ENERGY LAW JOURNAL

Volume 46, No. 3 2025

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NOTES

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THE ENERGY BAR ASSOCIATION
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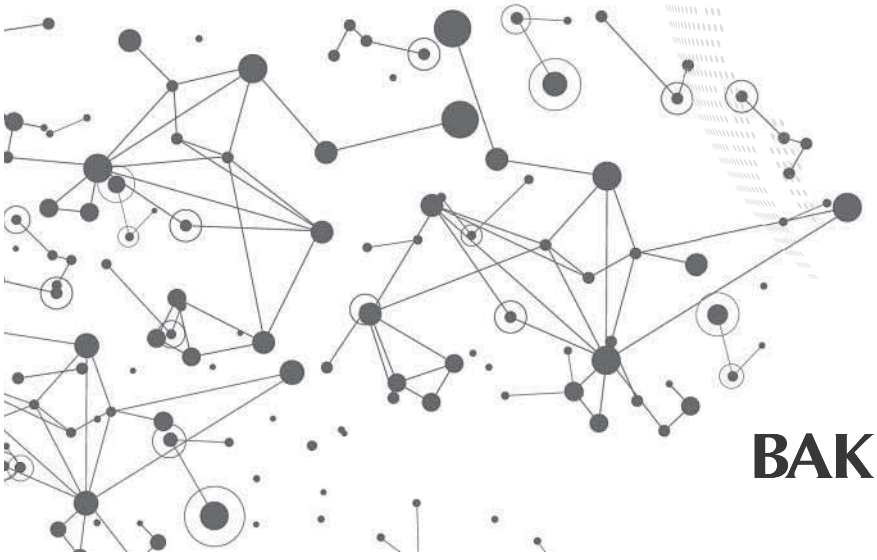

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Rick Smead is Managing Director, Advisory Services, for RBN Energy LLC. He specializes primarily in the natural gas sector, offering expert policy analysis and advice, litigation support, and strategic advice with respect to gas pipelines, potential supplies, and market initiatives. Rick is a long-time supporter of EBA and its mission, and he was the 2023 recipient of the **Paul E. Nordstrom Service Award.**

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COMMITTEE REPORTS

Neither the reports of the Energy Bar Association Committees nor the review of Canadian energy law developments are included in the print version of the Journal. Rather they are published online on the EBA's website at https://www.eba-net.org/energy-sector-reports/. Persons citing to the reports should use the following format: [Title of Report], 46 Energy Law Journal [page number] Online (2025), [link to report]. Included in the full electronic version of the Energy Law Journal, Volume 46, No. 3, are the following reports:

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Rising Star in Energy Award

The Rising Star in Energy Award is given to a member in recognition of outstanding contributions to the EBA, CFEBA, and/or FELJ early in their careers, with demonstrated engagement through leadership or other proactive efforts. Award winners are in their first ten years of practice as an attorney or energy professional. This award honors and recognizes a substantial commitment to the practice of energy law through their work, in addition to a commitment to EBA, its mission and core values, such as EBA's diversity and inclusion policy and pro bono efforts.

2025	Karen Bruni
2024	Andrew DeVore
	Qingliu (Mary) Yang
2023	Serena A. Rwejuna

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President's Award

This Award is given occasionally to an individual that has made an extraordinary contribution to the profession or the development of energy law over a long career.

2023	Senator Lisa Murkowski
2019	Robert S. Fleishman
2017	Robert R. Nordhaus
2010	Richard D. Cudahy (Judge)
2008	Richard J. Pierce, Jr.
2006	Senator Pete V. Domenici
2004	Charles B. Curtis
2002	Stephen F. Williams (Judge)
2001	Congressman John D. Dingell

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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.

2025	Robert A. "Bob" Weishaar
2024	Lawrence R. Greenfield
2023	Rick Smead
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2021	David T. Doot
2020	Harvey L. Reiter
2019	James Curtis "Curt" Moffatt
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2025	Brandon F. Marzo
2024	Gordon Kaiser
2023	Cliona Mary Robb
2022	Cindy Miller
2021	Frank R. Lindh
2020	Holly Rachel Smith
2019	H. Russell Frisby
2019	Andrew O. Kaplan
2016	Sandra Mattavous-Frye
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2013	Jeff Genzer
2012	Sonny Popowsky
2011	Ben Stone
2010	James Van Nostrand

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This Award was created in memory of Jason F. Leif, a past President of the Energy Bar Association (EBA), a past President of the Houston Chapter of the EBA, and a motivating force in the revitalization of the Houston Chapter. This award honors and recognizes exemplary long-term service, or one or more particularly significant examples of service, by an EBA member to one or more of the EBA Chapters, enhancing the role of the EBA Chapters in representing EBA's values and character at the regional level. Exemplary service to the community in connection with EBA Chapter activities may also be considered. The EBA Board created this award in 2018, and voted unanimously to honor Jason as the first recipient of the Award.

2025	Michael J. Messonnier, Jr.
2024	Freddi L. Greenberg
2023	Kelli Cole
2022	Jason Marshall
2021	Cynthia Brown Miller
2020	Crystal McDonough
2019	Daniel T. Pancamo
2018	Jason F. Leif

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The Champion for Diversity and Inclusion Award, is given to a Member who has embodied the principles of the Diversity and Inclusion Policy through their actions in the Associations and/or their professional career. The award is granted as deemed warranted by the EBA Board and may, or may not, be granted annually. Emma Hand was named as the first recipient of this award.

2025	Matthew Rudolphi
2024	Adrienne Clair
2022	Andrea Wolfman
2021	Sherry Quirk
2020	Chief Judge Carmen A. Cintron
2019	Emma Hand

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ENERGY LAW JOURNAL
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ENERGY LAW JOURNAL

Twice a year, the *Energy Law Journal* publishes legal, policy, and economic articles and other materials of lasting interest with significant research value on subjects dealing with the energy industries. The Journal also welcomes articles and other materials on emerging issues and significant developments affecting the energy industries. Articles by members and non-members of the Association are welcomed. The Journal publishes articles and other materials of varying length that provide a full consideration of the issues and opposing viewpoints. All submissions must contain a synopsis, table of contents, and brief biographical statement about the author(s). Style and form of citations must be in conformity with the "Bluebook," as well as the *Energy Law Journal* Style Manual posted on the Energy Bar Association website. All submissions should be sent to Harvey L. Reiter, Editor-in-Chief, *Energy Law Journal*, by mail to Stinson LLP, 1775 Pennsylvania Ave., N.W., Suite 800, Washington, D.C. 20006 or electronically to harvey.reiter@stinson.com. The opinions expressed in the published materials are those of the writers and are not intended as expressions of the views of the Energy Bar Association. Inquiries about advertising in the Journal should be addressed to Michele Smith at the Energy Bar Association at (202) 223-5625. The Journal is indexed in the INDEX TO LEGAL PERIODICALS, the CURRENT LAW INDEX, WESTLAW, and LEXIS SERVICES.

The Journal is printed on 100% recycled paper.

To be cited as: 46 ENERGY L.J. ____(2025).

ISSN 0270-9163

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

It is my privilege to serve as your EBA President this year and to welcome you to this edition of the Energy Law Journal and update you on how your Energy Bar Association is working to support you.

We are continuing to implement our new strategic plan which focuses on EBA being the preeminent association for energy professionals, expanding our programs to meet the need of a changing industry, enhancing the structures that allow EBA to thrive, and growing the organization so more may benefit from EBA has to offer. Our Energy Forum in September furthered these goals by covering a wide spectrum of issues, and the Professional Education Committee is planning a great annual meeting for April 14 and 15 in DC. Our Chapters provide another opportunity for programming and networking, so members experience the benefits of EBA closer to home. Whether your practice focus is federal, state, or local; transactional or regulatory; in house, governmental, or private practice; or legislative, executive, or judicial, EBA is here to help you learn, grow, and give back. If you are not already volunteering, this is a great time to engage!

There has never been a better time to be an energy lawyer or professional, and this edition of the Journal reflects the great diversity of opportunities and challenges within our industry today. Jeremy Medovoy takes a careful look at FERC enforcement proceedings and its preference for settlement, and he offers some straightforward revisions to the Penalty Guidelines to further the settlement process. Eliza Martin examines the phenomenon of rate-regulated utilities engaging in political activities utilizing money collected from monopoly ratepayers through government set rates, and she suggests an alternative approach for empowering ratepayers against utilities' economic and political entrenchment. While the industry is actively focused on data centers and manufacturing expansion, Cole Jermyn and Michael Zimmerman look at another phenomenon – end-use electrification – and the implications for transmission and generation and the duty to serve. William Bolgiano takes a fascinating look at utility rate case expense as an anti-consumer form of one-way fee shifting, proposing some guardrails and limits that state regulators should consider.

There are many who work hard to make this Journal a must-read. I especially want to thank Harvey Reiter, Caileen Gamache, Nicholas Cicale, and Mary Yang for their leadership and stewardship. This Journal is an important part of EBA continuing to be the pre-eminent association for energy professionals.

Sincerely,

Floyd R. Self
President, Energy Bar Association

EDITOR IN CHIEF'S PAGE

In his last entry as Editor in Chief of this Journal, my predecessor, Bob Fleishman, recounted some of his experiences in a role he had held for nearly fifteen years. My role at the helm ends with this edition, after six years in the position and another fourteen before that as Bob's executive editor. Twenty years in all. Fifteen editions, including the first two special editions in the Journal's history. Timely symposia on (1) the war in Ukraine and the role of U.S. natural gas exports to Europe (2) mitigating the impacts of climate change and (3) the challenges posed by the growth of data centers. Nearly 250 articles, including three articles addressing the impact of AI on utility operations, regulation and legal practice, three ELJ articles that I wrote or co-authored, and scores of book reviews, committee reports and student notes. As Larry David might have said about his multi-year run on Curb Your Enthusiasm – that's pretty, pretty, pretty good.

It's also long enough.

Waiting to take on the position is our Journal's superb Executive Editor, Caileen "Kat" Gamache. Bob's May 2019 Editor's Page noted that with his departure and my promotion from Executive editor, "[w]e needed a new Executive Editor who, by our tradition and practice, will serve as Editor-In-Chief after Harvey." That, of course, was Kat, who succeeded me as Executive Editor. But while Bob was correct that Kat would succeed me in the Editor-in-Chief post, that decision was far more than just a continuation of "tradition and practice." Kat has already served four years as ELJ's Administrative Editor and another six as the Executive editor. She's worked with me on editing sixty-four articles, numerous student notes and committee reports. She's also coordinated the symposia and special editions we've published and contributed a superb ELJ law review article of her own during that time.

And Kat will have a terrific editorial team with which to work. Nick Cicale, who has spent the last six years as the Journal's Administrative Editor, will be the new Executive Editor. Nick brings the benefit of his experience in government, industry and private practice in energy litigation and transactional work to the Journal. Mary Yang, who has served for the last three years as the Journal's International Articles Editor, but who also has a wealth of FERC experience – including a stint as an assistant to former Commissioner Allison Clements – will assume Nick's current position. During the transition period, Nick and Mary have been deeply involved in our editorial decisions. And they will continue to have our talented group of peer review editors to help them in the editing process going forward. The Journal could not be in better hands.

For Kat, Nick and Mary, let me say this. I can't predict the future, but, if the past has any predictive value, it will almost certainly be an interesting ride. Consider how the world has changed in the six years since I became Editor in Chief.

My first edition was in the fall of 2019. I had no idea that the next edition would be written, reviewed, edited and published remotely during the height of the pandemic in 2020. That was also the year President Trump announced Operation Warp Speed, a public/private partnership to produce a COVID-19 vaccine –

a vaccine that would save millions of lives using MRNA technology. Without that technology, the President rightly bragged, it would have taken several years, not months to produce the vaccine. Who knew then that, only a few years later, that same President would appoint Robert Kennedy Jr. as HHS Secretary – someone who said that the President should get the Nobel prize for Operation Warp Speed,[1] but who has also stated that "[t]here's *no* vaccine that is, you know, safe and effective,"[2] that the COVID-19 virus had been engineered not to affect Ashkenazi Jews or those of Chinese descent[3] and who, once appointed, would slash funding for future MRNA vaccines (a decision that former Trump Surgeon General Jerome Adams said would cost lives[4]) and order the wholesale dismissal of both the CDC head he had chosen *and* FDA's vaccine advisory panel?[5]

Speaking of technological advancements, who in 2019 – only six years ago – was predicting that the growth of AI would lead to an explosion in demand for electricity largely created by electricity needs of massive data centers?

