courts primarily in recognition of the need to stimulate new supplies.").

231. The Commission explained its policy on this in two orders. *See, e.g.*, *La. Power & Light Co.*, 14 FERC ¶ 61,075, at p. 61,128 (1981) and *Sw. Pub. Serv. Co.*, 144 FERC ¶ 61,133 at P 45 (2013).

sake of filing it."[232] There, the Commission rejected a proposal because it deemed it to be hypothetical.[233] Merely pointing to a hypothetical scenario is not enough to clear the necessary threshold.[234] Stated slightly differently, though the just and reasonable standard features a certain degree of flexibility,[235] that flexibility is not unbounded.

Even in the face of advanced metering and improvements in metering technology, the coincident peak method has withstood the test of time – and there are good reasons for that.[236] As a threshold matter, as far as just and reasonable methods for allocating demand costs are concerned, the use of coincident peak pricing is still the predominant method, as it represents "an eminently sensible" solution.[237] The burden on the Commission, when confronted with these rate design questions, is not to find the most mathematically optimal solution[238] – just and reasonable is not a standard that necessarily lends itself to mathematical precision.[239] In the context of transmission ratemaking, the Commission's goal in approving a proposed demand cost allocation method is that it reasonably aligns

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232. In another instance, the courts remanded and vacated a proceeding because it was deemed unreasonable to base demand charges on unsupported estimates of coincident peak demand. *See* Villages of Chatham & Riverton v. FERC, 662 F.2d 23, 29-31 (D.C. Cir. 1981).

233. 162 FERC ¶ 61,136, at P 25. It's worth acknowledging that, despite being in a context different than transmission pricing, the Commission has considered market rules solely in the context and framework of economic theory. *See* S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41, 65 (D.C. Cir. 2014) ("Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall.") (quoting Assoc. Gas Distribs. v. FERC, 824 F.2d 981, 1008 (D.C. Cir. 1987)). That said, it is not clear whether that deference applies to transmission rate cases.

234. For example, the Commission considers the utility's transmission planning as a means of connecting the dots between cost causation and cost causation. *See, e.g.*, Order No. 888-A, *supra* note 131, at 235 (citing "Accordingly, utilities are free to propose in a section 205 filing an alternative to the use of the 12-month rolling average (e.g., annual system peak) in the load ratio share calculation, subject to demonstrating that such alternative is consistent with the utility's transmission system planning and would not result in overcollection of the utility's revenue requirement.").

235. The basic premise of the Commission's flexibility in evaluating transmission pricing proposals is that comparable access to efficiently priced transmission services is critical to the continued development of competitive wholesale markets. *See, e.g.*, *Am. Elec. Power Serv. Corp.*, 44 FERC ¶ 61,206, at p. 61,749 (1988). The circumstance the Commission found itself in 1994 is not terribly different than the one it finds itself in now – new uses of the electric system brought along with it new rate structures and new rate policies.

236. A few strands of literature argue that modern day demand charge allocation has its roots in price discrimination. *See, e.g.,* John L. Neufeld, *Price Discrimination and the Adoption of the Electricity Demand Charge*, 47 J. OF ECON. HIST. 693, 694 (1987). This Article takes no position on the matter, as some literature reveals that the primary actors debating the different cost allocation methods may not have fully understood the issues at hand. *See* Yakubovich, *supra* note 44, at 579-80.

237. Union Elec. Co. v. FERC, 890 F.2d 1193, 1198 (D.C. Cir. 1989) (citing that costs "are assessed to the peak-period users because it is peak demand that determines how much a utility will invest in capacity.").

238. To that end, the Commission enjoys a certain degree of deference. *See, e.g.,* Petal Gas Storage v. FERC, 496 F.3d 695, 698 (D.C. Cir. 2007) (acknowledging that the Commission is afforded substantial deference in the field of ratemaking).

239. In the market rule context, the Commission does not necessarily require a cost-benefit analysis. *See, e.g., Sw. Power Pool,* 173 FERC ¶ 61,267 at n.52 (2020) ("WEIS Order") (citing "*PJM Interconnection,* 151 FERC ¶ 61,208 at P 49 (2015) ('[T]he Commission does not generally require the mathematical specificity of a cost-benefit analysis to support a market rule change.'), *order on reh'g*, 155 FERC ¶ 61,157 at P 30 (2016) ('[W]hile the Commission is required to consider all relevant factors and make a "common-sense assessment"

costs and benefits.[240] Furthermore, under the just and reasonable standard, the utility does not need to disprove other options – it only needs to make the necessary showing under section 205 (i.e., the idea that you can't file something just for the sake of filing it.).[241]

If mathematical precision is not a prerequisite, the question then becomes "what exactly is the problem to be solved here?" As a threshold matter, the principal question to be addressed is whether the demand allocator is doing its job.[242]

The answer to that question depends on the degree to which the ultimate charges align with usage (alignment arguably being the engine and rudder for maneuvering cost causation questions).[243] Demand allocators are, at best, an approximation of the demand that the customer has on a particular system.[244] Thus, inherent in the design is both a feature and a flaw – the value is merely a proxy. Recent cases seem to suggest that at least one issue raised with the coincident peak method is a potential asymmetry in the measurement of the demand (i.e., billing)

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that the costs that will be incurred are consistent with the ratepayers' overall needs and interests, the Commission's finding need not be accompanied by a quantitative cost-benefit analysis.'), *aff'd sub nom. Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 660-61 (D.C. Cir. 2017); *see also Sw. Power Pool, Inc.,* 141 FERC ¶ 61,048 at P 57 (2012) ('[W]e note that our approval of the Integrated Marketplace proposal is not based on any specific cost-benefit amount. A cost-benefit analysis is largely a tool for stakeholders to evaluate different market designs and to determine their interest in moving forward with a market proposal.')."

240. In short, just and reasonable demands a linear connection between an allocator and cost causation. *See* Ill. Com. Comm'n v. FERC, 756 F.3d 556, 561 (7th Cir. 2014).

241. *See, e.g., Sw. Power Pool*, 158 FERC ¶ 61,063 at n.16 (2017) (citing City of Bethany v. FERC, 727 F.2d 1131 (D.C. Cir. 1981) ("FERC has interpreted its authority to review rates under the FPA as limited to an inquiry into whether the rates proposed by a utility are reasonable — and not to extend to determining whether a proposed rate schedule is more or less reasonable than alternative rate designs"), *cert denied*, 469 U.S. 917 (1984)); OXY USA v. FERC, 64 F.3d 679, 692 (D.C. Cir. 1995) ("[T]he Commission may approve the methodology proposed in the settlement agreement if it is 'just and reasonable'; it need not be the only reasonable methodology or even the most accurate."); *see also* 44 FERC ¶ 61,206, at 61,749 ("The Commission's task is to determine whether AEP's proposal is just and reasonable. It is not required to find that the proposal is the 'best', or 'superior' to all others, in order to adopt it. Since AEP has shown that its method is just and reasonable, it is entitled to use it.").

242. As the author understands demand charges, they were largely a means of approximating the impact that a particular customer has on the system. The current structural feature of the electric industry is that the demand side of the equation is unable to respond nimbly over short- and medium-term horizons. There are a few reasons for this, but one prevalent issue is arguably the lack of visibility that end-use customers have on the prices they pay. *See, e.g*., Robert E. Gramlich, *The Role of Energy Regulation Addressing Generation Market Power*, 1 ENV'T & ENERGY L. & POL'Y J. 55 (2006).

243. 172 FERC ¶ 61,054, at n.80 ("We note that Dominion's proposed Tariff modification need not be superior to the 1-CP method, as long as it is just and reasonable, in other words, aligns with Dominion's approach to transmission planning."). *See, e.g.* OXY USA, 64 F.3d 679 (holding that, as long as the Commission finds a methodology to be just and reasonable, that methodology "need not be the only reasonable methodology or even the most accurate one.").

244. Kahn spoke directly to the complexity associated with this particular conundrum of identifying a separate charge for the fixed costs of the system ("When instead the products are truly joint, in that they can be economically produced only in fixed proportions, neither of them has a genuine, separate incremental cost function, as far as the joint part of their production process is concerned."). KAHN, *supra* note 43, at 79.

versus the *actual* impact that the customer causes on the system.[245] This "asymmetry" is not necessarily a new issue but embodies the tension resting between precision and simplicity.

The issue of asymmetry is not merely an academic exercise, either -- the potential for asymmetry presents challenges for the utility in not only aligning the two (i.e., the appropriate demand measurement versus a customer's actual impact on the system), but also doing so in a way that preserves that alignment across its customers (and, ultimately, billing).[246] Related to concerns of asymmetry,[247] another issue is that most existing allocation methods do not seem to insulate one customer's actions from another. As exemplified in *Dominion*, a customer choosing to reduce its load for economic reasons created cost-shifts for others.[248] Stated slightly differently, the asymmetry issue is that certain customers might evade, or escape, billing for demand costs they caused.[249]

At the risk of being a broken record, assume for the sake of example a utility that utilizes a single coincident peak to allocate demand costs, meaning that the charge will be based on a single hour out of 8,760 hours in a calendar year. One customer's usage during that one hour, and thus demand charge, may not align terribly well with the costs that the utility has incurred to serve that customer throughout the course of the year.[250] Even in the context of a 12-CP allocator – if a utility utilizes twelve coincident peaks, the demand charge could be based on a

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245. 172 FERC ¶ 61,054, at P 6 (citing "Dominion explained that customers have actively reduced demand of their own volition during the 1-CP to shift Transmission Service charges to other customers; Dominion further asserted that this 12-CP method would discourage cost-shifting among Network Customers."). Dominion explained that it observed this in response to rising network service charges. *See id.* at PP 6-7 ("Dominion added that the incentive for this type of cost-shifting behavior has risen over the past decade as Network Integration Transmission Service charges have increased to recover Dominion's significant transmission system investments.").

246. There is, outside of the RTO/ISO context, a different wrinkle to this problem that involves the potential asymmetry between unbundled customers taking service under the utility's *pro forma* tariff and pre-Order No. 888 bundled customers that do not take service under the utility's *pro forma* tariff. *See, e.g.,* John S. Moot, *Whither Order No. 888?*, 26 ENERGY L.J. 327, 336 (2005).

247. The disparity – or asymmetry – between competitive users of the system and captive users of the system has the potential to produce cost savings for the competitive users but cost increases to the captive customers. Tomain, *supra* note 109, at 328.

248. Reducing load on the basis of economic reasons is not necessarily the same thing as demand response. For example, in PJM, certain demand response providers can qualify as Curtailment Service Providers. The demand is registered with PJM and the demand reductions are verified by PJM – making this a tool that PJM can use in not only managing issues in real-time, but also a factor it can plan on having when it conducts its planning. *See PJM Interconnection,* 155 FERC ¶ 61,004 at P 2 (2016) (For more on Curtailment Service Providers).

249. The Commission's ultimate concern, dating back to Order No. 888, has been the scenario whereby one network customer could reduce its coincident peak – for the purposes of network billing – in a manner that would force remaining network customers to essentially absorb the evaded cost responsibility. One possible construction of this argument is that shifting your demand at the peak moments does not mean you are foisting costs onto someone else – the thrust of their argument being that usage at peak is representative of what the customer demands of the utility at the peak moments. That argument may ignore, however, that capacity during the remaining moments is not without cost. That argument may also ignore the idea that utilities are increasingly shifting investment to non-coincident peak moments. A rate design focused only on a peak moment may ignore those benefits and investments altogether. *See generally*, Order No. 888-A, *supra* note 131.

250. For example, because of the manner in which solar peaks earlier in the day, renewable penetration is requiring systems to specifically make investments during off-peak periods.

single hour out of the 720 hours in a month, or just twelve events within the 8,760 hours. Again, each customer is charged for its use during these coincident peak moments, but that single snapshot is not necessarily representative of the ways in which the customer either uses the system or causes costs to be incurred.[251] The problem to be solved, at least initially by the utility, is lining up the rate to be charged with the costs the utility incurs on behalf of the customer.[252]

It is unlikely, in the author's opinion, that the Commission will declare one method superior to another. That's just not how this works.[253] That said, however, demand charges seem imperfect.[254] Demand charges are blunt instruments used to allocate the costs of a diverse and complex system. These charges – which seek to aggregate the costs of a fairly large system and network of sub-components – do not necessarily offer a localized or terribly persistent or fulsome price signal. For example, it is pretty unlikely that each customer impacts the system in the same way and yet, for the purposes of allocating costs of the system, customers are charged a rate that presumes each customer impacts the system on a similar $/kWh basis (i.e., the push and pull of administrative efficiency versus mathematical precision). Moreover, demand charges may place a disproportionate emphasis on peak moments, rendering fairly meaningless – for the purposes of pricing and incentive signaling – the other moments of the year. Demand charges – as predominantly constructed – seem to lack a certain chorus that allows all of the elements to sing in harmony.[255] If anything, the success of the coincident peak method is its relative efficiency (and simplicity) in aligning the costs and benefits of the service,[256] even if not on an exact basis, but preserving "some resemblance" between costs and benefits (in other words, most of the chorus is singing together,

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251. Imagine, for a moment, a rate design that permits a Network Customer to charge its storage resources hours before a coincident peak moment only to then use those resources to lower its billing responsibility during the coincident peak moment. While it's true, yes, that the network customer did indeed use less of the system during the peak moment, that usage may not necessarily be representative of the customer's demand of the system.