In what future world would anyone in 2019 have predicted that the Presidential nominee of a Republican party whose platform had railed for decades against government policies that would "pick economic winners and losers"[6] and promote "creeping socialism" would force companies (1) to give up equity stakes in their companies to replace grants authorized by Congress (think Intel) or (2) to grant the government a "golden share" to get merger approval (think U.S. Steel)?

Maybe a few predicted that four of the five hottest years in recorded history would occur between 2019 and 2024 (although likely hoping they'd be wrong).[7] But did any of us foresee the fall of Afghanistan and the return of the Taliban? Russia's assault on Ukraine? The fall of Syria's Assad, or Lebanon's Hezzbollah? Sweden and Finland joining NATO? Or that a President would pardon nearly fifteen hundred individuals convicted of attacking the Capitol and injuring hundreds of Capitol police officers - and then fire the prosecutors who had obtained the convictions?[8] Or that DHS would begin widespread deployment of masked ICE agents, and, in the name of immigration enforcement would send a band of

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1. Sarah Ewall-Wice, *RFK Jr. Says Trump Deserves Nobel Prize for COVID Vaccine He Hates*, DAILY BEAST (Sept. 4, 2025, 3:39 PM), https://www.thedailybeast.com/rfk-jr-says-trump-deserves-nobel-prize-while-slamming-covid-response/.

2. Jessica McDonald, *RFK Jr. Incorrectly Denies Past Remarks on Vaccine Safety and Effectiveness*, FACTCHECK.ORG (last updated Aug. 23, 2024), https://www.factcheck.org/2023/11/scicheck-rfk-jr-incorrectly-denies-past-remarks-on-vaccine-safety-and-effectiveness/.

3. 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.

4. Zac Anderson, *Trump's Ex-Surgeon General Slams RFK Jr.'s Vaccine Cuts: 'People Are Going to Die'*, USA TODAY (Aug. 10, 2025, 8:21 PM), https://www.usatoday.com/story/news/politics/2025/08/10/donald-trump-jerome-adams-vaccines-robert-kennedy-jr/85603117007/.

5. Ahmed Aboulenein et al., *US Health Secretary Kennedy Guts Vaccine Advisory Committee*, REUTERS (June 10, 2025, 2:55 AM), https://www.reuters.com/business/healthcare-pharmaceuticals/all-members-vaccine-advisory-panel-will-be-retired-us-health-secretary-kennedy-2025-06-09/

6. David Malakoff, *Republican Party Platform Has a Lot to Say About Science*, SCIENCE (Aug. 29, 2012), https://www.science.org/content/article/republican-party-platform-has-lot-say-about-science#:~:text=The%20platform%20criticizes%20Obama%20for,preferences%20determine%20the%20industry%20outcomes.

7. Annual Global Temperature Records, NASA (last visited Oct. 31, 2025), https://earthobservatory.nasa.gov/images/event/85098/annual-global-temperature-records

8. Associated Press, *Justice Department Abruptly Fires 3 Prosecutors Involved in Jan. 6 Criminal Cases*, CNN POL. (June 28, 2025, 9:30 AM), https://www.cnn.com/2025/06/28/politics/justice-department-doj-fires-jan-6-prosecutors-pam-bondi.

ICE agents to rappel from a military Black Hawk helicopter into a Chicago apartment building, break into the building in the middle of the night, with no warrant, detain several U.S. citizens and use zip ties to restrain young children (at least four of whom were U.S. citizens) whose parents would be whisked away? The explanation for this raid: the building was targeted because it was "known to be frequented by Tren de Aragua members and their associates."[9] At the time I wrote this paragraph in early October, more than one hundred U.S. citizen children "have been left stranded without parents because of immigration actions this year."[10]

And, in our chosen field, did any of us imagine in 2019 that the concept of an independent regulatory agency might become a thing of the past?

On this last point, the President, by my count, has fired over a dozen commissioners or board members of various independent agencies. These were individuals who, by statute, have for cause protections against dismissal, but who were dismissed without explanation. These Presidential firings have teed up a challenge to *Humphrey's Executor*, a ninety-year-old unanimous Supreme Court decision holding that such for cause provisions were constitutional.[11] The firing of Commissioners hasn't happened at FERC (yet). But then Presidential nominee, now Commissioner David LaCerte, testified at his confirmation hearing that he "personally would welcome a modification on *Humphrey's Executor*."[12] How the potential loss of independence might affect FERC and those who practice before it may well become grist for future articles.

For those of the Journal's readers who have followed my past Editor-in Chief's messages – estimates are that the number may even reach the upper twenties – you'll know that I've used these messages to recount events in the world that have taken place between editions. They've typically included a discussion of developments in energy and administrative law, Detroit sports, references to famous (and formerly famous) individuals who have passed away, and a section titled "They said *that*?" This edition will also include noteworthy quotes, but the headlines over the last six months have seemed to write themselves. So, you will find "they said that"-like quotes under some of those headlines.

Energy Law and Policy Developments

Blindsided

Mark Christie, who served as a FERC Commissioner, and then as Chair of the FERC for five years, presided over his final monthly open meeting on July 24, 2025. This, the Chairman noted, marked the end of his thirty-one-year long career

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9. Rebekah Riess and Bill Kirkos, *37 People Arrested and American Kids Separated from Parents after ICE Raid at Chicago Apartments*, CNN US (Oct. 3, 2025), https://www.cnn.com/2025/10/03/us/chicago-apartment-ice-raid.

10. *Id*. The Supreme Court may have given DHS the green light for raids of this type when it granted the government's motion for an emergency stay of a lower court injunction barring ICE from detaining individuals based on their accents, speaking Spanish, or "working in jobs such as construction, landscaping, agriculture, or car washes that often do not require paperwork and are therefore attractive to illegal immigrants." Noem v. Perdomo, No. 25A169, 2025 U.S. LEXIS 2779, at *2 (Sept. 8, 2025) (Kavanaugh,J. concurring). The lower court had granted the injunction to stop ICE raids in the Los Angeles area undertaken by "teams of armed and masked agents [who] pulled up to car washes, tow yards, farms, and parks and began seizing individuals on sight, often before asking a single question." *Id*. at *13 (Sotamayor, J. dissenting).

11. *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

12. Keith Goldberg, *FERC Nominee Says He Supports Review of Removal Protections*, LAW360 (Sept. 4, 2025, 4:37 PM), https://www.law360.com/energy/articles/2382985?nl_pk=8e9a73e7-c80b-4fd0-a5db-2331d9c57006&utm_source=newsletter&utm_medium=email&utm_campaign=energy&utm_content=2025-09-05&read_main=1&nlsidx=0&nlaidx=0.

in government. It was a distinguished career in which he served as former Virginia Governor Allen's director of policy, then as chair of the Virginia Corporation Commission where he served from 2004 until assuming his position as a FERC commissioner in early 2021. Chairman Christie did not find out until he'd been informed by a reporter for Law360, that he had not been renominated by the President to serve a second term on the Commission.[13] Shameful. He deserved better.

Trump's War on the Wind and Sun

The Trump Administration's disdain for wind and solar projects has manifested itself in numerous ways. It has halted new leases for wind projects,[14] cancelled wind permits and licenses for numerous projects, many close to completion,[15] ordered review of previously reviewed projects,[16] hiked tariffs on solar inputs,[17] and pushed successfully for the elimination or sharp reduction in tax credits for solar and wind projects in the "Big Beautiful Bill.[18] At the same time, its EPA has proposed a rule to end its fifteen year old endangerment finding[19] and its DOE has issued several "emergency" orders to keep coal and other fossil fuel plants running.[20] Renewable energy projects in "blue" states have faced the harshest treatment. An October 2, 2025 article in Utility Dive reported that DOE had cancelled $7.6 billion in clean energy project grants for 223 clean energy projects – "all in states that voted for former Vice President Kamala Harris in the 2024 election."[21]

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13. Madeline Lyskawa, *FERC Chair Bids Goodbye at Last Monthly Meeting*, LAW360 (July 24, 2025, 8:18 PM), https://www.law360.com/compliance/articles/2368868?utm_source=shared-articles&utm_medium=email&utm_campaign=shared-articles.

14. Spencer Kimball, *Trump's Broadside Against Wind Industry Threatens Projects That Could Power Millions of Homes*, CNBC (Feb. 16, 2025, 7:57 AM), https://www.cnbc.com/2025/02/16/trumps-broadside-against-wind-industry-puts-projects-that-could-power-millions-of-homes-at-risk.html.

15. Lauren Sommer, *Trump Administration Cancels $679 Million for Offshore Wind Projects at Ports*, NPR (Aug. 31, 2025, 5:00 AM), https://www.npr.org/2025/08/31/nx-s1-5522943/trump-offshore-wind-energy-ports; *see also* Isabella O'Malley, *Trump Halts Work on New England Offshore Wind Project That's Nearly Complete*, AP NEWS (Aug. 23, 2025, 1:38 PM), https://apnews.com/article/offshore-revolution-wind-project-stopped-trump-33214b9efb8f3f7a98c58299581bff9f.

16. Rachel Frazin, *Trump Targets Another Offshore Wind Project*, THE HILL (Sept. 3, 2025, 5:57 PM), https://thehill.com/policy/energy-environment/5484952-trump-offshore-wind-farms/.

17. Meredith Fowlie, *Tariff Trial and Error in the Solar Energy Sector*, ENERGY INST. AT HAAS: ENERGY INST. BLOG (August 4, 2025), https://energyathaas.wordpress.com/2025/08/04/tariff-trial-and-error-in-the-solar-energy-sector/.

18. Allen S. Braddock et al., *Congress Phases Out Energy Tax Credits*, NAT'L L. REV. (July 7, 2025), https://natlawreview.com/article/congress-phases-out-energy-tax-credits.

19. *EPA Releases Proposal to Rescind Obama-Era Endangerment Finding, Regulations that Paved the Way for Electric Vehicle Mandates*, EPA (last updated July 30, 2025), https://www.epa.gov/newsreleases/epa-releases-proposal-rescind-obama-era-endangerment-finding-regulations-paved-way.

20. *See, e.g*., Brian Dabbs, *DOE Directs Philadelphia Fossil Fuel Plant to Keep Running*, GREENWIRE (Aug. 29, 2025, 1:29 PM), https://subscriber.politicopro.com/article/eenews/2025/08/29/doe-directs-philadelphia-fossil-fuel-plant-to-keep-running-00534944; Kevin Clark, *DOE Extends Emergency Order to Keep Michigan Coal Plant Running into November*, POWER ENG'G (Aug. 22, 2025), https://www.power-eng.com/coal/doe-extends-emergency-order-to-keep-michigan-coal-plant-running-into-november/; Claire Brown & Harry Stevens, *Coal and Gas Plants Were Closing. Then Trump Ordered Them to Keep Running*, N.Y. TIMES (June 6, 2025), https://www.nytimes.com/2025/06/06/climate/trump-coal-gas-plants-energy-emergency.html.

21. Robert Walton, *DOE Cancels $7.6B in Clean Energy Awards in States that Voted Against Trump*, UTIL. DIVE (Oct. 2, 2025), https://www.utilitydive.com/news/doe-cancel-clean-energy-awards/801764/?utm_source=Sailthru&utm_medium=email&utm_campaign=Newsletter%20Weekly%20Roundup:%20Utility%20Dive:%20Daily%20Dive%2010-04-2025&utm_term=Utility%20Dive%20Weekender.

FERC commissioners have long viewed their role in electric regulation as resource technology neutral.[22] While orders like Order No. 841 have been aimed at reducing barriers to the use of wind, solar and batteries, these have largely been characterized as means to reduce undue discrimination against particular energy resources – not measures to favor any particular technology. But with a President fixated on creating barriers for energy resources he disfavors, and who believes (maybe correctly if signals from the Supreme Court's shadow docket are any indication) that there are no independent administrative agencies, how long before he moves to fire FERC officials who are perceived to be thwarting a pro-coal agenda or for no stated reason at all?[23] Politico reports that the DOE has already "added 'climate change,' 'green' and 'decarbonization' to its growing 'list of words to avoid' at its Office of Energy Efficiency and Renewable Energy."[24] Ironically, wind and solar energy companies may find allies in the oil and gas industries. Expressing concern about the Administration's cancellation of offshore wind projects, Darren Woods, *Exxon's* CEO said this: "Ever-changing policy, particularly as administrations change, is not good for business. It's not good for the economy and ultimately, it's not good for people."[25]

DOE Orders FERC to Issue Proposed Rule Regulating Transmission Interconnections to Large Retail Loads

On October 23, 2025, the Department of Energy invoked section 403 of the Department of Energy Organization Act to require FERC to issue a proposed rule that enables "large loads, including AI data centers, served by public utilities [to] be able to connect to the transmission system in an orderly and non-discriminatory manner."[26] Those FERC practitioners who have been in practice for more than a few years will recall that during the first Trump administration, DOE Secretary Perry similarly invoked section 403 to required FERC to issue a proposed rule widely seen as intended to prop up the coal industry. But while FERC was obligated by law to *issue* the proposed rule, it was under no obligation to *adopt* it. And it didn't, as all the FERC commissioners, including three Trump appointees, voted

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22. See, e.g., Order No. 841, *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 162 FERC ¶ 61,127 P 124 (2018); Order No. 2222, *Remarks of Chairman Neil Chatterjee on Order 2222*, FERC (Sept. 17, 2020), https://www.ferc.gov/news-events/news/remarks-chairman-neil-chatterjee-order-2222; *2021 Reliability Tech Conference: Opening Statement from Commissioner Clements*, FERC (Sept. 30, 2021), https://www.ferc.gov/news-events/news/2021-reliability-tech-conference-opening-statement-commissioner-clements.