252. Suedeen G. Kelly et al., *The Subdelegation Doctrine and the Application of Reference Prices Mitigating Market Power*, 26 ENERGY L.J. 297, 299 (2005).

253. Rate design, especially, enjoys a certain degree of deference as it is a careful and deliberate balance of competing interests and objectives. *See, e.g.,* Brancato, *supra* note 171, at 99 (citing "[c]ommissions may have to balance a desire to achieve, on the one hand, a precise correlation between users and the incremental costs for which they are responsible and, on the other, a relative stability of rates. Obviously, a utility tariff can not be changed so frequently that customers are unable to make intelligent purchasing decisions. Such an approach would undermine the entire effort to change rate structures, which is predicated on the belief that consumers will make efficient choices when charged for the costs they actually impose on the system. If these efficient choices are made, the need to build new plants at a greatly increasing cost per unit, dictated by growing use at the peak, will be tempered.").

254. The premise of more precise demand charges is by no means new. Munroe, *supra* note 16, at 214 (citing "[t]here is the need as well for a critical assessment of regulatory changes particularly with reference to pricing flexibility, developing interruptible and curtailable rates to retain customers at risk, and eventually developing continuous load-factor pricing.").

255. The playbook is largely written for real-time pricing, but to date, there is little appetite to move in that direction. *See* Kavulla, *supra* note 36, at 20 (citing "[i]n general, a time-of-use rate with a critical peak price add-on is a reasonable compromise to face customers with both routine contours of price differentials, including demand-related portion of transmission and distribution investments that can be allocated to peak periods (the time-of-use rate) and with events representative of unusually stark scarcity conditions (critical peak price).").

256. Midwest ISO Transmission Owners v. FERC, 373 F.3d 1361, 1364 (D.C. Cir. 2004).

though not necessarily in harmony). What's also challenging is separating signal from noise – were demand charges designed for demand that was only inelastic?

Most recently, the Commission has accepted proposals that seek to better align charges that reflect changes to the operational realities of the utilities – this appears to be the path we are heading down.[257] This path is very much one the Commission cleared when it articulated its policy back in Order No. 888 that utilities are obviously free under section 205 to propose and file methods that reflect their transmission planning.[258] The Courts have upheld this flexible approach, mostly with affirmations that there is no one way to do this and certainly no off-the-shelf solution.[259] That flexibility is more of a reflection of how difficult the task is, as opposed to an outright blessing to proceed with any and all methods.[260]

So, then, what roughly falls under the umbrella of flexibility? Most of the methods in circulation today represent modern variants of the coincident peak methodology for demand allocation, each with its own pros and cons. For the sake of discussion, this Article does touch on a few of these methods.[261] These methods include, but are not necessarily limited to using: (1) average demand; (2) solely non-peak usage; (3) both coincident and non-coincident peak demand; (4) increasing the number of hours considered; and (5) the use of a ratchet. We also touch on other novel concepts as well.

The first alternative is the average demand methodology, where the demand allocation is based on the average demand over a period of time (maybe even over the course of the entire year). If you buy the argument that the utility is planning for all hours, not just a handful of peak hours, then maybe it does make sense to design a rate that takes into account all hours of the year, even if on an average basis.[262] As imperfect as it is, average cost pricing is attended by benefits that cannot be ignored: a certain ease of understanding and predictability for both utility and customer. Even though the Commission rejected Dominion's proposal to use a customer's average demand across the year as a backstop, it did so because

257. The Commission did ultimately express an openness and willingness to Dominion moving from a 1-CP method to a 12-CP method. Even though moving from one coincident peak method to another doesn't seem overly significant on its face, accepting the proposal signaled the Commission's interest in considering a variety of different factors (instead of utilizing something resembling a "one-sized fits-all" approach). This contrast is fairly stark when considering the procedural history involving the use and setting of coincident peaks in Dominion. *See PJM Interconnection, & Va. Elec. and Power Co.*, 109 FERC ¶ 61,012 at PP 45-46 (2004).

258. *See generally* Order No. 888, *supra* note 63. This is, quite possibly, the most nutritionally dense bread crumb that we have – so long as a utility can express a linear relationship between planning and cost allocation, the method will likely be OK.

259. "There is no necessary relationship between a particular method of demand allocation and a particular method of demand billing." Batavia v. FERC, 672 F.2d 64, 83 (D.C. Cir. 1982).

260. To be sure, apart from structural changes, there are other "low-hanging fruit" type items that might work towards "right-sizing" costs and charges. One such fruit is addressing issues with load forecasts and forecasting peak demand. This Article doesn't attempt to tackle this issue, but others have. *See, e.g.*, Todd Aagaard & Andrew N. Kleit, *Too Much Is Never Enough: Constructing Electricity Capacity Market Demand*, 43 ENERGY L.J. 79, 88 (2022).

261. The review of possible alternatives is limited, purposefully, as this section could easily become the equivalent of letting a thousand flowers bloom (and the associated risk of letting the garden become overrun). There are nearly endless variants and possibilities.

262. KAHN, *supra* note 43, 95-96, 101-03.

Dominion was unable to support its proposal.[263] That lack of support stemmed from Dominion's own admission that its concerns over cost shifts were still hypothetical in nature.[264]

It is not entirely clear from the Commission's order whether there would have been a flaw with Dominion's proposal.[265] Would the backstop have been viable? Or would that have been the fatal flaw rendering the proposal unjust and unreasonable, overall, when some customers are allocated costs using their peak demand while others are allocated costs using their average demand. Would Dominion have had more success had they only proposed to use an average demand?[266] It's not clear. On one hand, it is true that the average demand concept continues to afford the customer control, even if on a muted basis (i.e., a rate based on usage is a good thing, even if that usage is averaged out over the course of a certain length of time, leaving the customer with some agency over its billing). On the other side of that coin, a potential issue with the use of average demand is that it blunts the only lever a customer has in affecting, or driving, ultimate billing. In other words, while the rate is based on a customer's average demand, the customer's ability to impact its rates are considerably less than under a coincident peak paradigm.

There may also be lessons to learn from a recent Pacific Gas & Electric ("PG&E") case, where the utility proposed a rate for its stand-by customers – in essence, charging a unique rate to its stand-by customers.[267] In determining the rate, PG&E developed what it phrased a "probabilistic" method.[268] Under the method, rates were based on the percentage of "contract demand" that the standby class would likely use rather than usage at the time of system peak.[269] This, of course, represented a deviation from the coincident peak method that relies on

263. 162 FERC ¶ 61,136, at P 25 (citing "[t]raditionally, public utility transmission providers have relied on the demand of its transmission customers at its system's coincident peak to determine each customer's network transmission service charges. A public utility transmission provider may adopt a different approach, but it must adequately support it. Here, Dominion has failed to do so. Dominion relies on a hypothetical situation under which a transmission customer could reduce its load at Dominion's coincident peak to avoid Network Service charges, shifting costs to other transmission customers; however, Dominion has not provided any evidence that such cost shifts have actually occurred or are likely to occur.").

264. The D.C. Circuit recently spoke to the potential for a customer using batteries to "reduce its apparent demand to zero during system peak, eliminating [the customer's] responsibility for its pro rata share of [the utility's] fixed costs." The D.C. Circuit invited the utility to return to the Commission for relief should the customer's deployment of batteries result in a confiscatory outcome. Duke Energy Progress, LLC v. FERC, 23 F.4th 1008, 12 (D.C. Cir. 2022).

265. *See Old Dominion Elec. Coop*., 172 FERC ¶ 61,161 at PP 1, 7 (2020) (accepting modification from a 12-CP methodology to an average hourly demand allocator for one of three components of the demand rate).

266. It is the author's view that the ultimately accepted 12-CP proposal best represented and approximated the average demand that each customer causes. While not perfect, it nevertheless better represented the customer's usage throughout the year. That said, it's not clear the issues *really* went away (instead, the move from 1-CP to 12-CP blunted the issue but did not resolve it directly).

267. Cogeneration Ass'n of Cal. v. FERC, 525 F.3d 1279, 1281 (D.C. Cir. 2008) (citing "Under this method, rates are based on the percentage of 'contract demand' the standby class is likely to use, rather than usage at the time of system peak. Contract demand is the maximum amount of electricity a standby customer can draw under the terms of its contract.").

268. *Id.*

269. *Id.*

shares each customer uses of the system when demand is at its "zenith" (and, notably, historical usage). The question for us is one of applicability to the scenarios applied here – the contract demand concept is interesting, as it represented a case where the Commission permitted a utility to charge a rate (based on expected usage) for a unique type of customer.[270] Network service is not based on a reservation (that's a role and construct for point-to-point transmission service) and the applicability of that sort of rate construct to the premise of network service seems tenuous at best. The question, for the sake of a complete thought process, is nevertheless an interesting one: does a model that puts the burden on the customer of making an appropriate reservation make sense (with, of course, the appropriate push-and-pull levers of incentives and penalties for meeting or exceeding the reservation, respectively)?

Another alternative is utilizing a blend between coincident peak and non-coincident peak data, which would try and capture both the peak moments *and* the non-peak impact that a customer has on a system.[271] This method can be more accurate than the average demand methodology, but it still has the potential to underestimate costs (if, for example, more weight is given to the non-peak hours than the peak hours). Ultimately, the choice of methodology depends on the specific circumstances and goals of the allocation process.[272] The use of non-coincident peak factors is not terribly controversial despite the Commission's clear preference for utilizing coincident peak information to derive demand charges. The question of whether or not to utilize non-coincident peak factors is not necessarily a policy question, but rather one to be addressed on the merits – are non-coincident peak factors affecting the incurrence of capacity costs? The Commission has spoken to this and has expressly allowed utilities to consider factors beyond coincident peak.[273]

The Commission's order in this case provides more than a map and a compass – the Commission expressly acknowledged several factors that will prove relevant and salient in the years to come. First, the Commission acknowledged the appropriateness of considering factors beyond just system peak as it relates to allocating demand charges.[274] Second, the Commission acknowledged the concern – the

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270. *Id* at 1282.

271. *Cogeneration Ass'n of Cal.,* 525 F.3d at 1286.

272. This is why, for example, this article takes the position that solutions will need to be fact- and case-specific (i.e., to manage the unique interaction between utility and customer). This is in line with the Commission's long-settled history favoring settlements. *See, e.g.,* Mary Ann Walker, *Settlement Practice at the FERC: Boom or Bane*, 7 ENERGY L.J. 343, 344 (1986).

273. 172 FERC ¶ 61,054, at PP 32-33. As explained elsewhere in this article, the Commission accepted Dominion's proposal as a method for resolving the tension created by load reductions that skewed the actual usage of, and dependency on, the transmission system. *See also* Small, *supra* note 40 at 135 (explaining that the Commission may also evaluate factors such as "[t]he full range of a company's operating realities including, in addition to system demand, scheduled maintenance, unscheduled outages, diversity, reserve requirements, and off-system sales.").

274. 169 FERC ¶ 61,041, at P 54 (citing "[h]ere, we find that Dominion's proposed 12-CP methodology aligns with how Dominion conducts transmission system planning. Dominion has shown that, in the past five years, its transmission planning has changed to factor-in additional load periods because it is experiencing both winter and summer peaks, a changing capacity mix, growth of distributed energy resources, growth in renewables, and replacement of aging transmission infrastructure.").

concern stemming from Order No. 888 – that load reductions during coincident peak moments do not represent a customer's actual usage or need of the system.[275] In that regard, the argument is that demand was "artificially lowered" solely for the purpose of billing. Third, the Commission acknowledged that utilities are planning their systems to meet a wider variety of concerns and issues beyond just peak usage – and thus aligning planning that accounts for things beyond peak and the ultimate rate charged.[276] The task inherent in determining whether any particular method is just and reasonable will be determining the nexus between a customer's own operations and load profile along with whether the demand charges align with those parameters.[277]

Critically, as useful as different demand-side management tools are, their ability to affect or reduce demand charges is limited by their ability to offset investments that the utility must make on behalf of the customer.[278] The utility, of course, has an obligation to serve. The thrust of the question posed here is whether that "offset" means the customer is essentially responsible when the lights go out.[279] The very fact- and case-specific negotiation will center upon questions such as how much of the customer's load is the utility required to serve – all, none, some?

A related concept is thinking about whether to simply increase the number of hours of demand used – going well above twelve to consider a different number of hours (enabling the utility and customer to identify the most representative number of hours – be it twenty, fifty, one-hundred, or whatever the case might be). This idea is something of a blend – a shift away from coincident peak, solely, of course, and trending somewhere between non-coincident peak information and average demand. This would be more in line with utilizing non-coincident peak factors, but moving away from the idea that coincident peak can only be some number between one and twelve – and instead, a reflection that there are a variety

275. *Id.* at P 60 (citing "[w]hile we recognize system benefits may result from voluntary load reductions, the record in this proceeding demonstrates that voluntary load reductions during the 1-CP events are obscuring the level of transmission system usage by Dominion's customers. As detailed in the examples offered by Dominion, certain wholesale customers are voluntarily reducing demand during the 1-CP events and returning to normal levels of demand during off-peak times. This can result in Dominion not having an accurate depiction of transmission usage with which to plan the transmission system in a manner that ensures all demand can be reliably served.").