23. This scenario is less hypothetical than I would have thought. Two Immigration Judges at the Department of Justice were recently fired without explanation and took their case to an administrative law judge with the Merit Systems Protection Board. The government has since taken the position that even inferior officers have no for cause protections against dismissal and that statutory provisions to the contrary are superseded by the President's broad executive power under Article II of the Constitution. *See* Jackler v. Department of Just., Docket No. DA-0752-25-0330-I-1, *Agency's Motion for Leave to File Additional Pleading and Alternative Motion to Remand* (Sept. 27, 2025), https://washingtonlitigationgroup.org/wp-content/uploads/2025/09/Jackler-Motion.pdf.

24. Zack Colman, *Energy Dept. Adds 'Climate Change' and 'Emissions' to Banned Words List*, POLITICO (Sept. 28, 2025, 2:47 PM), https://www.politico.com/news/2025/09/28/energy-department-climate-change-emissions-banned-words-00583649.

25. Rebecca F. Elliott, *Unexpected Critics of Trump's Attacks on Wind Energy: Oil Executives*, N.Y. TIMES (Sept. 27, 2025), https://www.nytimes.com/2025/09/27/business/energy-environment/oil-gas-trump-offshore-wind.html?unlocked_article_code=1.pk8.GglR.wjyRUG35A55v.

26. *Letter from DOE Secretary Wright to FERC Chairman and Commissioners*, DOE (October 23, 2025), https://www.energy.gov/sites/default/files/2025-10/403%20Large%20Loads%20Letter.pdf.

the rule down.[27] The President's stated view is that the is no such thing as an independent administrative agency, and that he is free to fire any agency commissioner at will.[28] It is hard to imagine that, whatever the merits of DOE's proposal, if it loses independence the current Commission would buck the Administration's wishes this time around.

DOE Report that Poo-Poos Climate Change Effects Draws Ire from Scientists

"[C]arbon dioxide (CO2) -induced warming appears to be less damaging economically than commonly believed." That was the gist of the Department of Energy's July 29, 2025 Report, A Critical Review of Impacts of Greenhouse Gas Emissions on the U.S. Climate ("Climate Report").[29] According to DOE, "[t]he report was developed by the 2025 Climate Working Group, a group of five independent scientists assembled by Energy Secretary Chris Wright with diverse expertise in physical science, economics, climate science and academic research."[30]

But a group of 85 scientists who filed comments on the report had a starkly different view. They described the five researchers chosen by DOE Secretary Wright as "hand-picked authors well-known for manufacturing the appearance of scientific uncertainty about the dangers of climate change" and compared the release of the report to "tactics similar to those used by the tobacco industry."[31] The scientists minced no words

> The DOE CWG report does not meet standards of quality, utility, objectivity and integrity appropriate for use in supporting policy making. In assessing the science of climate change, the U.S. government should follow standards appropriate for a Highly Influential Scientific Assessment, including an unbiased, robust, and transparent peer review process. Rigorously reviewed assessments, like the Intergovernmental Panel on Climate Change and National Climate Assessment reports, provide much more accurate representations of the scientific understanding of climate change.
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> As detailed in the over 400 pages of our expert review, the DOE CWG Report exhibits pervasive problems with misrepresentation and selective citation of the scientific literature, cherry-picking of data, and faulty or absent statistics.[32]

Third Circuit Says FERC-Approved Regional Transmission Plans Supersede State Siting Decisions Based on Need

The numerous appeals of Order No. 1920 remain pending in the Fourth Circuit, including challenges by several states that the rule impinges on state transmission siting authority. But a September 5, 2025 decision of the Third Circuit

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27. Darius Dixon & Eri Wolff, *Energy Regulator Rejects Perry's Plan to Boost Coal*, POLITICO (Jan. 8, 2018, 5:58 PM), https://www.politico.com/story/2018/01/08/rick-perry-energy-coal-nuclear-269263.

28. Exec. Order No. 14,215, *Ensuring Accountability for All Agencies*, https://public-inspection.federalregister.gov/2025-03063.pdf.

29. *Climate*, U.S. DEP'T. OF ENERGY, https://www.energy.gov/topics/climate.

30. *Id*.

31. Press Release, Dep't of Energy, *Leading Scientists Conclude DOE's New Climate Report is "Not Scientifically Credible"* (Sept. 2, 2025), https://drive.google.com/file/d/1r3-lNf45sTIuurKYp-FUHla5oKrSc3nxV/view?usp=sharing.

32. *A Critical Review of Impacts of Greenhouse Gas Emissions on the U.S. Climate*, Docket No. DOE-HQ-2025-0207, *Climate Experts' Review of the DOE Climate Working Group Report* (filed Sept. 30, 2025), at 1, 4, https://drive.google.com/file/d/1PwAR8I9YYmPhbQ6CRekHkroJGMbjbX7l/view.

may have moved the needle in FERC's direction. *Transource Pennsylvania, LLC v. Defrank* holds that where a state agency with authority over transmission siting denies siting authority to a transmission project on grounds that the facility isn't needed, that determination must give way under the Supremacy Clause to a FERC decision approving a regional transmission plan that includes the same project.[33] The case has the added significance that while Pennsylvania's determination of need conflicted with FERC's finding of regional benefits, there was no dispute that the facility would raise delivered electricity costs to the residents of Pennsylvania.[34] The opinion adds that nothing in the Federal Power Act scheme, however, impinges on the state's authority to deny a siting permit on environmental or safety grounds.[35]

An NLRB Case, But It Could Affect FERC, too.

On August 19, 2025, the Fifth Circuit issued an opinion that, if widely adopted, could invalidate the future decisions of every federal agency whose board members or commissioners have for cause protections against dismissal. *Space Exploration Technologies Corp. v. NLRB*[36] involved a lawsuit by Space X and others charging that the NLRB's initiation of unfair labor practice proceedings against it were unconstitutional because the agency's very structure was unconstitutional. More specifically, they argued that the agency's ALJs enjoyed an unconstitutional double layer of protection: for cause protections against their dismissal overlayed by for cause protections against dismissal given to the Board that appointed them.[37] In addition, they argued, and the Fifth Circuit agreed, that *Humphrey's Executor v. United States*,[38] which found constitutional the for cause protections given FTC commissioners against dismissal by a President, did not apply to NLRB Commissioners.[39] Finally, Space X maintained that because this rendered the whole structure of the agency unconstitutional, it was irreparably harmed by the agency's decision to initiate an investigation, even before it had begun. The court agreed with that, too.

In opposing Space X's requested injunction, the NLRB had argued that Space X had not shown harm from the agency's decision to initiate an investigation, citing *Collins v. Yellen*[40] for that proposition. But the Fifth Circuit held that *Yellen* only applied to claims for retrospective relief, *essentially invalidating any future actions by the NLRB*.[41]

So, what might that mean for FERC? Its ALJs enjoy for- cause protections against removal, as do its commissioners (for now). Does this mean that any regulated entities participating in a proceeding directed against them or that affects them could seek an injunction on grounds that the agency is illegally constituted? Stay tuned.

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33. Transource Pa., LLC v. Defrank, No. 24-1045, 2025 U.S. App. LEXIS 22972, at *35-41 (3d Cir. 2025), https://www2.ca3.uscourts.gov/opinarch/241045p.pdf.

34. *Id*.

35. *Id*. at *44-45.

36. 151 F.4th 761 (5th Cir. 2025).

37. *Id*. at 774-75 (citing Jarkesy v. SEC, 34 F.4th 446, 463 (5th Cir. 2022)), *aff'd and remanded*, 603 U.S. 109 (2024)).

38. 295 U.S. 602 (1935).

39. *Space Expl. Techs. Corp,* 151 F.4th at 775-76.

40. 594 U.S. 220 (2021).

41. *Space Expl. Techs. Corp,* 151 F.4th at 779-80.

FERC Becomes First Independent Agency to Implement Executive Order to Slash Regulations

On October 1, 2025, FERC issued what it termed a "direct final rule" authorizing conditional withdrawal of over fifty existing regulations it determined were either "outdated, seldomly used, or duplicative."[42] In so doing it became the first agency to implement the President's executive orders to reduce the number of regulations in the federal government.[43]

What is really striking about this final rule is that FERC has dispensed with prior notice and comment without invoking any of the statutory exceptions to that APA requirement. It doesn't claim the rule is one solely of internal organization,[44] or that it involves the foreign affairs function[45] or even that waiver of notice is permitted under the "good cause" exception,[46] an exception that has historically largely been limited to emergencies.[47] Rather, the sole basis FERC offers for proceeding this way (rule is final, but only conditionally effective, i.e., not effective if anyone protests it) – is a 30 year old *advisory* recommendation of the Administrative Conference of the United States (ACUS).[48]

To be sure, ACUS recommendations have carried weight.[49] But the FERC rule cites no examples of other agencies that have relied on the 1995 ACUS recommendation as grounds to exempt repeal of agency regulations without prior notice and comment. Indeed, the well-established principle is that a rule first adopted after prior notice and comment can only be repealed the same way.[50] The ACUS recommendation suggested that agencies *might* be able to rely on the good cause exemption (which FERC did not invoke) but added that they might instead have to seek an amendment to the Administrative Procedure Act.[51]

None of the foregoing is to suggest that FERC's approach to eliminating outdated or redundant regulations is a bad one. And it may be that, regardless of

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42. Order No. 913, *Implementation of the Executive Order Entitled "Zero-Based Budgeting to Unleash American Energy*", 193 FERC ¶ 61,002 at P 2 (2025).

43. Keith Goldberg*, FERC Issues Trump-Ordered Rule to Phase Out 53 Regs*, LAW360 (Oct. 2, 2025, 8:51 PM), https://www.law360.com/energy/articles/2395273?nl_pk=8e9a73e7-c80b-4fd0-a5db-2331d9c57006&utm_source=newsletter&utm_medium=email&utm_campaign=energy&utm_content=2025-10-03&read_main=1&nlsidx=0&nlaidx=0.

44. 5 U.S.C. § 553(a)(2).

45. *Id*. § 553(a)(1).

46. *Id*. § 553(b)(B).

47. OFF. OF THE FED. REG., A GUIDE TO THE RULEMAKING PROCESS (2013), https://uploads.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf (good cause exceptions relate primarily to "emergencies where problems must be addressed immediately to avert threats to public health."); *see also* Jifry v. FAA, 370 F.3d 1174, 1179 (D.C. Cir. 2004).

48. Notice of Public Meeting, *Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43108, 43110 (1995), https://www.govinfo.gov/content/pkg/FR-1995-08-18/pdf/95-20560.pdf [hereinafter *Recommendation 95-4*].

49. A 1980 ACUS report, along with a Nick Fels 1980 article in the ELJ led to changes to 28 U.S.C. § 2112(a) allowing random venue selection of a single circuit court when multiple petitions for review of the same agency order are filed in different circuits within a ten-day window. *See* Nicholas Fels, *Beyond the Stopwatch: Determining Appellate Venue on Review of FERC Orders*, 1 Energy L. J. 35 (1980); JONATHAN R. SIEGEL, SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES 42-43, ADMIN. CONF. OF U.S. (May 28, 2021), https://www.acus.gov/sites/default/files/documents/revised-sourcebook-combined-copy-to-circ-may282021.pdf (crediting a 1980 ACUS report with the idea of amending 28 U.S.C. § 2112(a) to adopt the random selection process).

50. Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 101 (2015); Clean Air Council v. Pruitt, 862 F.3d 1, 6 (D.C. Cir. 2017).

51. *Recommendation 95-4*, *supra* note 48, at 43,113.

whether the "direct final rule" is statutorily kosher, no one will be aggrieved by the sunsetting of rules that are indisputably redundant or outdated.