276. *Id.* at P 55 (citing "Dominion points to the growth of distributed generation in creating operational challenges, such as backflow occurring onto the transmission system during light load periods, which requires transmission upgrades. Additionally, Dominion notes that data center growth has a high load factor, which influences year-round monthly peaks, and that renewable generation resources are being sited in areas further away from heavy load centers, covering a broader geographic area with multiple points of interconnection.").

277. *Id.* at P 55.

278. The threshold question, at least in the author's opinion, is the degree to which the utility is obligated – literally, standing ready – to ensure that it has adequate transmission service to fulfill the needs of the network customer, particularly when, or if, the behind-the-meter generation is unavailable or cannot be called upon. These questions seem like the very fact-specific questions that need to be tailored between utilities and customers.

279. Cudahy, *supra* note 1, at 357 (citing "one of the merits of territorial electrical franchise has been their function of defining who is responsible in a particular place for the adequacy, reliability, reliability, and quality of the electric supply.").

of meaningful hours. Although this wouldn't move the rate design closer to something resembling "marginal costs," it would nevertheless seem to move towards a better measurement of usage, and this reliance, on the transmission system.[280]

Another fairly prevalent method is what is referred to as the "ratchet."[281] Concerns and issues with the viability and sustainability of coincident peak pricing are not new – in fact, you could argue, these issues are quite "arcane" and have been debated thoroughly for decades.[282] Ratchets have been one mechanism for navigating the debate. A ratchet, simply, is a way to essentially create a "minimum" threshold for billing.[283] At the risk of oversimplifying the strategy employed by this rate mechanism, the so-called "ratchet" tool is a way for the utility to create more rate stability year to year. The Commission has accepted this approach in different contexts but has expressed a general reluctance to employ the ratchet, generally.[284] Because the coincident peak method invites a certain amount of volatility in that usage can change drastically depending on a variety of circumstances, utilities have attempted to utilize the "ratchet" method as a means to mitigate the volatility.[285] However, the Commission has expressed a generalized reluctance towards the use of a ratchet as, in one circumstance, the ratchet could even enable some customers to subsidize others.[286]

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280. An efficient rate design will lead to customer behavior that optimizes system costs. *See* Mark Lebel & Frederick Weston, *Demand Charges: What Are They Good For? An Examination in Cost Causation*, REGUL. ASSISTANCE PROJECT 7 (Nov. 2020), https://www.raponline.org/wp-content/uploads/2020/11/rap-lebel-weston-sandoval-demand-charges-what-are-they-good-for-2020-november.pdf.

281. One purpose of a ratchet is to encourage conservation at time of system peak. *See, e.g.,* Carolyn Brancato, *supra* note 171, 86 (citing "[a] demand ratchet is a form of rate design whereby customers are billed throughout the year on the basis of their maximum annual demand or their maximum demands during the peak capacity season. A customer pays a rate for his maximum peak demand and then is charged a monthly demand rate which is a fixed percentage of his annual or seasonal peak demand. If the original peak is exceeded, that new peak becomes the basis for charging the customer."). *See also* Small, *supra* note 40, at 137 ("A ratchet imposes minimum payment obligations on utility customers. Two determinative factors in deciding whether a ratchet should be allowed are whether the customer is a full requirements customer, and whether the demand costs are allocated on a 12 CP basis.").

282. Kan. Gas & Elec. Co. v. FERC, 758 F.2d 713, 714 (D.C. Cir. 1985).

283. Reasonable minds can debate whether or not a ratchet is similar in nature to the so-called "minimum bill." A minimum bill is essentially a bargain between utilities and customers whereby, even if the customer consumes no energy, the customer will nevertheless compensate the utility with a minimum amount of revenue for "standing ready" to serve. *See generally* Jim Lazar, *Electric Utility Residential Customer Charges and Minimum Bills: Alternative Approaches to Recovering Basic Distribution Costs*, REGUL. ASSISTANCE PROJECT (Nov. 2014), https://www.raponline.org/wp-content/uploads/2016/05/rap-lazar-electricutilityresidentialcustomer-chargesminimumbills-2014-nov.pdf.

284. *See Conn. Light & Power Co*., 14 FERC ¶ 61,139, at pp. 2-3 (1981), *aff'd sub nom.* Second Taxing Dist. of City of Norwalk v. FERC*,* 683 F.2d 477, 487-88 (D.C. Cir. 1982); *Union Elec. Co.*, 12 FERC ¶ 61,239, at p. 61,586 (1980).

285. The logic being that ratchets "more fairly charge customers for their share of the company's generation and distribution costs and tend to reduce customers' demand fluctuations." Given that the ratemaking incentive works towards "average" demand, this theory appears to have been undone by caselaw seemingly demonstrating that ratchets reduce the incentive customers previously had to manage or reduce their demand at the time of system peak. *See* Brancato, *supra* note 171, at 86.

286. *Cent. Ill. Light Co.,* 10 FERC ¶ 61,248, at p. 13 (1980) (citing "it follows that those low-usage members of the wholesale class affected by operation of the ratchet during a given month will in effect be subsidizing those class members with recorded floors above the 'ratcheted' level.").

To be sure, there are also nutritionally dense breadcrumbs to feast upon that do not involve coincident peak methods, at least not exclusively.[287] In one case, the Commission accepted a rate design that featured an "initial block" and a "tail block" – effectively, a blending of embedded costs and marginal costs within the same rate.[288] The initial block represented 80% of the average system costs (roughly speaking, the embedded costs). For demand (and energy use) beyond the 80% the remaining 20% tail block was designed to represent the estimated long-run marginal costs for future capacity and energy.

In another case, we have the NYISO model. There, the transmission service and pricing model does not rely on coincident peak methods for allocating the demand costs of the transmission system.[289] Significantly, the NYISO tariff does not necessarily abide by the concepts of point-to-point or network services.[290] Parties taking service under the New York Independent System Operator (NYISO) tariff are billed based on actual energy withdrawals to service load (including, for example, the cost of congestion to serve that load).[291] As opposed to a demand charge, NYISO's framework seemingly factors in not only the fixed costs of the system,[292] but also the marginal costs (e.g., congestion) of administering and providing transmission service.[293] To be clear, these are separate charges.[294] Although NYISO did, at one point, attempt to remove network service from its tariff, the Commission rejected that on the basis that, even if customers did not "avail themselves" of network service, the service should still be available.[295] This model

287. In the author's opinion, right-sizing demand charges mirrors the theory of right-sizing the capacity contributions of different generating technologies (otherwise known as the Effective Load Carrying Capability). *See PJM Interconnection,* 183 FERC ¶ 61,009 at PP 29 (2023) (citing "[t]hus, we find that PJM's proposal to strengthen the ability of its ELCC model – the objective of which is to estimate the reliability contribution of resources in a future Delivery Year based on forecasted system conditions – to account for deliverability is just and reasonable.").

288. *See generally Norwood*, *supra* note 38.

289. In one context, NYISO described its model as less dealing with physical reservations and more of a Commission-approved "financial reservation" model (without the physical features, such as transmission service requests). *See N.Y. Indep. Sys. Operator, Inc*., 123 FERC ¶ 61,134 (2008).

290. In fact, initially, the NYISO framework did not offer the option for firm point-to-point transmission service. *See Cent. Hudson Gas & Elec. Corp., et al.*, 86 FERC ¶ 61,062, at p. 8 (1999) (citing "[t]here is no notion of firm service at a fixed price under the tariff.").

291. *Id.* at 6-7.

292. *Id.* at 31 (citing "the Transmission Service Change is an hourly rate that recovers the embedded fixed costs of the transmission system. It is assessed on the basis of hourly metered loads for deliveries within the ISO's control area.").

293. *Id.* at 34 (citing "[t]he second rate component is the Transmission Use Charge which recovers any congestion costs associated with the transaction and marginal losses.").

294. 86 FERC ¶ 61,062, at P 31 (citing "[t]here are three components to the transmission charge included in the New York ISO Tariff. They are as follows: (1) the Transmission Service Charge; (2) the Transmission Use Charge; and (3) the NYPA Transmission Adjustment Charge.").

295. *See N.Y. Indep. Sys. Operator, Inc.,* 131 FERC ¶ 61,074 at P 14 (2007) (citing "*See New England Power Pool*, 83 FERC ¶ 61,045, at p. 61,231 n.30 (1998) (requiring NEPOOL to reinstate point-to-point service as an option for transmission service; 'the choice must be the customer's to make, not the transmission provider's to dictate.'").

relies less on a "snapshot" in time and more on the cost of the service at the time the service is being provided.[296]

Finally, it wasn't all that long ago that performance-based ratemaking was considered viable – these programs presented the theoretical framework for leveraging rewards and penalties as a means of aligning incentives, efficient investment decisions, and adequate reliability.[297]

IX. CONCLUSION

The coincident peak load allocation method remains the bread-and-butter of allocating demand costs associated with the transmission system.[298] Its place in the history books of ratemaking methodologies renders it, and affords it, reasonable deference (even if, for example, other methods could be justifiably reasonable so long as they're supported).[299] The importance of getting pricing right – particularly for peak moments and moments of scarcity – is possibly more acute than ever. For example, while coincident peak methodologies are accustomed to wrestling with the normal variability that attends fluctuating weather patterns, those weather patterns seem to be getting more extreme by the year.[300]

The so-called energy transition has yielded serious questions about the future of the industry.[301] Ideas and issues are as bountiful as the offerings at your local buffet – the overburdened plate includes issues running the gamut of the electrification of everything, renewable portfolio standards, cap-and-trade programs, distributed energy generation, state policies, methods for solving resource adequacy, and a massive transmission build-out.[302] And while all of those issues deserve

296. Intertwined with the transmission service paradigm in NYISO is that transmission works in tandem with the "locational-based marginal pricing" (otherwise, what we refer to as locational marginal pricing) and a financial instrument to manage congestion costs, called "transmission constraint contracts." *See* 86 FERC ¶ 61,062, at PP 3-4.

297. *See, e.g.,* Richard P. Bonnifield & Ronald L. Drewnowski, *Transmission at a Crossroads*, 21 ENERGY L.J. 447 (2000) (For a fuller discussion of performance-based rates).

298. *See, e.g*., 169 FERC ¶ 61,041, at P 53 ("Traditionally, public utility transmission providers have relied on the demand of its transmission customers at its system's coincident peak to determine each customer's network transmission service charges.").

299. *See* Order No. 888, *supra* note 63, at 31,736 (cross-referenced at 75 FERC ¶ 61,080), *order on reh'g*, Order No. 888-A, *supra* note 131 (cross-referenced at 78 FERC ¶ 61,220), *order on reh'g*, Order No. 888-B, *supra* note 183, *order on reh'g*, Order No. 888-C, *supra* note 183, *aff'd in relevant part sub nom.* Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom.* New York v. FERC, 535 U.S. 1 (2002) ("Because network service is load based, it is reasonable to allocate costs on the basis of load for purposes of pricing network service. . . . [W]e recognize that alternative allocation proposals may have merit. . . . [T]hey will be evaluated on a case-by-case basis and decided on their merits.").

300. Maximilian Auffhammer et al., *Climate change is projected to have severe impacts on the frequency and intensity of peak electricity demand across the United States,* 114 PROC. NAT'L ACAD. SCI. 1 (2017).

301. By now, we know that we're converting, even if slowly, to a low carbon "energy economy," but this conversion will not be cheap. The primary question posed by this article has to do with the cost of transmission and wondering whether the existing levers and mechanisms are in alignment and producing the right signals for both investment and usage. *See, e.g.,* Harvey Reiter, *Removing Unconstitutional Barriers to out-of-State and Foreign Competition from State Renewable Portfolio Standards: Why the Dormant Commerce Clause Provides Important Protection for Consumers and Environmentalists*, 36 ENERGY L.J. 45, 45 (2015).

302. One construction of this statement is that "improving technologies alone is insufficient, and policy support has been indispensable to demand response's success, as is the case for other distributed energy resources.

serious consideration, this Article does not seek to overwhelm the plate even further. In fact, the Article only considers what might happen to modern day rate design and ratemaking in the face of these significant changes – something of a forgotten yet fundamental element underlying so many of the moving parts on the surface. The system is changing, so should the cost allocation for transmission?