Obituaries

Dick Cheney

Survivor of a five heart attacks and later the recipient of a heart transplant, former Vice President Dick Cheney finally succumbed to complications of pneumonia and cardiac and vascular disease on November 3, 2025. He was eighty-four. A defense hawk and one of the nation's most powerful vice presidents, Cheney was considered the main proponent of the "war on terror" under the Bush administration following the Al Qaeda 9-11 attacks. He was also criticized sharply both for his support of "enhanced interrogation" tactics, including waterboarding, of terrorist suspects and for pushing for the U.S. invasion of Iraq in 2003 based on faulty intelligence that Iraq was developing weapons of mass destruction. Long a supporter of a strong presidency, Cheney nonetheless became a staunch critic of President Trump and of Trump's refusal to accept his election defeat in 2020. The lifelong conservative endorsed Kamala Harris during the 2024 presidential campaign, citing his "duty to put country above partisanship to defend our Constitution."[52]

Alex Delvechhio

Alex Delvechio, whose twenty-four-year career with the Detroit Red Wings was eclipsed only by the twenty-five years Gordie Howe spent with that team, died on Tuesday, July 1, 2025. He was ninety-three. During his Hall of Fame career, all of which he spent with Detroit, Delvecchio won three Stanley Cups and three Lady Bing trophies for "gentlemanly conduct"[53]- the latter awarded mainly for managing to avoid fighting penalties while still scoring goals and playing defense.[54] My best friend, Chuck Hadden, and my relatives can answer this really trivial trivia question: "What is Alex Delvechhio's birthday?" Why do they know the answer? I read as a kid and fan that his birthday was December 4th, the day after mine (and Chuck's half birthday). For those readers interested, I've included a video link to the NHL Network's tribute to Delvecchio.[55]

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52. Stepehen Collinson & Veronica Stracqualursi, *Dick Cheney, Influential Republican Vice President to George W. Bush, Dies*, CNN (last updated Nov. 4, 2025), https://www.cnn.com/2025/11/04/politics/dick-cheney-death-obit.

53. *NHL Lady Byng Memorial Trophy Winners*, NHL (June 12, 2025), https://www.nhl.com/news/nhl-lady-byng-memorial-trophy-winners-complete-list-287910994#:~:text=The%20Lady%20Byng%20Memorial%20Trophy,end%20of%20the%20regular%20season ("The Lady Byng Memorial Trophy is an annual award given "to the player adjudged to have exhibited the best type of sportsmanship and gentlemanly conduct combined with a high standard of playing ability.")

54. Christian Romo, *NHL Figures React to the Death of Detroit Red Wings Legend Alex Delvecchio*, DETROIT FREE PRESS (July 2, 2025, 2:30 PM), https://www.freep.com/story/sports/nhl/red-wings/2025/07/02/what-nhl-analysts-said-alex-delvecchio-detroit-red-wings-death/84444671007/.

55. Video posted by NHL Media (@NHLMedia), TIKTOK, *NHL Network Mourns the Passing of Detroit Red Wings Legend and Hockey Hall of Famer Alex Delvecchio* (July 1, 2025), https://x.com/NHLNetwork/status/1940169732373848166?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1940169732373848166%7Ctwgr%5Ef448d47d611ea73672c32b15eec16308c20d17f0%7Ctwcon%5Es1_c10&ref_url=https%3A%2F%2Fwww.freep.com%2Fstory%2Fsports%2Fnhl%2Fred-wings%2F2025%2F07%2F02%2Fwhat-nhl-analysts-said-alex-delvecchio-detroit-red-wings-death%2F84444671007%2F.

Jane Goodall

Jane Goodall, a world-renowned primatologist and conservationist, died of natural causes during a speaking tour in California at the age of ninety-one. Goodall's work with primates began in Tanzania when she was twenty-six. Her studies established "that primates display an array of similar behaviors to humans, such as the ability to develop individual personalities, and could make and use their own tools," and even engage in "kissing, embracing, holding hands and patting on the back."[56] The Jane Goodall Institute, which she founded with Genevieve di San Faustino, continues Goodall's pathbreaking work in twenty-five cities around the world.[57] She was known for her kindness, but in a Netflix documentary entitled *Famous Last Words* and released only days after her death, Goodall said this: "There are people I don't like, and I would like to put them on one of Musk's spaceships and send them all off to the planet he's sure he's going to discover." When asked who they would be, she responded that Musk "would be the host" and that the guests would include Trump, Putin, Xi and Netanyahu.[58]

Hulk Hogan

Terry Gene Bollea, much better known as Hulk Hogan, passed away from a heart attack at age seventy-one on July 24, 2025. Hogan, a member of the WWE Wrestling Hall of Fame, began his career in 1977. He is widely credited with popularizing pro wrestling from its roots as a regional attraction to a nationwide audience.[59]

Diane Keaton

A movie star whose career covered six decades, Diane Keaton died on October 11, 2025. She was seventy-nine. Keaton, born Diane Hall, took her mother's name as she began her acting career because there was already an actress named Diane Hall registered with Actors' Equity. Keaton began acting on Broadway in 1968 as an understudy in the production of *Hair*. A year later she landed a starring role in Woodie Allen's Broadway show *Play It Again, Sam*, a role for which she received a Tony nomination and which she would reprise years later in the movie of the same name. She became famous though as the girlfriend and later wife of Al Pacino's Michael Corleone in the 1972 classic, *The Godfather* and the other two movies in the Godfather trilogy. But she may have gained her greatest fame in a series of movies by director Woody Allen, including her Oscar winning performance in *Annie Hall* (1977), the film version of *Play It Again, Sam (*1972), *Sleeper (1973), Love and Death (1975) Interiors* (1978), *Manhattan* (1979) and *Manhattan Murder Mystery* (1993). She starred in the 1990s

56. Julia Jacobo, *Jane Goodall, Famed Primatologist and Conservationist, Dies at 91*, ABC NEWS (Oct. 1, 2025, 4:23 PM), https://abcnews.go.com/International/jane-goodall-famed-primatologist-anthropologist-conservationist-dead-91/story?id=109868347.

57. *Id*.

58. Richard Luscombe, *Jane Goodall Said She Would Launch Trump and Musk On One-Way Trip Into Space*, THE GUARDIAN (Oct. 6, 2025), https://www.theguardian.com/science/2025/oct/06/jane-goodall-trump-elon-musk-putin.

59. Katie Kindelan, *WWE Star Hulk Hogan's Cause of Death Revealed*, ABC NEWS (July 31, 2025), https://abcnews.go.com/GMA/Culture/wwe-star-hulk-hogan-cause-death-revealed/story?id=124249036.

Father of the Bride movies and a number of more serious roles well into the 2000s.[60]

Charles Kirk

Charlie Kirk, founder of the right wing group Turning Point USA, and a supporter of President Trump credited with raising turnout among young, white, male voters for the 2024 Presidential election,[61] was shot to death on September 10, 2025, during an event at Utah Valley University, where he was speaking at the time. He was thirty-one years old, leaving behind a wife and two young children.[62] Following the search for and apprehension of twenty-two-year old suspected killer Tyler Robinson, Utah Governor Cox warned that "we can return hate with hate," and "can always point the finger at the other side," but "…at some point, we have to find an off-ramp, or it's going to get much, much worse."[63] President Trump had these somewhat less unifying words for the nation: "[W]e have radical left lunatics out there and we just have to beat the hell out of them."[64] Not to be outdone, Vice President Vance had these comforting words for the public: "While our side of the aisle certainly has its crazies," he claimed, "it is a statistical fact that most of the lunatics in American politics today are proud members of the far left."[65]

At his funeral service, Kirk's widow, Erika said this about her husband's assailant: "The answer to hate is not hate." But in what was described as a eulogy, the President offered these uplifting words: "I hate my opponent and I don't want the best for them."[66]

June Lockhart

Older EBA members and those who later watched reruns of 1950s, 1960s and 1970s television series on Nick at Night, will likely remember *Lassie* and *Lost in Space*. And if you do, you'll certainly remember the actress who portrayed the mom in both series - June Lockhart. She died of natural causes at age one hundred on October 25, 2025. Before gaining fame as a wise and understanding TV mom, Lockhart appeared in a number of movies and, at age twenty-two, won a Tony award for best newcomer. Decades after the TV series ended, Lockhart "provided

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60. Victoria Edel et al., *Diane Keaton, Famed for Roles in Father of the Bride, First Wives Club and More, Dies at 79*, PEOPLE (Oct. 11, 2025, 6:42 PM) https://people.com/diane-keaton-dead-oscar-winning-actress-dies-at-79-exclusive-8603118.

61. Ashley Ahn & Maxine Joselow, *Where Charlie Kirk Stood on Key Political Issues*, N.Y. TIMES (Sept. 11, 2025), https://www.nytimes.com/2025/09/11/us/charlie-kirk-views-guns-gender-climate.html?unlocked_article_code=1.lE8.gKTE.EViE3NctDHdw.

62. Fran Lawther & Sam Levin, *Charlie Kirk Shooting Death – What We Know So Far*, THE GUARDIAN (Sept. 11, 2025), https://www.theguardian.com/us-news/2025/sep/10/charlie-kirk-shooting-what-we-know.

63. Nicholas Bogel-Burroughs et al., *Live Updates: Family Member Alerted Officials to Suspect in Charlie Kirk Killing*, N.Y. TIMES (last updated Sept. 16, 2025), https://www.nytimes.com/live/2025/09/12/us/charlie-kirk-news-suspect?unlocked_article_code=1.lU8.UK78.Q8TSdE76OjF1.

64. *Id*.

65. Steve Benen, *JD Vance's 'Statistical Fact' on Political Violence is Neither Statistical nor a Fact*, MSNBC (Sept. 16, 2025, 10:00 AM), https://www.msnbc.com/rachel-maddow-show/maddowblog/jd-vances-statistical-fact-political-violence-neither-statistical-fact-rcna231630.

66. Tyler Pager, *Trump Remembers Kirk as a Martyr While Attacking Political Opponents*, N.Y. TIMES (Sept. 21, 2025), https://www.nytimes.com/2025/09/21/us/elections/trump-charlie-kirk-memorial-service.html?unlocked_article_code=1.n08.2RFa.9IIoluClgy_6.

the voice of Alpha Control in the 2021 Netflix reboot of *Lost in Space*."[67] Some astronauts, she said in a 2004 interview, "told her they were inspired to pursue their careers because of 'Lost in Space.'" But, she added, "I did 'Lassie' for six years and I never had anybody come up to me and say, 'It made me want to be a farmer.'"[68]

James A. Lovell, Jr.

A decorated Navy pilot, James Lovelle gained his greatest fame as the commander of Apollo 13, the failed and nearly catastrophic 1970 moon mission. The ways in which that mission was threatened by an explosion and salvaged by his heroics, those of his crew and the heroics of the engineers on the ground were later memorialized in the popular movie Apollo 13, where Lovell was portrayed by Tom Hanks. When a ruptured oxygen tank robbed the capsule of enough air to survive, the three-man crew used the two-person landing module to survive. Between that mission, his earlier Apollo 8 mission to circle the moon, his trips on the Mercury and Gemini spacecraft, Lovell eventually flew for 715 hours in space. Lovell was later awarded the Presidential Medal of Freedom by President Nixon and the Congressional Space Medal of Honor by President Clinton.[69] Lovell never did get to land on the moon. He died on August 8, 2025, at the age of ninety-seven.

Bill Moyers

Bill Moyers, a famed journalist and former press secretary to President Lyndon Johnson, passed away at the age of ninety-one. Moyers began his career as a sportswriter, and, after earning a divinity degree became a Baptist minister. But it was his work on President Johnson's Senate election campaign while in college that led him first to work at the Peace Corps as deputy director and then to the White House as press secretary. But the longest part of his career was as a journalist, first as publisher of Newsday, which won two Pulitzers and then for years on public television as host of Bill Moyers' Journal and for CBS as a correspondent.[70]

Mary Rose Oakar

Mary Rose Oaker died on September 13, 2025, at the age of eighty-five. She served in the U.S House of Representatives from 1977-93 – the first woman and first Arab American woman ever to serve in Congress from Ohio. As a consistent, albeit unsuccessful advocate for equal pay for comparable work for women, Oakar founded the Bipartisan Women's Caucus and successfully pushed for the creation of the Susan B. Anthony one-dollar commemorative coin. After leaving Congress she plead guilty to campaign finance violations for which she received a sentence of probation and later returned to elective office for a single term in the Ohio

67. Anita Gates, *June Lockhart, Beloved Television Mother, Dies at 100*, N.Y. TIMES (Oct. 25, 2025), https://www.nytimes.com/2025/10/25/arts/television/june-lockhart-dead.html.