To be sure, there is nothing fundamentally defective about the way that transmission is currently priced or allocated.[303] In fact, the rules of ratemaking haven't changed much.[304] This article does not attempt to ascribe value to the different methods. The contribution of this Article is neither a diagnosis nor prognosis. The entire point of this article is to pause, momentarily, to consider these issues and what the road ahead *might* look like. Is the coincident peak method the most efficient method? No – no pricing method is perfect in its ability to harmonize the universe of competing interests, incentives, and objectives.[305] It is also unlikely for there to be a uniform approach or unanimous consensus on any of these issues. In fact, it is unrealistic to expect as much.[306] And so, in that regard, this Article does not attempt to answer the question of whether a resolution, or solution, even exists. As unsatisfying as that is, the underlying fundamentals of this particular policy dilemma could very well change in short order. Modern day technological advancements are advancing rapidly and will only serve to animate (or frustrate) further policy debates about how the system is being used and how to apportion the costs with that usage. As just one example shows, storage being considered and used as a transmission asset would seemingly render the very hypothesis being explored and tested in this text unambiguous: demand charges were designed for a system that no longer exists.

As much time as we spend thinking about the right resource mix and how much that mix will, or should, cost,[307] it seems equally important to get the cost of delivery right, too.[308] For now, while modifying existing rate designs seems to be

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Working out the rules for participation has required considerable tinkering and iteration, and the path of progress has hardly been straight." Eisen, *supra* note 103, at 351.

303. *See, e.g.*, Me. v. FERC, 854 F.3d 9, 23 (D.C. Cir. 2017) ("Statutory reasonableness allows a 'substantial spread' of potentially reasonable rates."). In fact, the Commission once acknowledged the "complexity of estimating marginal cost on the transmission grid" and "encourage[d] experimentation in this area." *Pricing Policy Statement*, *supra* note 127, at 11.

304. *See, e.g.*, JAMES C. BONBRIGHT, *Principles of Public Utility* Rates, POWELL GOLDSTEIN LLP 31 (1961), https://www.raponline.org/wp-content/uploads/2016/05/powellgoldstein-bonbright-principlesofpublicutilityrates-1960-10-10.pdf (citing "[i]nstead, the merits of alternative rules of ratemaking are to be judged solely by reference to their functional efficiency in getting the work of the world accomplished – in attracting capital to public utility enterprises, in supplying incentives to high-grade management, in controlling the demand for the service, etc.").

305. Harmonizing costs and pricing are matters that "have been with us for a long time and they are to some degree indeterminate" and pose a "perennial dilemma." *See* Cudahy, *supra* note 1, at 359.

306. *See, e.g.*, Craig Glazer et al., *The Future of Centrally Organized Wholesale Electricity Markets*, FUTURE ELEC. UTIL. REGUL. 47 (2017), https://eta-publications.lbl.gov/sites/default/files/lbnl-1007226.pdf (arguing that the "electric utility industry speaks with a unanimous voice on very few questions.").

307. Harvey L. Reiter, *When Is Renewable Not Renewable: Constitutionality State Laws Denying New Large Canadian Hydroelectric Projects Treatment as Renewable Res.*, 5 HARV. BUS. L. REV. ONLINE 76, 76 (2015).

308. Patrick J. McCormick II. & Sean B. Cunningham, *Requirements "Just and Reasonable" Standard: Legal Bases for Reform Elec. Transmission Rates*, 21 ENERGY L.J. 389, 389 (2000) (citing "The widening gap

the more straight-forward path to addressing the issues presented in this article, these modifications would likely represent mere variants to an outdated model. Is it worth exploring novel ideas and concepts to tackle the novel issues of the future?[309] Maybe – the Commission is no stranger to innovation and competition – but for now, the majority of our focus rests on the mantle of the ideas that have come before (with a specific focus on identifying whether there's continued utility and value in some of these other methods).[310]

Indeed, it is possible there's space for a more innovative solution. In fact, there is no exact rulebook suggesting transitions are without turbulence. Case in point, there was a time and place when the Commission considered an alternative to network and point-to-point transmission service products.[311] The Commission ultimately terminated the rulemaking – given the passage of time and developments within the industry – but the premise of the proposed rulemaking is still a good one and represents the idea that the Commission can identify solutions that "right-size" a solution to a particular problem.

What was true around the time of open access remains true today: flexibility is paramount.[312] As the Commission did then, it will have to do now: identify a path forward, merging and weaving together both old and new. In the years leading up to Order No. 888 and the Commission's Transmission Pricing Policy Statement, the Commission developed its policy – a foundation laid piece by piece,

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between transmission capacity and growing demands on the system threatens to make transmission function as more of a "bottleneck" than a "pipeline" for increasingly competitive markets in electricity. . . . Transmission rate reform, to encourage new investment in transmission infrastructure, is an essential ingredient in the remedy for the "transmission investment gap.").

309. The Commission is no stranger to exploring and adopting, when appropriate, innovative approaches to pricing problems. *See, e.g.*, Heidi Werntz, *Let's Make Deal: Negotiated Rates for Merch. Transmission*, 28 PACE ENVTL. L. REV. 421, 451 (2011); *see also,* Jon Wellinghoff et al., *Facilitating Hydrokinetic Energy Development through Regulatory Innovation*, 29 ENERGY L.J. 397 (2008).

310. As ambitious as this article desires to be, new information, dialogue, and caselaw may render the Article's contents obsolete, as our understanding of the issues will evolve naturally over time, sometimes rapidly. There is, inherently, no right or wrong answer. Furthermore, no statement in this Article should be interpreted as a criticism of any particular theory, argument, policy, or case – the purpose of this Article is to seek understanding, serve as a decent custodian of history and caselaw, and attempt to think holistically about pricing.

311. In 1996, the Commission issued a Notice of Proposed Rulemaking aimed at understanding whether having two products – each with their own unique terms and conditions – was the best vehicle for accomplishing open access. *See* Notice of Proposed Rulemaking, *Capacity Reservation Open Access Transmission Tariffs*, FERC Stats. & Regs. ¶ 32,519, 61 Fed. Reg. 21,847, 21,848 (1996) (to be codified at 18 C.F.R. pt. 35). We also know that the Commission does not view these things in a vacuum (in that, for example, modifications to transmission service are not viewed in isolation from modifications to transmission rates); *see* Order No. 888-A, *supra* note 131, at 240 (citing "any modifications to the non-price terms and conditions established in the pro forma tariff must be fully supported by the utility and the appropriateness of such proposed changes will be evaluated by the Commission for consistency with the proposed rates or rate methodologies.").

312. *See generally* 61 Fed. Reg. 21,847. In 1996, the Commission issued a Notice of Proposed Rulemaking aimed at understanding whether having two products – each with their own unique terms and conditions – was the best vehicle for accomplishing open access. *See* Order No. 888-A, *supra* note 131, at 240 (citing "[A]ny modifications to the non-price terms and conditions established in the pro forma tariff must be fully supported by the utility and the appropriateness of such proposed changes will be evaluated by the Commission for consistency with the proposed rates or rate methodologies."). We also know that the Commission does not view these things in a vacuum (in that, for example, modifications to transmission service are not viewed in isolation from modifications to transmission rates).

brick by brick – through case law. It is not clear that the Commission has issued any "brick" yet that would represent the foundation of a solution for the problems articulated in this article.

Possibly, more principally than the narrow issues raised in this Article, is the need for harmony between retail markets and wholesale markets[313] – as outlined by Commissioner Christie, the price signals sent to load are muted,[314] as their electric bills include non-by-passable charges, for example.[315] More often than not, there is the faintest of eye contact between the two, let alone a handshake indicating some form of agreement or unity between the two related, but separate elements of electric delivery.[316] Possibly a story for the next article.

313. Severin Borenstein & James Bushnell, *Do Two Electricity Pricing Wrongs Make a Right? Cost Recovery, Externalities, and Efficiency,* 14 AM. ECON. J.: ECON. POL'Y 80, 100 (2022). Not only that, but retail pricing also continues to suffer from a number of distortions – most notably, the idea that retail prices do not fluctuate with the momentary fluctuations of supply and demand. The authors of that article make persuasive arguments – pulling on several strands of literature – that there are several pervasive distortions with respect to retail pricing and that, critically, markets with multiple distortions may not be necessarily improved by addressing one distortion in insolation.

314. *See, e.g*, Serota, *supra* note 96, at 792 (citing "[r]atepayers are not responsive to price signals because these users are not charged real time marginal prices.").

315. Christie, *supra* note 42, at 19.

316. *See, e.g.,* Ashley Brown & Susan Kaplan, *Retail and Wholesale Transmission Pricing: A Troublesome Divergence?* HARV. ELEC. POL'Y GRP. 5 (1999); *see also, Michael* Giberson & Lynne Kiesling, *The Need for Electricity Retail Market Reforms*, 40 REGUL. 34 (2017).

FOSSIL FUTURE

By Alex Epstein
Reviewed by Kenneth A. Barry[*]

I. INTRODUCTION

One thing you have to concede about self-described philosopher and energy expert Alex Epstein is that he's unafraid to buck the consensus. His latest opus, *Fossil Fuels*, subtitled "Why Global Human Flourishing Requires More Oil, Coal, and Natural Gas – Not Less," questions nearly every premise of the urgent campaign to replace conventional fuels with greener alternatives.[1] And those proclamations of alleged urgency confront the public continually. To take just one example out of today's headlines, the September 5, 2023 edition of *The Washington Post* blared: "*Climate-linked ills threaten humanity*."[2] The same edition's lead editorial blasted the Texas school board for considering a curriculum standard stipulating that "human activities *can* [rather than *do*] influence climate."[3] The editorial acknowledges that Texas "always gets hot in the summer," but then intones: "[T]he severity and frequency of extreme heat will only increase as the world warms, driven by burning fossil fuels."[4]

To Epstein, such stern mainstream media admonitions crystallize the problem of how the public is informed. To the author, fossil fuels aren't the menace – but rather the salvation – to human civilization. And not merely as a bridge to a carbon-free future: unlike the utility and even oil and gas industry spokespeople who

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1. Many of Epstein's core arguments in favor of fossil fuels or against renewables were advanced in his first book, The *Moral Case for Fossil* Fuels. ALEX EPSTEIN, THE MORAL CASE FOR FOSSIL FUELS (Portfolio 2014); *see* Jody Freeman, *A Critical Look at "The Moral Case for Fossil Fuels,"* 36 ENERGY L.J. 327 (2015), for a review of the book by Harvard Law professor, Jody Freeman; *see also* Alex Epstein, *A Straw Man Attack on the "The Moral Case for Fossil Fuels,"* 38 ENERGY L.J. 79 (2017), for a rebuttal to the Freeman review by Epstein himself.

2. Annie Gowe, et al., *Climate-Linked Ills Threaten Humanity*, WASH. POST (Sept. 5, 2023, 6:00 AM), https://www.washingtonpost.com/climate-environment/interactive/2023/pakistan-extreme-heat-health-impacts-death/?pwapi_token=eyJ0eXAiOiJKV1QiLCJhbGciOiJIUzI1NiJ9.eyJyZWFzb24iOiJnaWZ0IiwibmJmIjoxNjkzODg2NDAwLCJpc3MiOiJzdWJzY3JpcHRpb25zIiwiZXhwIjoxNjk1MjY4Nzk5LCJpYXQiOjE2OTM4ODY0MDAsImp0aSI6ImExNzYyOWM1LTRjOTAtNGNhOS04ODQzLWNlYTQzMzQyNjBjNCIsInVybCI6Imh0dHBzOi8vd3d3Lndhc2hpbmd0b25wb3N0LmNvbS9jbGltYXRlLWV-udmlyb25tZW50L2ludGVyYWN0aXZlLzIwMjMvcG-FraXN0YW4tZXh0cmVtZS1oZWF0LWhlYWx0aC1pbXBhY3RzLWRlYXRoLyJ9.yv46ZgrprAvESofGzi3MEG4NMvVZ7HDgrxmoX4_TPnQ&itid=gfta.

3. *School officials are still arguing about teaching climate change*, WASH. POST (Sept. 6, 2023, 7:03 PM) https://www.washingtonpost.com/opinions/2023/09/06/texas-climate-change-textbooks/.

4. *Id.*; The editorial also scolds certain Texas school board members for suggesting that school books should discuss the "benefits" of burning fossil fuels or that "naturally occurring climate change can lead to increasing temperatures," inasmuch as that would "downplay conclusive research showing fossil fuel use is rapidly warming the planet." *Id.*

embrace "net zero" goals for the longer term (while recognizing the need for hydrocarbons to fuel societies for a least a decade or two), Epstein argues, through the considerable length and breadth of *Fossil Future* (it runs 430 pages), that mankind will need a robust supply of fossil fuels indefinitely. Hence, while environmentalists might tag Epstein as an extreme climate denialist, he might turn the tables and label advocates of rapid fossil fuel elimination as energy deniers.

To be fair (and clear), Epstein does not deny that carbon emissions are contributing to the warming of the planet. Instead, in a one-hundred-page overture before the book gets down to brass tacks, Epstein develops his core thesis that the benefits bestowed by fossil fuels on economic development and basic human comfort far outweigh any environmental drawbacks; and besides, he insists, negative impacts are "masterable" through utilization of fossil fuels.