68. *Id*.

69. Richard Goldstein, *James A. Lovell Jr., Commander of Apollo 13, Is Dead at 97*, N.Y. TIMES (Aug. 11, 2025), https://www.nytimes.com/2025/08/08/science/space/james-a-lovell-jr-dead.html.

70. Frazier Moore, *Bill Moyers, Former White House Press Secretary Turned Acclaimed Public TV Journalist, Dies at 91*, PBS NEWS (June 26, 2025, 4:49 PM), https://www.pbs.org/newshour/nation/bill-moyers-former-white-house-press-secretary-turned-acclaimed-public-tv-journalist-dies-at-91.

House of Representatives and one additional term on the Ohio Board of Education.[71]

Ozzie Osbourne

Ozzie Osbourne, the British high school dropout who first gained fame with the heavy metal band Black Sabbath in the late 1960s, passed away on July 22, 2025, at the age of seventy-six, the victim of Parkinson's disease and a heart attack. His death came only a few weeks after a farewell performance with his old band, decades after they had disbanded. He suffered for decades from drug addiction, and after being fired from Black Sabbath in 1978 fashioned a successful solo career. He may have gained his most fame, however, from the 1990s MTV reality show, "which portrayed the star as the well-meaning, frequently befuddled patriarch of an unruly household."[72]

Robert Redford

He only won one Oscar nomination for acting during his long career, that for his role as a 1930s grifter in the 1973 movie, *The Sting*. But in his life, which ended at age eighty-nine on September 16, 2025, Robert Redford won several Oscars as a director of a number of films covering serious topics (*The Milagro Beanfield War* (1988)*, Quiz Show* (1994)). He also earned great fame in a number of blockbuster films, including *Butch Cassidy and the Sundance Kid* (1969), *All the President's Men* (1976), about Watergate, *Three Days of the Condor* (1975) *Barefoot in the Park* (1967), *The Way We Were* (1973), *Out of Africa* (1985) and my favorite, *The Natural.* He may best be remembered, however, for founding the Sundance Institute, which holds the world famous Sundance Film Festival each year to promote independent films and for his environmental activism.[73]

The Headlines That Wrote Themselves

Florida Governor Who Touted Skills Training Benefits of Slavery Supports Florida Surgeon General Who Equates Polio Vaccine Mandate for School Children with Slavery

"*Every last one of them is wrong and drips with disdain and slavery."*

That was how Florida Surgeon General Joseph Ladapo announced Florida's frightening plan to end *all* vaccine mandates for school children – measles, mumps, rubella and even polio.[74] As if that statement was not remarkable enough, Lapado added that the state has conducted no studies of the effect that ending such mandates would have on public health.[75] In making his announcement, Lapado

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71. Trip Gabriel, *Mary Rose Oakar, 85, First Arab American Woman in Congress, Dies*, N.Y. TIMES (Sep. 16, 2025), https://www.nytimes.com/2025/09/16/us/politics/mary-rose-oakar-dead.html.

72. Mark Savage & Ruth Comerford, *Ozzy Osbourne Dies, Weeks After Farewell Show*, BBC NEWS (July 22, 2025), https://www.bbc.com/news/articles/cyvjd3p887qo.

73. Brooks Barnes, *Robert Redford, Screen Idol Turned Director and Activist, Dies at 89*, N.Y. TIMES (Sep. 26, 2025), https://www.nytimes.com/2025/09/16/movies/robert-redford-dead.html.

74. Gary Fineout, *Florida Moves to Scrap State School Vaccine Requirements*, *Politico* (last updated Sep. 3, 2025, 3:20 PM), https://www.politico.com/news/2025/09/03/florida-scrap-school-vaccine-requirements-00541739.

75. Gregory Svirnovskiy*, Florida Surgeon General Denies Need for Study Ahead of End to Vaccine Mandates in the State*, *Politico* (Sept. 7, 2025, 11:22 AM), https://www.politico.com/news/2025/09/07/vaccines-florida-surgeon-general-00549262.

indicated that his position was supported by Florida Governor DeSantis. But that's not so clear. DeSantis's Board of Education has instructed public schools to teach that some Black people benefited from slavery because it taught them useful skills.[76] So maybe DeSantis would say that if vaccine mandates are like slavery, that's a good thing, too.

President from Party That Once Fought the "Red Menace" Rolls Out Red Carpet for Kremlin Boss

"Yes, it's in my brain the deadline… When I see the moment where it's not going to stop… we'll be very tough."

President Trump, June 5, 2025, responding to question whether he was considering sanctions on Russia for its continued attacks on Ukrainian civilians.[77]

"We're going to be doing very severe tariffs if we don't have a deal in 50 days."

President Trump, July 14, 2025, making statement about sanctions on Russia during White House meeting with NATO Secretary-General Mark Rutte.[78]

"Ten days from today."

President Trump, July 30, 2025, announcing that tariffs on Russia would be imposed on August 8, 2025, rather than mid-September.[79]

"Yes, they will. There will be consequences… I don't have to say. There will be very severe consequences."

President Trump, August 13, 2025, responding to questions about what would happen if Russia did not agree to an immediate ceasefire with Ukraine.[80] So how did the threatened "severe consequences" play out? Under indictment by the International Criminal Court for the abduction of Ukrainian children, suspected in the murder of numerous political opponents, responsible for the constant

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76. Antonio Planas, *New Florida Standards Teach Students That Some Black People Benefited from Slavery Because it Taught Useful Skills*, NBC NEWS (July 20, 2023, 5:14 PM), https://www.nbcnews.com/news/us-news/new-florida-standards-teach-black-people-benefited-slavery-taught-usef-rcna95418; Steve Peoples et al., *DeSantis is Defending New Slavery Teachings. Civil Rights Leaders See a Pattern of 'Policy Violence*, AP (last updated July 27, 2023, 9:31 PM), https://apnews.com/article/desantis-slavery-election-2024-1fb51d663e6051051aa23b71421b9479.

77. Dmytro Basmat, *'Deadline is in My Brain' — Trump Dismisses Timeline to Impose Russian Sanctions*, THE KYIV INDEP. (June 5, 2025, 7:59 PM), https://kyivindependent.com/russian-sanctions-deadline-is-in-my-brain-trump-says-dismisses-timeline-to-impose-additional-sanctions/.

78. Charles Maynes & Joanna Kakissis, *Trump Touts Weapon Sales to NATO for Ukraine and Threatens Russia with 100% Tariffs*, NPR (July 14, 2025), https://www.npr.org/2025/07/14/nx-s1-5467272/russia-ukraine-war-trump-nato-weapons-tariffs.

79. Nandita Bose & Andrea Shalal, *Trump Says Russia Faces Tariffs in 10 Days if No Progress on Ending Ukraine War*, REUTERS (July 29, 2025), https://www.reuters.com/world/europe/trump-says-russia-faces-tariffs-10-days-if-no-progress-ending-ukraine-war-2025-07-29/.

80. Greg Norman, *Trump Threatens 'Very Severe' Consequences if Russia Doesn't Agree to End Ukraine War*, FOX NEWS (Aug. 13, 2025), https://www.foxnews.com/politics/trump-threatens-very-severe-consequences-russia-doesnt-agree-end-ukraine-war.

bombing of civilian targets in Ukraine – Russian President Putin was welcomed to Alaska and warmly greeted by President Trump, who actually had the government roll out the red carpet for the Russian dictator.

"I'm not happy."

President Trump, September 8, 2025, expressing his displeasure over Russia's heavy bombing of civilian targets in Kyiv and threatening new sanctions on Russia, again.[81]

"What's with Russia violating Poland's airspace with drones? Here we go!"

President Trump's reaction to Russian drone attacks – nineteen in all – that entered Polish airspace, damaging several homes in Czosnówka, Poland.[82] A few days later, another Russian drone crossed into Romania, another NATO member.[83] And on September 19, 2025, Estonia (another NATO member) complained that three Russian jets had invaded *its* air space, an act that Estonia's Foreign Minister Tsahkna called "unprecedentedly brazen."[84]

President Asks Jewish President of Harvard to Cough up $500 Million As Punishment for School's Antisemitism

Citing Harvard's failure to fight antisemitism on campus, the Trump Administration has frozen more than two hundred million dollars in federal funding for various types of research and pressured the University to settle for $500 million. Harvard's president, Alan Garber, who is Jewish, sued the Administration for violation of the school's First Amendment rights.[85] In a September 3, 2025 decision, federal district court judge Allison Burroughs sided with Harvard.[86] While acknowledging its recent efforts to combat antisemitism on campus,[87] Harvard, the judge found, "was wrong to tolerate hateful [antisemitic] behavior for as long as it did."[88] But, she added, the Administration imposed the funding freeze without any prior inquiry into whether the affected Harvard labs

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81. Guy D. McCardle, *Morning Brief: Trump Threatens New Sanctions on Russia, Iran Offers Nuclear Limits if Sanctions Are Lifted*, MSN (Sept. 8, 2025), https://www.msn.com/en-us/politics/international-relations/morning-brief-trump-threatens-new-sanctions-on-russia-iran-offers-nuclear-limits-if-sanctions-are-lifted/ar-AA1M6VAb.

82. Tiffany Wertheimer et al., *'What's With Russia Violating Polish Airspace?' - Trump Reacts to Moscow Drone Incursion on Nato Ally*, BBC NEWS (Sept. 9, 2025), https://www.bbc.com/news/live/c2enwk1l9e1t.

83. Ellie Cook, *Romania Condemns Russia for Drone Entering its Airspace*, NEWSWEEK (Sep. 14, 2025), https://www.msn.com/en-us/news/world/romania-condemns-russia-for-drone-entering-its-airspace/ar-AA1MvXfq?ocid=BingNewsSerp.

84. Sophie Tanno, *Estonia Says its Airspace Was Violated by Three Russian Jets*, CNN (Sep. 19, 2025), https://www.msn.com/en-us/news/world/estonia-says-its-airspace-was-violated-by-three-russian-jets/ar-AA1MU95n?ocid=entnewsntp&pc=U531&cvid=68cd819da9e945c38fb68a6a237dccae&ei=30.

85. Betsy Klein & Devin Cole, *Judge Says Trump Administration Unlawfully Blocked $2 Billion from Harvard*, CNN (Sep. 3, 2025), https://www.cnn.com/2025/09/03/politics/harvard-trump-first-amendment-funding-cuts?cid=external-feeds_iluminar_msn.

86. Harvard College v. United States Dept. of Health and Hum. Servs., Civil Action No. 25-cv-11048-ADB (filed Sep. 3, 2025), https://www.harvard.edu/federal-lawsuits/wp-content/uploads/sites/17/2025/09/gov.uscourts.mad_.283718.238.0_1.pdf.

87. *Id*., slip op. at 5, 81 ("Harvard is currently, even if belatedly, taking steps it needs to take to combat antisemitism and seems willing to do even more if need be.")

88. *Id*.

> were engaging in antisemitic behavior, were employing Jews, were run by Jewish scientists, or were investigating issues or diseases particularly pertinent to Jews, … meaning the funding freezes could and likely will harm the very people Defendants professed to be protecting. And it is unlikely that any Jew, even one directly impacted by antisemitism would be in favor of stopping research on, for example, Alzheimer's disease, heart disease, or autism to name a few, as a means of redressing their unrelated harm.[89]

Later in September, a second federal judge in California ordered the Administration to restore $500 million in federal grant funding to UCLA that the Administration had similarly cut off as punishment for UCLA's inadequate efforts to combat antisemitism.[90] The Administration has sought a billion dollars from UCLA to settle, a figure California Governor Newsom characterized as "extortion."[91]

So Much for *Stare Decisis*

"Settled legal precedent in the U.S. is not 'gospel' and in some instances may have been 'something somebody dreamt up and others went along with.'"

Justice Clarence Thomas on his view of the role of *stare decisis* at the Supreme Court.[92]

Freedom of Speech for Me, but Not for Thee

"Over the last 4 years the previous administration trampled free speech rights by censoring Americans' speech on online platforms, often by exerting substantial coercive pressure on third parties, such as social media companies, to moderate, deplatform, or otherwise suppress speech that the Federal Government did not approve."

From President Trump's January 20, 2025 Executive Order, *Restoring Freedom of Speech and Ending Federal Censorship*.[93] Since then, his Vice President, Mr. Vance said that the Administration may revoke the tax exempt status of foundations Vance "accused of underwriting a 'disgusting article' about" the late Charlie Kirk.[94]

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89. *Id*. slip op. at 71-72.

90. Associated Press, *Judge Orders Trump Administration to Restore $500 Million in Federal Grant Funding to UCLA*, CNN (Sep. 23, 2025), https://www.msn.com/en-us/politics/government/judge-orders-trump-administration-to-restore-500-million-in-federal-grant-funding-to-ucla/ar-AA1N8gJL?ocid=BingNewsSerp.

91. *Id*.

92. Ramon Antonio Vargas, *Clarence Thomas Says Precedent Might not Determine Cases on Upcoming Supreme Court Docket*, THE GUARDIAN (Sep. 28, 2025), https://www.theguardian.com/us-news/2025/sep/28/clarance-thomas-precedence-supreme-court-docket.

93. *Restoring Freedom of Speech and Ending Federal Censorship*, THE WHITE HOUSE (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/restoring-freedom-of-speech-and-ending-federal-censorship/

94. Michael Birnbaum et al., *Trump, Allies Seek to Punish Speech They Dislike Following Kirk Killing*, WASH. POST (Sep. 18, 2025), https://www.washingtonpost.com/politics/2025/09/18/trump-free-speech-charlie-kirk/

"Today, two senior Democrats on the House Energy and Commerce Committee selectively targeted a handful of news media outlets for their coverage of political events. By writing letters to the cable providers and other regulated entities that carry these news media outlets, the Democrats are sending a message that is as clear as it is troubling – these regulated entities will pay a price if the targeted newsrooms do not conform to Democrats' preferred political narratives. This is a chilling transgression of the free speech rights that every media outlet in this country enjoys."

Statement of then FCC Commissioner Brendan Carr on February 22, 2021.[95]

"President Biden is right. Political satire is one of the oldest and most important forms of free speech. It challenges those in power while using humor to draw more people into the discussion. That's why people in influential positions have always targeted it for censorship."

Then FCC Commissioner Carr posting on Twitter (now X) in 2022.[96]

"Free speech is the counterweight—it is the check on government control. That is why censorship is the authoritarian's dream."

Then FCC Commissioner Carr posting on X in 2023.[97]

"Should the government censor speech it doesn't like? Of course not. The FCC does not have a roving mandate to police speech in the name of the "public interest."

Then FCC Commissioner Carr posting on Twitter (now X) in February 2019.[98]

*"And I've been very clear from the moment that I have become chairman of the FCC, I want to reinvigorate the public interest. And what people don't understand is that the broadcasters, and you've gotten this right, are entirely different than people that use other forms of communication. They have a license granted by us at the FCC, and that comes with it an obligation to operate in the public interest… Look, we can do this the easy way or the hard way. These companies can find ways to change conduct, to take action, frankly, on Kimmel, or, you know, there's going to be additional work for the FCC ahead." *** Public interest means*

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95. Benjamin Arden, *FCC Commissioner Carr Responds to Democrats' Efforts to Censor Newsrooms*, FCC NEWS (Feb. 22, 2021), https://docs.fcc.gov/public/attachments/DOC-370165A1.pdf.

96. Pallavi K, *What Did Brendan Car Say About Political Satire? Keith Olbermann Recalls Trump's FCC Chair's Past Remarks Amid Jimmy Kimmel Suspension,* SOAPCENTRAL (Sep. 18, 2025), https://www.soapcentral.com/entertainment/what-brendan-carr-say-political-satire-keith-olbermann-recalls-trump-s-fcc-chair-s-past-remarks-amid-jimmy-kimmel-suspension.

97. Robert Birsel, *Brendan Carr's 'Censorship' Remarks Resurface After Jimmy Kimmel Suspension*, NEWSWEEK (Sep. 18, 2025), https://www.msn.com/en-us/news/politics/brendan-carrs-censorship-remarks-resurface-after-jimmy-kimmel-suspension/ar-AA1MNuGo.

98. Brendan Carr (@BrendanCarrFCC), X (Feb. 14, 2019, 9:05 AM), https://x.com/BrendanCarrFCC/status/1096062915201953795.

*you can't be running a narrow partisan circus and still meeting your public interest obligations… That means you can't be engaging in a pattern of news distortion.*** This is a very, very serious issue right now for Disney."*

The same FCC member, now Chairman, threatening to investigate ABC under the same "public interest" standard, if they did not punish late night host Jimmy Kimmel for remarks suggesting that MAGA supporters were trying to weaponize Charlie Kirk's death against left wing groups.[99] Hours later, ABC suspended Kimmel's show[100] (only to reverse course a few days later) and Nexstar, owner of numerous local television stations (and seeking FCC approval of its $6.2 billion merger with competitor Tegna) also announced it would no longer carry Kimmel's show,[101] a decision that, after public outcry, it reversed, too.

"[T]he First Amendment prohibits government officials from relying on the 'threat of invoking legal sanctions and other means of coercion . . . to achieve the suppression of disfavored speech.'"

The Supreme Court, speaking unanimously only last year.[102]

Border Czar Homan: "I did nothing criminal."

A Reuters news story reported that during an 2024 FBI undercover sting operation then future Border Czar, Tom Homan, "was caught on a recording accepting a $50,000 bribe in a bag from the restaurant chain Cava" in return for promises of "immigration-related government contracts when he joined the Trump administration."[103] When asked about the allegations by Fox New's Laura Ingraham, he did not deny taking the cash, responding only that "I did nothing criminal. I did nothing illegal…the FBI and DOJ came out and said, you know, said that nothing illegal happened, no criminal activity."[104] That, it seems may be correct: federal bribery laws apply to payments made to government officials in exchange for official acts and Homan was not then a federal official.[105] But still, if these were ordinary times wouldn't allegations of this nature be worth investigating?

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99. Joseph A. Wulfsohn, *FCC Chair Levels Threat Against ABC, Disney After Kimmel Suggested Charlie Kirk Assassin Was 'MAGA'*, FOX NEWS (Sep. 17, 2025), https://www.foxnews.com/media/fcc-chair-levels-threat-against-abc-disney-after-kimmel-suggested-charlie-kirk-assassin-maga.

100. Corbin Bolies, *FCC Chair Takes Victory Lap Over Jimmy Kimmel Suspension, Says Late Night Went From 'Court Jesters' to 'Court Clerics'*, THE WRAP (Sep. 17, 2025, 7:28 PM), https://www.thewrap.com/fcc-chair-takes-victory-lap-over-jimmy-kimmel-suspension/.

101. Connor McCrory, *Nexstar Pulled Jimmy Kimmel Live from ABC Stations While Seeking Merger Approval from FCC*, THE MIRROR (Sep. 17, 2025), https://www.themirror.com/entertainment/tv/fcc-nexstar-jimmy-kimmel-show-1396318.

102. NRA v. Vullo, 602 U.S. 175, 189 (2024).

103. Sarah N. Lynch, *Trump Aide Homan Accepted $50,000 in Bribery Sting Operation, Sources Say*, REUTERS (Sep. 22, 2025), https://www.reuters.com/world/us/trump-aide-homan-accepted-50000-bribery-sting-operation-sources-say-2025-09-21/.

104. Rebecca Beitsch, *Homan Sidesteps Question on Alleged $50,000 Payment Saying, 'I Did Nothing Criminal'*, THE HILL (Sep. 23, 2025), https://thehill.com/homenews/administration/5517204-tom-homan-border-czar-50k-payment/.

105. *See* 18 U.S.C. § 201. According to Randall Eliason, a former chief of the public corruption unit in the U.S. Attorney's office in D.C., and a former law professor on white collar crime: "[i]f someone who is not yet a public official, but expects to be, takes bribes in exchange for agreeing to take official acts after they are appointed, they can't be charged with bribery. But they can be charged with conspiracy to commit bribery. In a conspiracy charge, the crime is the agreement to commit a criminal act in the future." Carol Leonnig & Ken Dilanian, *Tom Homan Was Investigated for Accepting $50,000 from Undercover FBI Agents. Trump's DOJ Shut*

Portland's Antifa Problem?

Senior Antifa(?) members protest ICE raids in Portland, Oregon.

Don't Just Blame the Messengers, Shoot Them

Dissatisfied with a weak jobs report from the Labor Department's Bureau of Labor Statistics, the President announced that he was firing the Bureau's head, Erika McEntarfer, on the unsubstantiated claim that she had produced "fake" and "manipulated" job numbers for political purposes.[106] In the month following her firing, the BLS numbers were even worse.[107]

A few weeks after McEntarfer's firing, HHS Secretary Kennedy announced that he was firing CDC Director Susan Monarez, an official who had been confirmed by the Senate only a month earlier. Her crime: calling out Kennedy's silencing of vaccine experts and politicization of science.[108] Following her dismissal, four other C.D.C. experts quit en masse.[109]

These firings and resignations followed on the heels of President Trump's earlier firing of Jeffrey Kruse, director of the Defense Intelligence Agency over his preliminary assessment that bombing of Iran's nuclear facilities had set Iran's nuclear program back months, not years – an assessment at odds the President's statement that Iran's nuclear capabilities had been "obliterated."[110]

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it Down, MSNBC (Sep. 20, 2025), https://www.msnbc.com/msnbc/news/tom-homan-cash-contracts-trump-doj-investigation-rcna232568.

106. Kevin Breuninger, *Trump Contorts Timeline of Jobs Report Revisions in Effort to Justify Firing BLS Chief*, CNBC (Aug. 6, 2025), https://www.cnbc.com/2025/08/06/trump-bls-jobs-revisions-election.html#:~:text=VIDEO05:27,on%20CNBC's%20%22Squawk%20Box.%22.

107. David Goldman, *Trump's Attempts to Undermine Faith in the Jobs Data Hit a Wall Friday. Here's How the Report Really Works*, CNN BUS. (last updated Sep. 5, 2025), https://www.cnn.com/2025/09/05/business/trump-jobs-report-data.

108. Sheryl Gay Stolberg et al., *White House Says New C.D.C. Director is Fired, but She Refuses to Leave*, N.Y. TIMES (Aug.2 7, 2025), https://www.nytimes.com/2025/08/27/health/cdc-monarez-kennedy-vaccines.html.

109. *Id*.

110. Martha McHardy, *Firing of Top Defense Official Who Contradicted Donald Trump Sparks Fury*, NEWSWEEK (Aug. 23, 2025), https://www.newsweek.com/jeffrey-kruse-firing-trump-iran-2118217#:~:text=The%20sudden%20dismissal%20of%20a,political%20loyalty%20under%20President%20Trump.

Role Reversal: DOJ releases the big fish to go after the small fry

The travails of Kilmar Abrego Garcia continue. DOJ's attorney had earlier admitted that the government had mistakenly sent Abrego Garcia to an El Salvadoran prison notorious for its mistreatment of inmates and then did nothing to try and have him returned. It then reversed course. It had him sent back to the U.S. but then charged him with human trafficking for MS-13, an organization to which he has no known links. In an effort to build up its case, the government dropped its existing case against several of MS-13's *top* leaders in the hope that they might provide evidence against Abrego Garcia.[111] It then offered to deport Mr. Garcia to Costa Rica – but only if he agreed to plead guilty to the human trafficking charge. When he declined in favor of having his day in court, the Government changed tactics again. This time it announced it was deporting him to Uganda. Mr. Abrego Garcia argued that this was cruel and arbitrary and exposed him to the risk of torture. DHS then announced a new, equally cruel alternative. It "intends to seek his removal to the small African kingdom of Eswatini," another country to which he has no connections and whose language he does not speak.[112] The judge before whom the Justice Department had brought the human trafficking charges against Abrego Garcia has since found that, even given the "high bar" to establish selective prosecution, there was a "realistic likelihood" that the government's case against him was brought vindictively, i.e. as punishment for his having challenged his earlier illegal deportation to El Salvador.[113] As the judge there noted, "the prosecutor may not punish a defendant for exercising a protected statutory or constitutional right."[114]

Navy directed to bomb, rather than arrest boat of Venezuelan drug smugglers

Maximum lethality, not tepid legality[115]
*I don't give a sh*t what you call it!*[116]

These, respectively, were the responses of Secretary of Defense-er, War[117] Hegseth and Vice President Vance to objections from Kentucky Senator Rand

111. Andrew C. McCarthy, *Trump DOJ Drops Cases Against Top MS-13 Leaders*, NAT'L REV. (July 5, 2025), https://www.nationalreview.com/2025/07/trump-doj-drops-cases-against-top-ms-13-leaders.

112. Sophie Rosenthal, *Trump Administration Wants Judge to Throw Out Abrego Garcia Deportation Fight*, WUSA9 (last updated Sep. 23, 2025), https://www.wusa9.com/article/news/dmv-immigration/trump-admin-asks-to-dismiss-kilmar-abrego-garcia-challenge-deportation-detention-dhs-ice-eswatini/65-4a9b58ea-bf42-4329-b587-8d6cdb900f0f.