II. OPENING SHOTS

The one-hundred-page opening (Part I of *Fossil Future*) is essentially an elaboration of the book's not-so-succinct subtitle. Epstein starts out with reflections on how our "knowledge system" (a favorite Epstein phrase) works in practice. A chain of information on scientific matters begins with "experts," whose analysis is passed on to "disseminators" (e.g., mainstream newspaper reporters, educators, and spokespeople for scientific institutions), and ultimately extends to "evaluators" (editorial writers, other public commentators, and policymakers)."[5] Epstein repeatedly decries a "chain of distortions" in this knowledge system that works its way down from the experts through to the evaluators.[6]

The author goes on to note that "billions of people are suffering and dying for lack of cost-effective energy"[7] and to criticize "our designated experts" (individuals or institutions chosen by the "knowledge system" to opine on the implications of research in the climate field) for persistently ignoring the benefits of fossil fuels.[8] The passage proceeds to list a gallery of well-known "designated experts" (e.g., James Hansen, Michael Mann, Al Gore, Amory Lovins, and others) who have stressed the catastrophic consequences of continued reliance on fossil fuels while failing, says the author, in their "moral case" for *eliminating* these fuels to "incorporate . . . the unique, massive, and desperately needed benefits of fossil fuels."[9]

Adding to the perplexity of the designated experts' advice, Epstein injects, is the "fact that our knowledge system" (often led the same experts) "regularly supports the elimination of the two most cost-effective, non-CO_2-emitting alternatives

5. ALEX EPSTEIN, FOSSIL FUTURE: WHY GLOBAL HUMAN FLOURISHING REQUIRES MORE OIL, COAL, AND NATURAL GAS--NOT LESS, 16 (Portfolio, 2022) [hereinafter FOSSIL FUTURE].

6. Epstein joins the chorus of conservative critics in calling out the reports of the U.N.'s Intergovernmental Panel on Climate Change (IPCC) as a "chain of distortions" omitting "crucial facts (such as "climate-related deaths are plummeting." *Id.* at 15. The "distortions of evaluation," he goes on to insist, are "the worst and most damaging . . . with fossil fuels in particular." *Id.*

7. *Id.* at 26.

8. *Id.* at 29-30.

9. FOSSIL FUTURE, *supra* note 5, at 30.

to fossil fuels – alternatives you'd expect anyone concerned [about carbon emissions] to eagerly champion: nuclear energy and hydroelectric energy."[10] Moreover, while Epstein concedes the "knowledge system in theory" supports wind and solar energy, "in practice" these technologies "face widespread local opposition" because they require mining, the consumption of "huge amounts of space," and entail "unprecedented amounts of long-distance electric transmission lines."[11]

Another charge by Epstein is that disseminators and evaluators defer all too readily to "catastrophizers" of fossil fuels' "side effects" (two more of the book's favorite terms). In Part I,[12] the author condemns such "catastrophizing" while asserting that "Our knowledge system's real track record on climate change is 180 degrees wrong," guilty of "wildly overstating side-effects."[13]

To sum up, the book's opening sections indict a "knowledge system" writ large for painting a picture that, in the author's telling, privileges advice from the wrong experts and showcases leading voices that are not only anti-energy but, when it comes right down to it, anti-human.

III. WHY ARE ENVIRONMENTAL ADVOCATES SO "ANTI-HUMAN"?

Epstein does not pose this precise question. But that's the underlying quandary in an extended section labeled "The Anti-Impact Framework."[14] The discussion that ensues seems foundational to everything Epstein has to say about the energy choices before us and the force fields buffeting them. It's here that the author most conspicuously dons his philosopher's hat. His central – and unquestionably controversial – contention is that those advocating rapid eliminating fossil fuels are fundamentally "anti-human" regarding their "primary moral goal."[15]

Epstein spins this theory out by arguing that environmentalists[16] look at all energy development projects through an *anti-impact* prism. In his view, they portray a concept of nature that, undisturbed, maintains a "delicate balance" and, hence, that human interventions with a significant environmental impact threaten to topple that balance.[17] The author has so much to say on this topic that just to

10. *Id.* at 34.

11. *Id.* at 37.

12. Part I begins at page 42.

13. FOSSIL FUTURE, *supra* note 5, at 54 (noting that here, Epstein catalogs a series of dire predictions from well-known experts that have not been realized, at least in the timeframes originally predicted. He uses this material to undermine the credibility of climate change experts warning of doomsday scenarios. It seems fair to add that the headlines and reportage on certain extreme weather events in 2023 reinforce the notion that climate change is upon us, and the consequences are dire. Presumably, Epstein would reply that the reportage is hyperbolic and lacks context.).

14. *Id.* at 74-105.

15. *Id.* at 75.

16. In this review, the term "environmentalists" is used interchangeably with anti-fossil fuel advocates, although the latter may be best viewed as a major branch or offshoot of the environmental movement.

17. The book more expansively elaborates the "delicate balance" view with some of the clunkier terminology one encounters between its covers (see 92-95). Epstein refers to a "delicate nurturer assumption" employed by anti-impact advocates that, he contends, distorts the trade-offs between development and ecological preservation by implying an idealized harmony of nature and its creatures in its pristine state – which, in turn, is subverted by humans viewed under a "parasite-polluter assumption."

summarize it would take pages. But a couple of excerpts capture the flavor. Epstein quotes from a favorable review of *The End of Nature* (1989) by noted environmentalist Bill McKibben as follows:

> Human happiness, and certainly human fecundity, are not as important as a wild and healthy planet. . . . Until such time as *Homo sapiens* should decide to rejoin nature, some of us can only hope for the right virus to come along.[18]

Epstein quickly acknowledges that such naked examples of "explicitly naming our primary goal as eliminating human impact" are "relatively rare,"[19] but he offers up this tidbit as telling evidence of the real agenda of radical naturalists (and by extension the most outspoken anti-fossil fuel advocates). Vaguer exhortations such as "going green," Epstein asserts, cloak the more radical *no-impact* agenda but, in practice, "absolutely do mean eliminating all types of human impacts – including the vast majority of human impacts that are beneficial to human flourishing."[20]

Returning to the innate tension between environmental protection and energy resource development, Epstein underscores that *every* type of energy, whether conventional or renewable, entails significant impact on the natural world:

> All forms of cost-effective energy involve developing nature – transforming it in a significant way. . . . Crucially, even when the mainstream knowledge system doesn't actively support stopping some development, it is highly sympathetic to the people trying to stop it – because they are seeking to eliminate some form of human impact, which is considered to be the epitome of morality.[21]

Conversely, laments the author, the "knowledge system" views the "significant side effects of cost-effective energy as immoral and in need of elimination."[22] Epstein moreover portrays as disingenuous the contrast his adversaries draw between a benign, nurturing nature and detrimental human impacts. "They know," he claims, that "climate danger used to be a menace to human life that most of us in the 'empowered world' cannot imagine today" and "by the modern standard of living [unimpacted nature] is a barely livable place."[23]

Near the end of this discussion, the author exhorts us to discard the "anti-impact framework" that, he says, unduly shapes the discourse about climate change and the "side effects" of energy production and consumption. It should be replaced, he posits, with a "human flourishing framework" that considers the "full context" by "weighing the benefits and side-effects of different forms of energy in relation to human flourishing – neither ignoring nor catastrophizing anything."[24]

Epstein closes Part I of *Fossil Future* by finally unveiling his mission or "project," as he calls it. He relates that about 14 years earlier, he commenced a study of the energy choices facing society and came swiftly to the conclusions that (1) the future of fossil fuels in the energy mix is an extremely important issue, but (2)

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18. FOSSIL FUTURE, *supra* note 5, at 81.
19. *Id.*
20. *Id.*
21. *Id.* at 83-84.
22. FOSSIL FUTURE, *supra* note 5, at 87.
23. *Id.* at 94.
24. *Id.* at 100.

the "mainstream knowledge system," incorporating its "anti-impact framework [is] guaranteed to give us terrible, anti-human guidance and its prescription of rapidly eliminating fossil fuels could well be catastrophically bad."[25] He then looked for "some general expert" who could provide a more enlightened, "full-context evaluation" but found that specialists in the topics that matter most ("energy, economics, environmental science, climate science") were "operating on the anti-impact framework" Epstein so thoroughly distrusts.[26] It was at this point that he decided to add "general expert on fossil fuels" to his philosopher shingle, "drawing on the best sources and specialists I could find."[27] The result is *Fossil Future*, a "synthesis of everything that [Epstein] learned."[28]

IV. ABOUT THAT BOUNTY OF BENEFITS

Part II of *Fossil Fuels*[29] undertakes to educate the readers more broadly on the benefits of burning fossil fuels. There is nothing understated in Epstein's expository style. Although such "benefits" have been a regular drumbeat of the preceding pages,[30] the author confides that "Those benefits are far, far greater than I have been able to explain so far." Manifestly, Epstein isn't reluctant to raise the bar he's attempting to clear.

He begins with some reflections on the meaning of "livable planet" – a phrase he perceives as exemplifying "vague, confusing environmental terminology." The term intertwines two different things, he continues: a planet that is "highly livable for human beings" and an "unimpacted" planet that is "allegedly more livable" for a wide range of species.[31] It's the former version, with *human beings* and their flourishing at the epicenter, that Epstein prioritizes. The question of what defines a livable world and what is conducive to it occupies the next several pages. The qualities that serve as his measuring rods are (1) "*nourishing*"; (2) "*safe*"; and (3) "*opportunity-filled.*"[32] Not unexpectedly, Epstein views fossil fuel development and utilization as the portal to attaining these habitability goals.

The chapter places side-by-side graphs depicting life expectancy, world population, and GDP-per capita over the last two millennia and observes that they mirror a graph of carbon dioxide emissions, with "hockey stick" increases beginning around the late 19th Century.[33] These correlations, he concludes, reflect "an incredible improvement in Earth's livability," notwithstanding "a lot of [human] impact, which fossil fuel use certainly does . . . ."[34] Yet, to Epstein's dismay, the

25. *Id.* at 103-04.

26. FOSSIL FUTURE, *supra* note 5, at 104.

27. *Id.*

28. *Id.*

29. Part II beings at page 109 with "Sec. 4 – Our Unnaturally Livable Fossil-Fueled World."

30. The heading of a passage at 9 begins, "The Unique, Massive, and Desperately Needed Benefits of Fossil Fuels."

31. FOSSIL FUTURE, *supra* note 5, at 114.

32. *Id.* at 115.

33. *Id.* at 118.

34. *Id.* at 118-19.

"knowledge system and its designated experts" miss the salience of these parallels by doggedly sticking to their "anti-impact framework":

> [E]ven though Earth is more livable than ever, it's widely evaluated as "destroyed" because we've impacted it so much – even though that impact has brought billions of people out of poverty and made them far safer from climate danger.[35]

Returning to the correlation between rising CO_2 levels and his proxies for planetary "livability," Epstein first concedes that correlations don't necessarily *prove* causation,[36] but then submits they're "often reflections" of causation. "In this case," he proceeds, "the relationship is causal to a degree that almost no one appreciates: the ultra-cost-effective fossil fuel energy emitting the CO_2 is literally driving the world's unprecedented, increasing livability."[37] From there, *Fossil Future* enlarges on how the invention and innovation of machines has succeeded, in innumerable ways, in displacing manual labor, with humanity reaping the benefits of productivity. This march of progress, Epstein emphasizes, could not have taken place without fossil fuels to produce and then power the machines.[38]

V. STACKING UP THE BENEFITS AGAINST THE "SIDE-EFFECTS"

As has been seen, *Fossil Fuels* takes a dim view of the "knowledge system" that shapes the general public's impressions about thermal energy and its tradeoffs or drawbacks. Epstein's ideas on getting to a more balanced view occupy much of the second half of the book; but the closing pages of Chapter 4 ("Our Unnaturally Livable Fossil-Fueled World") soften the ground with some tough rhetoric on how that knowledge system portrays the benefits side of the equation.

In a discussion on human health impacts posed by fossil fuel combustion emissions, the author first points out that, apart from carbon dioxide, "air pollution in the U.S. has declined dramatically."[39] Another tack is the assertion that "fossil fuel energy's side-effects are increasingly neutralized by its benefits." The "neutralized" concept has multiple facets. One is that he doesn't necessarily mean *reducing "the effect itself"* but rather the negative consequences thereof.[40] Another is a reminder of benefits (e.g., to human health and well-being) enabled by fossil fuels. For example, he chafes at the studies claiming to show reduced life expectancy from coal emissions in China, insisting that "any accurate study" would show dramatic *increases* in life expectancy, adding:

> That we never hear this illustrates once again how worthless our anti-impact, anti-energy, and ultimately anti-human knowledge system is . . . .[41]

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35. FOSSIL FUTURE, *supra* note 5, at 118-19.

36. *Id.* at 120.

37. *Id.*; Answering the fact that improvements in life expectancy, etc. are "invariably ascribed to crucial factors . . . such as scientific discoveries, technological innovation, improved medical care, and improved sanitation," Epstein insists they have "overwhelming depended on and will continue to depend on ultra-cost-effective energy production from fossil fuels or their equal." *Id.*

38. This will seem uncontroversial to most readers; but presumably Epstein hammers home the point because fossil fuels have become such a flashpoint (and subject of denigration) in the current political discourse.

39. FOSSIL FUTURE, *supra* note 5, at 166.

40. *Id.* at 168.

41. *Id.* at 170.