113. United States v. Abrego Garcia, No. 3:35-cr-00115, slip op. at 6-8 (M.D. Tenn. Oct. 3, 2025), https://storage.courtlistener.com/recap/gov.uscourts.tnmd.104621/gov.uscourts.tnmd.104621.138.0.pdf.

114. *Id*. at 1 (quoting United States v. Zakhari, 85 F.4th 367, 384–85 (6th Cir. 2023) (Kethledge, J., concurring)).

115. Callum Sutherland, *Trump Signs Executive Order Rebranding Department of Defense as the 'Department of War'*, TIME (Sep. 5, 2025), https://time.com/7314840/department-of-defense-name-change-department-of-war-pete-hegseth-trump/.

116. Gregory Svirnovskiy, *Rand Paul Clashes With JD Vance Over US Strike on Boat Leaving Venezuela*, POLITICO (Sep. 7, 2025), https://www.politico.com/news/2025/09/07/rand-paul-clashes-with-jd-vance-over-us-strike-on-venezuelan-boat-00549080; Bart Jansen, *Trump's Sinking of Venezuelan Boat Sparks Fight Between VP Vance, Sen. Rand Paul*, USA TODAY (Sep. 7, 2025), https://www.usatoday.com/story/news/politics/2025/09/07/rand-paul-lashes-jd-vance-venezuela-drug-boat-comments/86022532007/.

117. On Friday, September 5, 2025, the President issued yet another executive order, this one declaring that the Secretary of Defense is now authorized to use the "additional, secondary title – Secretary of War." *Restoring*

Paul that the Navy's sinking a boat of suspected Venezuelan drug smugglers rather than interdicting, arresting and trying them, was unlawful and "despicable."[118] Since then, a number of other boats carrying more than twenty alleged drug smugglers have been sunk by the U.S. military and the President has since announced that these smugglers are to be considered Designated Terrorist Organizations with which the U.S. is in "armed conflict."[119]

Speaker of House Says Trump Was FBI Informant in Epstein Case While Trump Says Whole Epstein Case is a Hoax

"He was an FBI informant to try to take this stuff down."

"This is a Democrat hoax that never ends . . . I think it's enough because I think we should talk about the greatness of our country and the success that we're having . . . that's what I want to talk about . . . not the Epstein hoax."

These were the wildly contradictory statements, respectively, of the Speaker of the House and the President concerning the White House's slow walking of the release of the files related to the FBI's investigation of the Jeffrey Epstein/Gislaine Maxwell-led sex trafficking scheme.[120] A "Democrat hoax" led by *Marjorie Taylor-Greene* intended to distract from the Administration's claimed successes? You decide.

First, the Epstein Hoax. Now Sec. Rubio Says Bolsinaro Conviction for Brazilian Election Fraud Was Witch Hunt, too?

Claiming that the Brazilian Supreme Court has "unjustly ruled to imprison former President Jair Bolsonaro" for interference in Brazil's last presidential election, Secretary Rubio has now vowed that "[t]he United States will respond accordingly to this witch hunt."[121]

President Commutes Seven Year Sentence of "Courageous" Fraudster George Santos, Then Pardons Crypto Felon Changpeng Zhao

"[A]t least Santos had the Courage, Conviction, and Intelligence to ALWAYS VOTE REPUBLICAN!" That was the explanation given by President Trump for his decision to commute the seven year sentence George Santos was serving for defrauding campaign donors.[122] Santos, you may recall, was the former Congressman who was expelled from the House of Representatives, a serial

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The United States Department of War, THE WHITE HOUSE (Sept. 5, 2025), https://www.whitehouse.gov/presidential-actions/2025/09/restoring-the-united-states-department-of-war/.

118. Sutherland*, supra* note 115.

119. Natasha Bertrand, *US Strikes Another Boat Off Venezuela Coast, Killing Four, Defense Secretary Announces*, CNN (Oct. 3, 2025), https://www.cnn.com/2025/10/03/politics/strikes-boat-carribbean-fourth.

120. Heather Mills, *Trump Was an FBI Informant in Epstein Case, Speaker Johnson Claims*, LIVENOW FOX (Sep. 6, 2025), https://www.livenowfox.com/news/trump-fbi-informant-epstein-case.

121. Secretary Marco Rubio (@SecRubio), X (Sep. 11, 2025, at 4:49 PM), https://x.com/SecRubio/status/1966257934129864715.

122. Saige Miller, *President Trump Commutes the Prison Sentence of George Santos*, NPR (last updated Oct. 18, 2025), https://www.npr.org/2025/10/17/nx-s1-5578304/trump-george-santos-prison-sentence-commuted.

liar who admitted to lying about his education, employment, upbringing and more and who plead guilty to "wire fraud and aggravated identity theft.[123]

Only days after commuting Santos's sentence, the President then announced that he had pardoned Changpeng Zhao, the founder of the crypto exchange, Binance. Zhao had plead guilty in 2023 to money laundering charges while federal prosecutors had previously alleged that Binance had become "a hub for illicit finance,"[124] more particularly, for financing the terrorist groups Hamas, Al Qaeda and the Islamic State.[125] The pardon comes after an Abu Dhabi-backed fund had made a $2 billion investment in Binance "using a digital token issued by a crypto firm launched by Trump's sons."[126] The pardon, said Republican Senator Tillis, sends "a bad signal."[127] The President's explanation for the pardon? "A lot of people say he wasn't guilty of anything… and so I gave him a pardon at the request of a lot of very good people."[128]

Say it Ain't So, Chauncey![129]

"Say it ain't so, Chauncey." Those are likely the thoughts of my two grown sons, who as youngsters sported Chauncey Billups Detroit Pistons jerseys (which they've handed down to my grandsons) following the FBI's announcement that Billups, along with more than thirty others, had been criminally charged in a massive illegal sports betting scheme. Billups, now the coach of the Portland Trailblazers, was the All-Star guard known as "Mr. Big Shot" for his heroics leading the Pistons to the NBA championship in 2004.[130]

Prez Demolishes East Wing of White House for New Ballroom. It's his "main priority" says Press Secretary.

It isn't clear why the White House instructed employees of the nearby Treasury Department not to distribute photos of its demolition, but the east wing of the White House exists no longer, and will be replaced by a $300 million, 90,000 foot

123. *Id*.

124. Jasper Goodman, *GOP Senator Denounces Trump's Pardon of Crypto Billionaire CZ*, POLITICO (Oct. 23, 2025), https://www.politico.com/live-updates/2025/10/23/congress/gop-senator-denounces-trumps-pardon-of-crypto-billionaire-cz-00620745.

125. Press Release, U.S. Treasury Announces Largest Settlements in History with World's Largest Virtual Currency Exchange Binance for Violations of U.S. Anti-Money Laundering and Sanctions Laws, U.S. Dep't of the Treasury (Nov. 21, 2023), https://home.treasury.gov/news/press-releases/jy1925#:~:text=FinCEN's%20settlement%20agreement%20assesses%20a,money%20laundering%20and%20sanctions%20obligations.

126. *Id*.

127. *Id*.

128. Isabella Murray, *Trump Pardons Billionaire Binance Founder Changpeng Zhao, Says He Did So at Request of Others*, ABC NEWS (Oct. 23, 2025, 6:10 PM), https://abcnews.go.com/Politics/trump-pardons-billionaire-binance-founder-changpeng-zhao/story?id=126803113#:~:text=Trump%20pardons%20billionaire%20Binance%20founder,ABC%20News%20Network

129. "Say it ain't so, Joe" is the pleading question attributed to a young White Sox fan after Shoeless Joe Jackson was charged with throwing the 1919 World Series in what has become known as the "Black Sox scandal." Scott Chiusano, *'Say it Ain't So, Joe': Remembering the 1919 Black Sox and Baseball's Biggest Scandal* , N.Y DAILY NEWS (Apr. 9, 2018), https://www.nydailynews.com/2015/10/09/say-it-aint-so-joe-remembering-the-1919-black-sox-and-baseballs-biggest-scandal/.

130. Shawn Windsor, *Mr. Big Shot and the Mob? Beloved Detroit sports icon Chauncey Billups takes a hit*, Detroit Free Press (Oct. 24, 2025), https://www.freep.com/story/sports/columnists/shawn-windsor/2025/10/24/chauncey-billups-rep-not-the-same-after-mob-poker-allegations-fbi-investigation/86844684007/?gnt-cfr=1&gca-cat=p&gca-uir=true&gca-epti=z114336e003600v114336b0048xxd004865&gca-ft=49&gca-ds=sophi.

ballroom.[131] Among other changes to the White House, said Press Secretary Leavitt, "the ballroom is really the President's main priority."[132]

Hatch Act, Shmatch Act

It took place immediately after the Senate vote that shut down many government operations on October 1, 2025. Suspended federal workers found that their presumably non-partisan agencies had placed away messages on their emails blaming Democrats for the shut down.[133] Still others got "suggestions" for their "out of office" to read: "I am out of office for the foreseeable future because Senate Democrats voted to block a clean federal funding bill (H.R.5371) leading to a government shutdown."[134] And the websites of a number of federal agencies posted messages like this: "The Radical Left in Congress shut down the government. HUD will use available resources to help Americans in need."[135]

HHS Head Who Said, "Don't Take Medical Advice from Me" Forces Public to Anyway

"What I would say is my opinions about vaccines are irrelevant ... I don't want to seem like I'm being evasive, but I don't think people should be taking advice, medical advice, from me."

That was the testimony of Health and Human Services Secretary Robert F. Kennedy, Jr. before the Senate Health, Education, Labor and Pensions Committee in May, 2025.[136] But he has since effectively forced the public to accept his medical advice anyway, firing the CDC's director on the preposterous grounds that *she* had told Kennedy that she was untrustworthy,[137] firing the CDC's entire vaccine review advisory panel because of alleged conflicts of interest,[138] installing vaccine skeptics who had been paid expert witnesses in lawsuits challenging vaccines to replace them,[139] cancelling a half billion dollars' worth of contracts on MRNA

131. Jonathan Edwards et al., *The East Wing is Gone, and Trump Turns to Damage Control*, , WASH. POST (last updated Oct. 23, 2025), https://www.washingtonpost.com/politics/2025/10/23/trump-ballroom-white-house-east-wing/.

132. Amelia Benavides-Colón, *Democrats Seize on Trump's Ballroom Project as Shutdown Messaging War Ramps Up*, NOTUS (Oct. 23, 2025), https://www.notus.org/democrats/democrats-trump-ballroom-east-wing-shutdown-messaging-war-karoline-leavitt#:~:text=Democrats-

133. Leah Feiger & Vittoria Eliott, *Government Workers Say Their Out-of-Office Replies Were Forcibly Changed to Blame Democrats for Shutdown*, WIRED (Oct. 2, 2025, 1:44 PM), https://www.wired.com/story/government-workers-say-their-out-of-office-replies-were-forcibly-changed-to-blame-democrats-for-shutdown/.

134. Shannon Bond et al., *Trump Administration Uses Taxpayer Dollars to Blame Democrats for Government Shutdown*, NPR (last updated Oct. 1, 2025), https://www.npr.org/2025/09/30/nx-s1-5558393/government-shutdown-trump-ethics-hatch-act.

135. *Id*.

136. Chris Stein, *RFK Jr Tells Congress 'People Shouldn't Take Medical Advice from Me'*, THE GUARDIAN (May 14, 2025), https://www.theguardian.com/us-news/2025/may/14/rfk-jr-kennedy-senate-house-hearings.

137. Colin Meyn, *RFK Jr. Claims Monarez Said She Wasn't 'Trustworthy' in Fateful Meeting*, THE HILL (Sep. 4, 2025), https://thehill.com/policy/healthcare/5486544-kennedy-fired-monarez-cdc-trustworthy/.

138. Will Stone, *RFK Jr. Boots All Members of the CDC's Vaccine Advisory Committee*, NPR (June 9, 2025), https://www.npr.org/sections/shots-health-news/2025/06/09/nx-s1-5428533/rfk-jr-vaccine-advisory-committee-acip.

139. Heidi Ledford & Rachel Fieldhouse, *Who is on RFK Jr's New Vaccine Panel — And What Will They Do?*, NATURE (June 12, 2025), https://www.nature.com/articles/d41586-025-01852-z.

research,[140] and effectively denying COVID vaccines to millions who are not over sixty five years old or at high risk because they will no longer be guaranteed insurance coverage for COVID vaccines.[141] What else might we have expected from an HHS head who has apparently acted on his belief that "[t]here's *no* vaccine that is, you know, safe and effective."[142]

As U.S. Birthrate Plummets to All Time Low, Prez and his VP Brag About Negative Net Migration

"Promises made. Promises kept. Negative net migration for the first time in 50 years!"