Epstein similarly exhibits little patience for studies that assert fossil fuel prices fail to reflect negative "externalities." To be fair, he says, such studies should also take pains to reflect the *positive* externalities (in other words, the economic value provided by a given unit of oil, natural gas, or coal). If we paid for the positive externalities, he muses, "we would be giving significant chunks of our life savings to the fossil fuel industry."[42]

VI. "COST-EFFECTIVENESS" OF FOSSIL FUELS VS. ALTERNATIVES

Up to this point, Epstein has sprinkled his book generously with references to the "ultra" cost-effectiveness of fossil fuels. In Chapter 5,[43] he goes beyond the bare assertion and wades more deeply into this facet of his overall benefits argument. Necessarily, his cost-effectiveness stance must thwart the commonly heard claim from anti-fossil fuel advocates that renewables not only are ushering in a greener, cleaner future but are already *more* competitive than conventional fuels.[44] This economics debate may be of greater interest to energy professionals than Epstein's retrospective on the historic contributions of coal, oil, and natural gas to civilization.

Much of this section is devoted to the natural advantages of fossil fuels from a chemical and physics perspective. In contrast with the "intermittent flow" of sunlight and wind that requires conversion, transmission, and "massive" storage,[45] observes Epstein, fossil fuels already have "naturally stored energy of ancient organisms, which means that ultimately they are *naturally stored sunlight"* and provide a "mass-energy-storage system for us."[46] Another critical advantage is the "energy density" of fossil fuels, facilitating economical, global transportation.[47] Yet another leg up for fossil fuels is simply that, because they've been around for such a long time, an "unrivaled amount of economic innovation and achievement has gone into harnessing" their physical attributes, creating "an incredibly high bar for potential alternatives . . . ."[48] In other words, they have incumbency on their side.

Finally, these fuels (routinely referred to as "finite resources" twenty-five or more years ago) "exist in staggering amounts," the author insists.[49] Even though statements on current "reserves" may speak only of *decades* of availability, Ep-

42. *Id.* at 172; At this point, Epstein expresses scorn for the "smug but inane refrain" that market prices for fossil fuels fail to reflect the negative externalities. FOSSIL FUTURE, *supra* note 5, at 172.

43. Chapter 5, "The Unique and Expanding Cost-Effectiveness of Fossil Fuels" begins on page 174.

44. In Chapter 6 ("Alternatives: Distortions versus Reality"), the book goes another round against renewables advocates contending that affordable, practical, and greener alternatives are already present and deployable *en masse.*

45. FOSSIL FUTURE, *supra* note 5, at 182-85.

46. *Id.* at 185.

47. *Id.* at 186-87.

48. *Id.* at 192.

49. FOSSIL FUTURE, *supra* note 5, at 192; The only other fuel with comparable attributes, says Epstein, is nuclear energy, but "it is strangled by governments to the point of near criminalization." *Id.* at 188.

stein distinguishes "reserves" from "deposits," with the latter being a better indicator of future abundance; and in that regard, *Fossil Future* assures us that "deposits . . . are absolutely huge" providing fuel for "centuries to come."[50]

The book cites the "shale energy revolution" as a vivid example of how technological advances have accelerated oil and natural gas production "in the last decade, especially in the United States."[51] This is certainly valid, but Epstein could be more nuanced when he asserts simply that "[i]n 2019, the U.S. was a net oil exporter."[52] The reality is more complicated. The Energy Information Administration (EIA) website (a source Epstein relies on) indicates that the U.S. was a net *overall energy* exporter that year, and in November 2019, was a net exporter of *petroleum products*. But it was still a net importer of *crude oil* (notwithstanding major strides in reducing the levels of imports since around 2005).[53]

VII. THE CASE AGAINST A HEAVY PUSH TOWARDS RENEWABLES

Chapter 6 ("Alternatives: Distortions versus Realities") tackles a related, no less pivotal subject: what is a *realistic* expectation for the penetration of renewables or "green" energy in the next ten years and beyond? *Fossil Future* goes up against the familiar battle cries of "green power" advocates: that the climate crisis is already upon us; that harm to the atmosphere from fossil fuel emissions is approaching an irreversible inflection point; that the only way out is a radical commitment to non-carbon-emitting alternatives; that the wind and solar energy – at least to power the grid – are more than equal to the task; and that a comparably aggressive commitment to electric vehicles (EVs) will speed the relegation of oil to a far lesser role in fueling mobility.

Epstein begins by deriding projections embraced by the "knowledge system" that green energy will *totally displace* conventional fuels in "less than thirty years"; and he is even more dumbfounded by "a group of prominent academics and other influential people" contending that the electric grid can be totally powered by renewables at the end of this decade.[54] Thus, a central aspect of the author's "project" is to debunk what he paints as "the incredible claims of our anti-energy knowledge system."[55]

To do so, Epstein points up an assortment of fallacies he alleges run through such predictions. One is that "efficiency" is the "lowest hanging fruit" that will result in reduced energy usage.[56] The author regards this as delusional because the third world has billions of people that are currently underserved or unserved by cost-effective fossil fuel-burning systems and can be expected to demand much

50. *Id.* at 199; This assertion comes with a caveat: Epstein acknowledges that the existence of "almost limitless deposits" doesn't necessarily mean they can be produced cost-effectively; but he is nonetheless confident that "unprecedented innovation and progress" in energy technology will enable their production. *Id.* at 200.

51. FOSSIL FUTURE, *supra* note 5, at 200.

52. *Id.*

53. *See Despite the U.S. becoming a net petroleum exporter, most regions are still net importers*, EIA (Feb. 6, 2020) https://www.eia.gov/todayinenergy/detail.php?id=42735. Therein, the EIA states that in November 2019, the nation imported 5.8 million b/d of crude oil, while exporting 3.0 million b/d – a net deficit.

54. FOSSIL FUTURE, *supra* note 5, at 204.

55. *Id.* at 205.

56. *Id.* at 206.

more conventional energy as they develop. Secondarily, Epstein finds it incongruous or worse that those insisting on advancing greener, low-carbon technologies (1) exclude nuclear and hydro power (presumably because they aren't "low-impact" resources); and (2) shrug off "global opposition" to solar and wind based on their total lifecycle impacts on nature.[57] Moreover, Epstein argues at length that wind and solar energy aren't nearly as competitive as they are cracked up to be.

The substance of Epstein's argument is probably familiar territory to longstanding students of energy physics and economics, but less so to readers who largely get their information on energy and the environment from the newspapers, political talk shows, and internet polemics. His chief points can be summarized as follows:

- Low current penetration. Despite "many decades on the market," wind and solar produce only around 3% of the world's energy. That contribution is almost entirely electricity, and with "no current competition with many of fossil fuels' mobility-related or industrial-related uses." To make headway in those applications and completely replace fossil fuels, generation at a "far, far lower cost" and the invention of cost-effective, low-carbon transportation machines would be necessary.[58]
- Rapid growth of wind and solar in context. While wind and solar power exponents boast of rapid expansion in their deployment, these double-digit annual growth rates are off a low base. Epstein notes: "[H]istory shows us that in business it's very common for something to have a temporarily rapid rate of growth when its base is small and then taper off as it grows."[59]
- Illusion of prices falling to levels below thermal generation. As to the "constant headlines about solar and wind already falling to prices that are cheaper than nuclear . . . coal . . . [or] gas," Epstein highlights several counterpoints. First, wind and solar are the beneficiaries of "massive government preferences" in the form of subsidies, as well as mandated incorporation in the form of renewable portfolio standards. Yet, he suggests, the leaders in wind and solar penetration – Germany and Denmark in Europe, California in the U.S. – have the highest retail electricity prices. "Why," he asks, "do solar and wind seem to always make electricity more expensive if they're actually so cheap?" The answer, he continues, lies in the "diluteness" and intermittency of wind and solar energy, entailing larger investments in transmission networks and the maintenance of fossil-fuel backup generation. There are three "approaches," the book claims, to working around the inherent shortcomings of wind and solar: relying on (1) "some controllable source of energy" (e.g.,

57. *Id.* at 206-07.

58. FOSSIL FUTURE, *supra* note 5, at 209; By "mobility-related" uses that aren't currently competitive running on electricity, Epstein apparently excludes most EVs (passenger vehicles and lighter-duty trucks).

59. *Id.* at 210.

fossil fuels); (2) a "diverse, distant, enormous" network of wind and solar generation; or (3) a "man-made storage system" holding enough renewable energy in reserve to meet demand. Of these, Epstein concludes, only the first approach "has been implemented at *any* cost."[60]

- Weather and sunlight match up poorly with end-use demand. Epstein anecdotally suggests that recent regional U.S. blackouts – for example, in Texas and California – can be traced to low outputs of wind or solar energy. He maintains that the wind doesn't blow very much when the weather is very cold or very hot, and notes that there isn't much sunshine in Germany at all in the cold winter months. As to the latter, he posits that "intermittent solar and wind can go to near zero for extended periods of time" with the consequence that they "do not replace existing, controllable energy infrastructure."[61]

Epstein's conclusions are severe. "Is it any wonder," he ponders, "that the more solar and wind a country uses, the higher its costs?"[62] Not only do such ventures entail "massive infrastructure duplication," he maintains, but also necessitate cycling thermal generation up or down to mirror the ebbs and flows of intermittent generation – "an efficiency killer, just like stop-and-go traffic kills your car's fuel efficiency."[63] A few pages later, he denounces wind and solar as "cost-adding, reliability-decreasing parasites" that aren't even close to having the ability to "power a grid on their own."[64] For good measure, he labels as a "fraud" the practice of large corporations such as Apple, Google, and Bank of America in asserting they're operating on 100% renewable energy, leading consumers to think a fossil-free energy reliance is actually achievable.[65]

An adjacent argument is Epstein's portrait of battery storage: this is no practical answer to wind and solar inherent intermittency, he contends, but rather a disingenuous myth. In theory, he explains, system designers could construct a tremendous amount of wind and solar generation – enough to meet not only current demands but also fill battery storage. But doing so is "completely cost-prohibitive" based on current know-how, "which is why no one has come close to even trying it."[66] After running through some figures to demonstrate the point, the author concludes:

> Thus, solar and wind replacing fuels isn't a fantastic breakthrough; it's a thoroughly dishonest fantasy – one that is used to advance anti-impact anti-energy policies.[67]

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60. *Id.* at 210-15.

61. *Id.* at 214-15.

62. FOSSIL FUTURE, *supra* note 5, at 216.

63. *Id.*

64. *Id.* at 219.

65. *Id.* at 219-20; Epstein claims that all Apple, et al. are doing is paying utilities extra to *credit* the portion of their generation that comes from renewables to customers willing to pay extra. He adds that corporate assertions of 100% renewable energy ignore, to take one example, Apple's use of large transport vehicles to ship parts and products around and their bulk of their manufacturing in China, where "64% of electricity is from coal." FOSSIL FUTURE, *supra* note 5, at 220.

66. *Id.* at 221.

67. *Id.* at 223.

In the concluding page of this section, Epstein cites examples of soured experiments in full-on reliance on solar generation in certain third-world countries, and contends that other modes of renewable energy – beyond wind and solar – either (1) can't realistically be expected to displace significant amounts of fossil fuels (biomass and geothermal);[68] or (2) have been wrongheadedly suppressed or dismissed by green power advocates (hydro-electricity, nuclear) because of their unacceptable human impact on nature.[69]

The author directs some vehemence particularly towards the green movement's anti-nuclear bias, since this is one technology that exploits abundant raw materials, taps into a very dense energy source, and doesn't emit greenhouse gases.[70] Moreover, Epstein insists, safety concerns are vastly overblown – labeling nuclear "the safest form of energy."[71] The real issue, he suggests, is that clean energy advocates, with only a few exceptions, dismiss nuclear as "morally unacceptable" because it tampers so profoundly with nature. Probing the practicality of nuclear further, the author submits that its operational costs have been needlessly ramped up because it's been swaddled in government regulations (due to the latter's "pseudoscientific opposition.")[72] Summing up this ideological logjam, Epstein does not mince words: "The anti-impact green energy movement is therefore a menace to our future, spreading deadly lies about energy to achieve deadly, anti-energy goals."[73]

As to the potential for carbon capture technology to turn fossil fuel combustion into "clean energy," it is somewhat surprising that Epstein sees scarcely a glimmer of hope in its economics. Large oil and gas companies and coal-burning utilities – not to mention various governments – have invested in R&D and test projects to make carbon capture and sequestration (CCS) commercially viable. But the author sees just limited scope for CCS, since it can be economical through the selling of CO_2 streams to oil producers for enhanced oil field recovery. While that can be cost-effective, he maintains that it can only work for a small amount of emissions (because the market is limited).[74] The economics of machines that suck CO_2 directly out of the atmosphere (i.e., "air capture") are far too expensive, he adds, to justify themselves.[75]

VIII. CLIMATE CHANGE: MENACE OR MANAGEABLE?

In its last three chapters, *Fossil Future* addresses three unquestionably important matters provoking the climate change debate. They all boil down, in one way or another, to how big a problem climate change really is. Is it an existential

68. There is an "advanced geothermal" concept, the book points out, that would drill very deep wells to access high-temperature, high-pressure water that could, in theory, drive generation. But it's yet to be commercialized, he notes, and – if it were shown to be practicable – would likely become the target of environmental advocates because it employs fracking and would thus arouse anti-impact sentiments. *Id.* at 230-31.

69. FOSSIL FUTURE, *supra* note 5, at 226-44.

70. *Id.* at 234.

71. *Id.* at 235.

72. *Id.* at 236.

73. FOSSIL FUTURE, *supra* note 5, at 237.

74. *Id.* at 239.

75. *Id.* at 240.

threat – a doomsday scenario for a habitable Planet Earth unless tackled decisively and pronto? Or is the threat exaggerated and, to the extent warmer temperatures are actually in store, technologically manageable and, for naturally colder regions, a blessing in disguise?

Epstein falls firmly into the latter camp. In Chapter 7 ("The Enormous Power of Fossil-Fueled Mastery"),[76] he suggests that we shouldn't refer to civilization's responses as "adaptation" (which sounds "trivial" or lame to his ears), but rather as "climate mastery," with its more emphatic, *we've-got-this* resonance.[77] He relates that climate and weather have always had their dangerous sides, but human ingenuity has enabled mankind, over time, to engineer more and better ways to cope with temperature extremes, storms, and droughts. The result has been a sharp reduction in the incidence of deaths from climate-related phenomena over the last hundred years (a period, he notes, where atmospheric concentrations of carbon dioxide have gone from purportedly "acceptable" to "unacceptable" levels).[78] The passage is buttressed with harrowing accounts of early 20th century hot and cold waves resulting in widespread death and environmental destruction – catastrophes that wouldn't occur in what the author likes to call our fossil-fueled modern world.[79]

Drought, wildfires, floods have likewise been "mastered," or at least mitigated, over the same period, Chapter 7 goes on to argue. And while property damage is up if measured in monetary terms (as property development – especially in zones more exposed to storms, floods, and fires – has rapidly expanded), the damages have remained low as a proportion of income or GDP, and hence not "a catastrophic, let alone apocalyptic, problem."[80] What especially irks Epstein is that the "knowledge system" and its disseminators refuse to acknowledge the "climate mastery abilities that will come with fossil fuels' climate side-effects."[81] As a result of this systematic "mastery denial," worries the author, the public gets only a partial (and hence misleading) view of what continued reliance on fossil fuels implicates.[82]

Passing that threshold, Epstein gets to the heart of the matter: his critique of the predominant narrative on the extent and impact of climate change. His first thrust, Chapter 8 ("The Problem of Systemic Climate Distortion"),[83] is a variation on the book's familiar theme – pushback to the narrative that virtually all scientists agree that unchecked greenhouse gas emissions present a dire threat to the environment and humanity. Since Epstein isn't a scientist himself, but rather an avid consumer of the relevant literature, he goes indirectly about the task of upending the premise that the "science is in," by citing comments of scientists who have challenged the consensus.

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76. Chapter 7 is contained in pages 247-289.
77. FOSSIL FUTURE, *supra* note 5, at 259, 285.
78. *Id.* at 260-65.
79. *Id.*
80. *Id.* at 270.
81. FOSSIL FUTURE, *supra* note 5, at 284.
82. *Id.* at 288-89.
83. Chapter 8 is contained in pages 290-318.

His first point repeats, with renewed emphasis, the fact that proponents of strong action to reduce use of fossil fuels accentuate the negative aspects of increased CO_2 emissions but ignore the "neutral and positive impacts."[84] The main "positive" for him is that the emissions are both a "warming gas" and a "fertilizing gas" (stimulating significantly more global plant growth).[85] For colder climates, incremental warming, suggests Epstein, will enhance comfort and add to the growing season. The chapter also underscores the uncertainty of how various factors impact weather and long-term climate trends, by themselves and in their interactions.[86] The author fumes at the persistence of governmental institutions in largely ignoring the benefits of increased greenhouse gas emissions, from research funding to the Intergovernmental Panel on Climate Change's (IPCC's) reports on climate change effects:

> The negatively distorted funding of research in the mainstream knowledge system leads to benefit denial, as well as overstatement of negatives . . . .And when research is distorted to ignore the benefits of fossil fuels, the rest of the knowledge system will follow – including synthesis where the IPCC downplays the extremely significant potential of global greening for human flourishing and dissemination, where the IPCC's latest Summary for Policymakers doesn't even mention the benefits of greening at all.[87]

In addition to citing the protests of eminent climate scientists who've dissented from the prevailing consensus,[88] Epstein takes issue with the frequently seen claim that "97 percent of scientists" concur that human activity is causing global warming (since such surveys lump together respondents who believe it's a huge problem with those who concede fossil fuel emissions increase warming but don't necessarily believe it is the major driver or a problem of unmanageable dimensions).[89] Finally, Epstein tears into the IPCC for its practice of writing up, with each report, a "Summary for Policymakers" that, in the author's view, is more a political document (hyping the severity of impending climate change) than an accurate distillation of the more measured committee assessments in the main body.[90] His verdict: "When our climate knowledge system summarizes the already-biased syntheses of already-biased research to become even more biased, it should lose all credibility."[91]

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84. FOSSIL FUTURE, *supra* note 5, at 291.

85. *Id.* at 297.

86. *Id.* at 292-93; Epstein also points up the spotty history of temperature data over long stretches of time: satellite data on atmospheric temperatures has only been available since 1979, and thermometer readings around the globe "for even the last hundred year" have been "limited." *Id.* at 293.

87. *Id.* at 300.

88. The notable dissenters primarily cited are Richard Lindzen, Judith Curry, and Patrick Michaels. Curry, a climate scientist at Georgia Tech before her retirement, parted with some shots (quoted in Epstein's book) on her frustration at figuring out "how to navigate the CRAZINESS in the field of climate science. Research and other professional activities are professionally rewarded only if they are channeled in certain directions approved by a politicized academic establishment" affecting receiving funding, getting papers published, getting prestigious jobs and committee appointments, etc. FOSSIL FUTURE, *supra* note 5, at 304.

89. *Id.* at 304-06.

90. *Id.* at 307-08.

91. *Id.*

But Epstein isn't quite as despairing in the quest for meaningful analysis as the above-quoted passage sounds. He maintains that by reading the underlying science assessments in the IPCC reports and "textbooks," he is able to get a handle on what the "mainstream institutions think – certainly incomparably better sense than the mainstream media institutions or IPCC summaries for policymakers."[92]

IX. RISING CO_2 LEVELS: IMPACTS FROM A "PRO-HUMAN" POINT OF VIEW

The book's culminating series of chapters begins with an extended take on projected carbon impacts from continued burning of fossil fuels, adopting a "full-context, pro-human" framework.[93] In about thirty pages, the reader is provided with the fruits of the author's examination, which he readily acknowledges must pass through "rigorous standards of assessment" to "overcome anti-impact distortions."[94] The resulting harvest, he says, picks up on the "least-distorted mainstream and nonmainstream expert sources."[95] It's indeed going to be a tall order for any theorized negative impacts to daunt the author; he declares that his inquiry "will focus above all on whether there are any impacts of rising CO_2 levels that could somehow overwhelm our enormous climate mastery abilities to the point of justifying any kind of restriction of the desperately needed value of continuing fossil fuel use."[96]

For starters, Epstein rejects out-of-hand the notion that emissions could make the Earth "unlivable," despite the alarms raised by "apocalyptic book titles."[97] His review of the scientific research on correlations between greenhouse gas emissions and warming temperatures veers away from the popular notion that the planet is heating up to unprecedented levels, chiefly by zooming out to the Earth's geological history (rather than confining himself to the 150 years or so that thermometers have been around).[98] His key takeaway is that, in the distant past, temperatures and CO_2 levels were far higher than they are today (or are likely to get), and yet "life on earth thrived."[99] Other salient points:

- The warming effect is more pronounced in the coldest regions, not so much in the temperate zones;[100]
- As carbon dioxide emissions increase, their warming or "greenhouse" effect is not linear, but rather diminishes; hence, the rate of warming will *decelerate*;[101]

92. FOSSIL FUTURE, *supra* note 5, at 312.

93. Chapter 9 begins on page 319.

94. FOSSIL FUTURE, *supra* note 5, at 320.

95. *Id.*

96. *Id.*

97. *Id.* at 321.

98. This is standard practice for books that take on the prevailing consensus that greenhouse gas emissions are damaging the climate; Epstein's book could have done a better job, however, of explaining the means by which geologists go about estimating temperatures and the presence of CO_2 in long-ago eras.

99. FOSSIL FUTURE, *supra* note 5, at 323.

100. *Id.* at 324.

101. *Id.* at 325-29.

- The long-term geological history of the planet shows "no direct correlation between temperature and CO_2," and indeed episodes of increasing emissions have *followed rather than preceded* temperature increases (calling into question that carbon dioxide increases are the main predicate for a warming climate);[102]
- Sea-level rises have been very slow and small; news stories about more dramatic rises have been cherrypicked to highlight certain locales where the phenomenon is happening for other reasons.[103]

Epstein reinforces these contentions with various charts. And, in a flourish of sharp rhetoric, he charges that such facts are "criminally" underdiscussed,[104] while noting that we'd have "plenty of time" to "decriminalize" nuclear energy, should the symptoms of planetary warming be greater than he anticipates.[105] His overarching conclusion is that – despite computer models predicting dramatic increases in warming (and associated side-effects like more severe storms, drought, etc.) – these predictions are unwarranted and in no small part driven by the incentive structure to issue "extreme warming predictions," the better to reap the rewards of "today's enormous amounts of climate funding."[106]

The author ends the chapter with guarded optimism that his insights about the underappreciated benefits and overstated detriments of fossil fuels may relieve humanity from the "pall of the belief that CO_2 emissions are causing climate catastrophe,"[107] so that, *inter alia*, "there is no need for murderous international treaties committing countries to CO_2 reductions; for national, state, and local restriction . . . preventing poor countries from developing to their full potential; [or] for mass blackouts in California and Texas . . . ."[108]

X. PARTING SHOTS

Although *Fossil Future* could have closed on that hopeful note, there is more. An extended "policy" coda unrolls a myriad of prescriptions with the common theme of liberating fossil fuels and nuclear energy from the hall of shame to which they've been consigned.[109] Epstein (1) calls upon readers, if inspired by his counter-consensus message, to join the fight against the misconceptions and fallacies he's outlined and (2) instructs governments on how to loosen up their regulatory policies to permit more efficient and expeditious development of energy and in-

102. *Id.* at 335.
103. FOSSIL FUTURE, *supra* note 5, at 340-44.
104. *Id.* at 324.
105. *Id.* at 331-32.
106. *Id.* at 336.
107. FOSSIL FUTURE, *supra* note 5, at 354.
108. *Id.*
109. *Id.* at 357; *see id.* at ch. 10 ("Maximizing Flourishing through Energy Freedom").

dustrial projects. The author also envisions, as an appealing "alternative" resource, nuclear "microreactors" that may be trucked around to remote locations or sent plying the seas to dock and serve coastal localities.[110]

In yet another epilogue-like chapter, "Reframing the Conversation and Arguing to 100,"[111] Epstein empties his barrels at an assortment of perceived nemeses to global, fossil-fueled progress. Most of these passages echo familiar refrains, inveighing against blinkered governments setting specific "net-zero" milestones;[112] mainstream media outlets purveying "distorted narratives" about purportedly catastrophic consequences from fossil fuels, or their rapid replacement by renewables;[113] educational systems devoted to climate change "indoctrination";[114] and the corporate world's embrace of the climate change mantra, coupled with voguish "ESG" movements.[115] As the title implies, Epstein offers advice on how to reframe the debate, fearing that the anti-fossil fuel legions have had the better of it to date.

XI. CONCLUSION

So, what to make of Epstein's *magnum opus?* Polemical tract? Or audacious *tour de force?* Is the author a prolific gadfly dabbling in complex technical issues, or an industrious and useful synthesizer of complex but critical scientific and philosophical issues, willing to stake out unpopular positions and absorb the inevitable incoming? I found myself going back and forth between these polarities. On the one hand, *Fossil Future* is a remarkable compendium of the many arguments launched by climate change activists against society's dependency on fossil fuels – juxtaposed with generally coherent refutations of each. On the other hand, it's dogmatically one-sided[116] and occasionally glib (e.g., in its bland assurance that nuclear energy is the safest of all energies and abhorred by environmental activists because it doesn't clear their hurdle for low impact on nature).[117] And to say the author's arguments are "coherent" doesn't necessarily mean they'll persuade most readers. Many, though, seem worthy of reflection, and *Fossil Fuel's* more controversial contentions can be a jumping off point for further exploration.

The book may be best understood as an advocacy piece, endeavoring to put the case for fossil fuels' continuing vitality in the most flattering light while

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110. FOSSIL FUTURE, *supra* note 5, at 360; While the nuggets of counsel Epstein offers in this chapter are too numerous to summarize, one particularly stood out: a denunciation of the "sustainable development" movement, which the author dismisses as a "self-righteous plague" spreading "anti-impact, anti-development policies in the unempowered world." *Id.* at 372-73.

111. Chapter 11 begins on page 393.

112. FOSSIL FUTURE, *supra* note 5, at 394.

113. *Id.*

114. *Id.* at 395.

115. *Id.* at 395-96.

116. *See* Daniel Yergin, *The New Map*, 41 ENERGY L.J. 375 (2020) (reviewed by Kenneth A. Barry) (contrasting to Epstein's approach with the more balanced and objective analysis of many current energy-versus-environment issues).

117. Epstein goes a bit too far in implying that low-carbon alternatives such as nuclear and hydropower are pervasively rejected by the climate change community, although it's a fair point that a number of prominent environmental organizations disapprove of both technologies.

searching out weaknesses in narratives insisting that their emissions are ruining the habitable environment, and that renewables offer a ready alternative. Few of those who already support eliminating CO_2 emissions as thoroughly and quickly as possible will find much of *Fossil Future* convincing (or, for that matter, readable); but the volume can serve as an in-depth resource for those skeptical of the green movement, and – for the undecided – offers some provocative material for debates the mainstream media has, as Epstein notes, preferred to avoid.

For much of the book, Epstein seems like a Quixotic character tilting with windmills – and solar panels. The few actual climate scientists brave (or foolish) enough to challenge orthodoxy have largely been shamed or silenced. But at the end of the book, the author acknowledges he's gained a broad platform with his prior book,[118] videos, consultations with political offices, and even talks at "elite institutions" such as major universities.[119] And his trail may be getting a little less lonely. Of late, Europe has started to wobble in its march to rid its energy systems of fossil fuels and its roads of gas-powered vehicles.[120] Moreover, the British Prime Minister announced on July 31 that the North Sea would be opened to more oil and gas drilling (*id.*).[121] In the U.S., the candidates competing for the 2024 Republican nomination have all attacked the Democrats' energy transition policy, and newcomer Vivek Ramaswami in particular has echoed strains of *Fossil Future* (to the point of labeling the climate change "agenda" a "hoax").

Finally, something must be said about the author's writing style. While it is commendable in its grammatical correctness and general clarity, the reader may be struck by Epstein's habit of repeating, over and over, points he has already adequately made – like a college professor who frames his lectures with an assumption that the students remember little from previous sessions. This, plus the author's predilection for single-sentence paragraphs, may make his declarations seem individually more profound but inevitably add to the door-stopper thickness of *Fossil Future.* Epstein legitimately has a lot to say, but a tighter approach to drafting might help reach a wider audience of curious, but time-pressed, consumers.

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118. Epstein published *The Moral Case for Fossil Fuels* in 2014.

119. FOSSIL FUTURE, *supra* note 5, at 400.

120. *See*, William Booth & Anthony Faiola, *Europe blinks in its commitment to a great green transition*, Wash. Post (Aug. 6, 2023), https://www.washingtonpost.com/world/2023/08/06/europe-britain-carbon-cost/. "Europe gets cold feet on warming; Division on a great green transition," (Aug.7, 2023, *Washington Post,* p. 1*).* The article notes that "now the bill is coming due . . . governments are starting to blink at the cost – political and economic – needed to power the great transition away from fossil fuels and toward renewables."

121. *Id.*

CHARLESTON: RACE, WATER, AND THE COMING STORM

By Susan Crawford
Reviewed Jeff Peterson[*]

I. INTRODUCTION

The American coast is in big trouble. A warming climate is supercharging hurricanes and their deadly and damaging storm surges. Rising sea levels push storm surges further inland than ever before while also bringing gradual but permanent inundation to places that have been dry land. Sea levels may rise by up to seven feet by 2100, and continue rising at an accelerating rate for the next several centuries. Seawater will lap at the doorsteps of both rich and poor, but disadvantaged communities are often more exposed to flood risk and less able to cope with impacts. Success in meeting global targets for reducing greenhouse gas emissions would slow, but not stop, rising seas.

Government reports and academic research studies fully document the dramatic impacts that coastal storms and rising seas are bringing to coastal cities. Despite growing confidence in the flood risks to coastal communities among scientists and public officials, most people in these communities have been slow to come to grips with the peril they face. Government reports and academic studies are strong on facts but weak on storyline, empathetic characters, and the deft touch that drives a reader to the next page. In *Charleston: Race, Water and the Coming Storm*, Susan Crawford offers what the government studies lack as she tells the compelling story of people in a renowned American city facing a future of ever rising water. She gives the reader a clear picture of the science foretelling the devastating impacts of coastal storms and rising seas, but focuses on how people are sorting out what the discouraging science means for economic viability, cultural integrity, and social justice in their community.

Millions of Americans have visited Charleston – it is rated a top tourist destination in the country. Many people reading Crawford's engaging story will find the setting familiar and feel they have a stake in Charleston's success. Thinking about the choices Charleston faces will also prompt readers to think critically about how other coastal cities will cope with a diagnosis of gradual, long-term inundation. Crawford's book will surely have a positive influence on Charleston's future. But it also makes a lasting contribution to the critical work of helping the American public understand the dramatic changes that more intense storms and rising seas are bringing to coastal cities and opening people's minds to considering the hard choices that coping with rising water will demand.

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II. CHARLESTON FACES HARD CHOICES – WHAT TO DO

A key insight of Crawford's work is that the City of Charleston and other coastal, urban areas must make choices among several options for a substantive response to deal with more severe storms and rising seas (i.e., decide what to do). But, they must also develop effective, broadly inclusive planning processes to support decision-making (i.e., decide how to decide what to do).

Charleston faces several unfortunate circumstances related to flooding. It is located on the south Atlantic coast and exposed to coastal storms projected to grow more severe because of a warming climate. In addition to storm surges from the sea, more intense rainfall is expected to fall inland where it will flow down several rivers and, meeting higher ocean waters, back up into the city. Charleston has coped with storms for centuries, recovering as flood waters drain away. But rising sea levels will bring both higher storm surges and every day, permanent inundation. The National Oceanic and Atmospheric Administration predicts that sea level in Charleston could rise by over a foot and a half by 2050, close to seven feet by 2100, and over twelve feet by 2150.

Crawford tells the story of Charleston's past efforts to cope with flood waters from early settlement to today. Charleston has tried to fill wetlands and build over them, improve drainage to minimize flood impacts, and build seawalls to protect parts of the city. In 2019, the city sponsored the "Dutch Dialogues" to hear from Netherlands flood control experts who offered innovative plans for stormwater management. But the city has been slow to implement these ideas, partly due to their cost.

In the past several years, the U.S. Army Corps of Engineers have developed plans for a major new seawall around the core of the city. This idea has drawn the interest of local officials because it has a high ratio of benefits to costs (i.e., the value of property protected is greater than the cost of the project) that might attract federal dollars. Crawford, however, points out some important issues with this proposal. It will only protect a small part of the city. In addition, even the Army Corps' limited seawall plan would require local matching funds to pay the high costs of construction. Charleston is not able to meet its local share, leaving local officials to speculate that they may need to wait for a major storm disaster and then hope that the federal government steps-in to cover the local costs of the project.

Perhaps the most fundamental problem with the seawall, however, is that it is designed as a solution to the old, familiar problem of storm surge flooding and not as a solution to the new, existential threat posed by rising sea level. Crawford persuasively, but gently, describes the only strategy that will save Charleston – relocation to higher ground. To her credit, she speaks to this controversial idea with the words of Mark Twain in mind: "The truth must be served like a coat, and not thrown in the face like a wet towel."

Relocation is presented as the challenging but unavoidable option, backed up by the conclusion of the Intergovernmental Panel on Climate Change writing in its *Sixth Assessment* report.

> Only avoidance and relocation can remove coastal risks for the coming decades, while other measures only delay impacts for a time, have increasing residual risk or

> perpetuate risk and create ongoing legacy effects and virtually certain property and ecosystem losses (high confidence).

Crawford cuts through the hand wringing and denial over relocation by offering a series of practical suggestions of what effective relocation might look like. For example, she makes a case for limiting new development in flood risk areas right away so that future relocation is more manageable. In the case of those with property already in a flood risk area, she suggests financial incentives to encourage people to move that grow smaller over time to encourage early action. New initiatives to make information about flood risks, including future sea level rise, much more widely available could prompt people to take a hard look at a buyout offer. Crawford makes the critical point that, although Charleston must live with some unfortunate geography, the good news is that there is high ground north of the city that makes large scale relocation physically feasible.

III. HOW TO DECIDE AMONG HARD CHOICES

Every resident of Charleston has a stake in the measures that are adopted to manage the coming flood waters. Crawford makes the point that it is not enough for the city to just make the right choice. The process that the city follows to engage the public in charting a path forward also matters and the process needs to be broadly and relentlessly inclusive. Why? Because most people will be affected in their daily lives. Because everyone will need to contribute to the costs. Because, for hundreds of years, the Black community in Charleston has been denied a say in most decisions and suffered the brutal indignities of racism.

What does a strong process look like? Crawford makes some good suggestions. For example, she points out that Charleston should be cooperating with neighboring communities to find a coastal flood resilience solution that works on a regional scale. The planning process needs to be built for the long run rather than to produce a one-shot report. And, because the federal government will need to pay a significant part of the costs of coping with the coming flood, the city improves its chances of getting federal funds if it engages federal agencies early and often.

All well and good. But perhaps the most important step the city can take to create an effective planning process is to create strong partnerships with local community organizations and build the trust of local leaders throughout the community, but especially in the Black community. Crawford lays out in convincing detail the central role that racism played in the development of Charleston. Starting from early days as a key destination for slave ships, through years of discriminatory zoning and segregation, to the failure to provide sufficient and safe affordable housing, to the "dress codes" used today by businesses to steer Black people away from nightlife where White tourists are preferred, Charleston has a lamentable and undeniable record of racism.

One of the most enjoyable aspects of *Charleston* is the care that Crawford takes to introduce the individuals that are coping with flooding and have played parts in deciding how the city manages flood waters. She tells the reader about Joe Riley, Mayor of Charleston for 40 years, who was a "fanatic for annexation." He oversaw dramatic expansion of the Charleston city limits but limited flooding investments to small scale stormwater management projects. John Trecklenburg,

Mayor since 2016 who is famous for playing the piano on any occasion, invited flood experts to Charleston for "Dutch Dialogues" to make recommendations to manage future floods but has been slow to implement new practices.

Crawford also introduces leaders in the Black community who have often not been included in the city's flood planning. Michelle Mapp, engineer, high school teacher, housing advocate, and lawyer, is working to improve housing in Charleston but sees a place unprepared for future flooding.

> I've been saying for the thirteen years that I've been here that we're one hurricane away from being a totally different community. And it scares me. I know the number of folk in this community who live in mobile homes still. Who live in substandard housing . . . Where will these people go?

The Rev. Joseph Darby, a fourth-generation minister and former pastor of a prominent Black church, was not consulted as part of the Dutch dialogues.

"There should be some significant Black participation in that because some of those flooding problems really hit the Black community hard," Darby said about the Dutch Dialogues. He was disappointed in the city's efforts to work with Black residents.

Latonya Gamble, the president of the Eastside Community Development Corporation, and a Black woman who grew up in Charleston's East Side public housing that was built on top of the city dump, sees the burden that flooding poses.

"I can't tell you how many times they have to start over, because there's mold in the house or it flooded and they have to throw away their stuff . . . ."

She sees the stormwater management plans and the seawall proposed by the Army Corps as inadequate.

> [W]e're going to address the storm water, but if it does not reach within our community, then we need to come up with a better plan. You know what I'm saying? I think that's a good plan to have, but then we need an additional plan, so that we can give our residents some relief.

By presenting the biographies of local leaders, rather than just their views on flooding, Crawford makes a case that these people are necessary to a strong planning process that can discover a path toward flood resilience. Charleston faces an existential crisis but now has a chance to follow Winston Churchill's advice to "[n]ever let a good crisis go to waste." Crawford finds in local leaders reasons to hope that the people of Charleston can overcome past failures and reinvent a city that is higher, drier, and socially just.

IV. CONCLUSION

In a concluding chapter, Crawford points out that Charleston is not alone in the flood challenges it faces or in lacking a plan for effective response. She calls on Charleston, other local governments, and the federal government to work together to deliver the timely and effective strategies for migrating to higher ground that are an inevitable outcome of geography and a changing climate for Charleston and many other coastal cities.

> Charleston's lack of preparation is clearly not unique. But we can predict that the catastrophic effects of climate change in Charleston will lead to a large movement of people, many of whom will be Black and low-income. For much of coastal America,

> Charleston is a bellwether. If we continue to muddle ahead as we are now, that migration is likely to be panicked, forced, miserable, and unfair. Neither local governments in the US nor the federal government have grappled with how to deal with making that migration work on a large scale. It would be a good idea to plan ahead as a nation, starting right now, for this future.

The country clearly needs the science and research community to continue its invaluable work to document and improve understanding of the risks that a changing climate poses for the American coasts. Also needed, however, are stories of specific places that people know and individuals they can relate to. In *Charleston,* Susan Crawford paints an engaging and thought-provoking picture of the flood challenges that coastal communities face that will help build the country's collective willingness to make the hard choices that a changing climate will demand.

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