"Why has housing leveled off over the past six months? I really believe the main driver is that you've had negative net migration into the United States for the first time in 60 years."

These, respectively, were statements from the White House[143] and Vice President Vance,[144] *bragging* that there were now more people leaving the U.S. than emigrating to it. Bragging about negative net migration? For more than half a century our birthrate has been below replacement level. And it is steadily dropping.[145] The CDC reports that our birthrate has now fallen to an all-time low of less than 1.6 children per woman.[146] It doesn't take a mathematician to know that if U.S. births are well below replacement level and we're losing more persons to outmigration, our total population – and with it the number of persons – including undocumented immigrants - paying into our rapidly depleting Social Security fund will continue to shrink, increasing the burden on current wage earners.[147] How is that a good thing?

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140. Mary Kekatos, *RFK Jr. Cancels at Least $500M in MRNA Vaccine Funding. What Are the Implications?*, ABC NEWS (Aug. 6, 2025), https://abcnews.go.com/Health/rfk-jr-cancels-500m-mrna-vaccine-funding-implications/story?id=124406624#:~:text=What%20are%20the%20implications?,-August%206%2C%202025&text=The%20Department%20of%20Health%20and%20Human%20Services%20(HHS)%20announced%20this,effective%20even%20as%20viruses%20mutate.%22.

141. Madison Czopek, *Robert F. Kennedy Jr. Said 'Everybody Can Get' the COVID-19 Vaccine. Is That True?*, POLITIFACT (Sep. 4, 2025), https://www.politifact.com/factchecks/2025/sep/04/robert-f-kennedy-jr/robert-f-kennedy-jr-said-everybody-can-get-the-cov/.

142. McDonald, *supra* note 2.

143. *ICYMI: Negative Net Migration for the First Time in at Least 50 Years*, THE WHITE HOUSE (Aug. 3, 2005), https://www.whitehouse.gov/articles/2025/08/icymi-negative-net-migration-for-the-first-time-in-at-least-50-years/#:~:text=The%20United%20States%20is%20on,Watch%20the%20full%20segment%20here.

144. Image posted by Donald Trump for President (@DonaldTrumpForPresident), FACEBOOK (Aug. 29, 2025), https://www.facebook.com/DonaldTrump4President/posts/vp-jd-vance-why-has-housing-leveled-off-over-the-past-six-months-i-really-believ/1192423962913631/.

145. *U.S. Birth Rate Hits All-Time Low, CDC Data Shows*, CBS NEWS (July 24, 2025), https://www.cbsnews.com/news/us-birth-rate-all-time-low-cdc-data/.

146. *Id*.

147. Kiran Rachamallu, *Immigrants Contribute Greatly to the Social Security Trust Fund's Solvency*, CTR. ON BUDGET AND POL. PRIORITIES; OFF THE CHARTS BLOG (April 23, 2025, 8:34 AM), https://www.cbpp.org/blog/immigrants-contribute-greatly-to-the-social-security-trust-funds-solvency.

No, "Trumped up" Is Not a New Phrase

trumped-up -- adjective: fraudulently concocted: spurious[148]

Examples of use in a sentence: "Erdogan's government has thrown (or attempted to throw) a number of key political opponents into jail on what critics say are trumped-up, spurious charges."[149]

Since taking office President Trump has issued threats to imprison California Senator Schiff,[150] called for members of the January 6 Select House Committee to be prosecuted for "treason"'[151] and for investigations of former New Jersey Senator Christie,[152] former President Biden and his family,[153] New York Attorney General Letitia James,[154] former Congresswoman Liz Cheney,[155] Homeland Security officials under his first Administration, Miles Taylor and Chris Krebs,[156] and Special Counsel, Jack Smith.[157] He's even urged a "major investigation" of Bruce Springsteen on grounds that Springsteen had been paid to support Vice President Harris's candidacy for president.[158] When Erik Siebert, his own appointee as U.S. Attorney for the eastern district of Virginia declined for lack of evidence to bring prosecutions against Letitia James and former FBI Director James Comey, Trump fired him. He then all but ordered Attorney General Bondi to charge them anyway: "We can't delay any longer, it's killing our reputation and credibility… JUSTICE MUST BE SERVED, NOW!!!"[159] Trump's appointee to replace Siebert as acting U.S. Attorney, Lindsey Halligan, quickly followed up. Apparently unable to find attorneys in her office to file the indictment, she brought the case before a grand jury on her own, obtaining indictments on only two of three charges against

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148. "trumped-up," *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/trumped-up.

149. *Id*.

150. Rebecca Beitsch, *Adam Schiff Readies for Battle as Prime Target on Trump Enemies List*, THE HILL (Sep. 6, 2025), https://thehill.com/homenews/house/5488222-trump-targets-senator-schiff/.

151. Gabe Whisnant, *Donald Trump's Jan. 6 'Jail' Warning Sparks Alarm from Critics*, NEWSWEEK (Dec. 8, 2024), https://www.newsweek.com/donald-trumps-jan-6-jail-warning-sparks-alarm-critics-1997320.

152. Joey Garrison, *President Trump Threatens Chris Christie With New 'Bridgegate' Investigation*, USA TODAY (Aug. 24, 2025), https://www.usatoday.com/story/news/politics/2025/08/24/donald-trump-chris-christie-bridgegate-investigation/85811006007/.

153. Jeff Mason, *Trump Directs Probe Into Biden's Use of Autopen, Biden Says Policy Decisions Were His*, REUTERS (June 5, 2025), https://www.reuters.com/world/us/trump-directs-probe-into-bidens-use-autopen-biden-says-policy-decisions-were-his-2025-06-05/; Chris Camerson, *Trump Orders Investigation of Biden and His Aides*, N.Y. TIMES (June 4, 2025), https://www.nytimes.com/2025/06/04/us/politics/trump-biden-investigation.html.

154. Michael Sisak, *Trump Weaponization Czar Urged New York Attorney General James to Resign Over Mortgage Probe*, AP (Aug. 19, 2025), https://apnews.com/article/trump-letitia-james-mortgage-investigation-martin-letters-2e2d3c8f723ac40c933d31bb69061227.

155. Whisnant, *supra* note 151.

156. Jacob Knutson, *Trump's Chilling Retribution Campaign Poses a Grave Threat to Democracy*, DEMOCRACY DKT. (July 25, 2025), https://www.democracydocket.com/analysis/trump-administration-weaponization-government-targeting-political-opponents/.

157. Andrew Goudsward, *Trump Curtails US Business With Law Firm Representing Jack Smith*, REUTERS (Feb. 25, 2025), https://www.reuters.com/world/us/trump-curtails-us-business-with-law-firm-representing-jack-smith-2025-02-25/.

158. Chris Willman, *Trump Demands 'Major Investigations' Into Bruce Springsteen, Beyonc . . . , Bono and Oprah, Repeating Baseless Rumors Superstars Were Paid Off to Support Kamala Harris*, VARIETY (May 19, 2025), https://variety.com/2025/music/news/trump-demands-investigations-bruce-springsteen-beyonce-bono-oprah-1236403291/.

159. Kathryn Palmer, *'NOW!!' Trump Pressures DOJ's Pam Bondi to Move on Investigations Into Political Foes*, USA TODAY (Sep. 22, 2025), https://www.msn.com/en-us/news/politics/now-trump-pressures-dojs-pam-bondi-to-move-on-investigations-into-political-foes/ar-AA1N06P2?ocid=BingNewsSerp.

Comey, and even then on what was reported as only a bare majority vote of the grand jurors.[160] A week later Halligan obtained an indictment of Letitia James for alleged mortgage fraud, again without the support of the career prosecutors in her office.[161] The President has also urged Congress to initiate impeachment proceedings against U.S. district court judge James Boasberg for temporarily blocking the deportation of Venezuelan migrants to El Salvador,[162] and the Defense – er, War Department to initiate a military tribunal to try former President Obama,[163] whom he has also accused of "treason."[164] And legal analysts have characterized as dubious the President's defamation suits against CBS and ABC.[165] One could imagine a lexicographer substituting "Trump" for "Erdogan" in Merriam-Webster's sample sentence above illustrating use of the term "trumped up." But while the confusion is understandable, use of the term "trumped up" dates back to 1728.[166] So, prescient maybe, but not new.

Trump Cuts Off Trade Talks with Canada After Ontario Airs Ad Quoting President Reagan's Warning Against Tariffs

During the American League Championship series between Seattle and Toronto, the Province of Ontario aired a commercial that included clips of a 1987 radio address in which President Reagan stated his oft-repeated warning about the dangers of "high tariffs" to American competitiveness and prosperity. Based on what President Trump called this "egregious behavior," he announced that "ALL TRADE NEGOTIATIONS WITH CANADA ARE HEREBY TERMINATED."[167] Trump's ire may have been triggered by a statement from the Ronald Reagan Foundation. Shortly after the ad was released, the Foundation

160. Jacob Rosen & Joe Walsh, *Judge Who Reviewed James Comey's Indictment Was Confused By Prosecutor's Handling of Case, Transcript Shows*, CBS NEWS (Sep. 26, 025), https://www.cbsnews.com/news/judge-james-comey-indictment-confusion-trump/.

161. Robert Alexander, *Trump Prosecutors Make Error in Letitia James Indictment*, NEWSWEEK (Oct. 10, 2025), https://www.newsweek.com/trump-prosecutors-make-error-in-letitia-james-indictment-10858507.

162. Nina Totenberg, *Trump Calls for the Impeachment of a Judge, As Lawsuits Pile Up*, NPR (March 18, 2025), https://www.npr.org/2025/03/18/nx-s1-5332086/trump-lawsuits#:~:text=oveview%20of%20trump%20legal%20cases&text=President%20Trump%20on%20Tuesday%20called,deport%20the%20alleged%20gang%20members.

163. Ron Dicker, *Donald Trump Forwards Shocker of A Plea For Barack Obama*, HUFFPOST (May 19, 2025), https://www.yahoo.com/news/donald-trump-forwards-shocker-plea-105850859.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAHvPQi72MjASfbz4Yn_q6GWJqTaz--JWibBfHhALPV6RaFB38V8hGDPQ8Ehytb-SmhRv49LStWA0NZRl8jI2QQoJ7FGsrKY6z82x5eXT2gKJEzysshQhRF_LZZkbK6iMcPFn8XcCuFXlROJSEuRP0Lz7LMlYKFl44vlVllJJniQIE.

164. Zachary B. Wolf, *Trump Accuses Obama of Treason, Annotated*, CNN (last updated July 23, 2025), https://www.cnn.com/2025/07/22/politics/trump-obama-treason-accusation-analysis.

165. David Enrich, *Trump's New Line of Attack Against the Media Gains Momentum*, N.Y. TIMES (Feb. 7, 2025), https://www.nytimes.com/2025/02/07/business/media/trump-media-lawsuits.html; Michael Sozan, *The Trump Administration and the FCC Are Weakening Freedom of the Press and Hurting Americans*, CTR. FOR AM. PROGRESS (May 5, 2025), https://www.americanprogress.org/article/the-trump-administration-and-the-fcc-are-weakening-freedom-of-the-press-and-hurting-americans/.

166. "trumped-up," *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/trumped-up.

167. Joe Walsh, *Ontario Will Pull Anti-Tariff Ads After Trump Vows to Cut Off Trade Talks with Canada*, CBS NEWS (last updated Oct. 24, 2025), https://www.cbsnews.com/news/trump-trade-talks-with-canada-tariff-ad-reagan/.

inexplicably[168] complained that the ad used "selective audio" that "misrepresents the Presidential Radio Address" and that Ontario hadn't sought its permission to use the audio clips.[169] It's unclear what "permission" Ontario needed to air clips of a public Presidential Address, much less one found on the You Tube link that *the Foundation itself* "encourage[d] [readers] to watch."[170] As for the accuracy of the ad's clips, as the Foundation itself notes, the subject of Reagan's radio address was called "Radio Address to the Nation on Free and Fair Trade" and the full clip does indeed make clear Reagan's concerns about the dangers of high tariffs to American consumers and American competitiveness. But don't take my word for it, just go to the You Tube link the Foundation provided.[171] The actual recording of President Reagan's radio address apparently didn't stop the President from lashing out. A day after calling off trade talks with Canada, he claimed that the ad was a "fake" and that Reagan, an ardent free trade advocate, "LOVED TARIFFS FOR OUR COUNTRY, AND ITS NATIONAL SECURITY."[172] Then, proclaiming that the "fraudulent ad" was a "hostile act," the President announced that he was increasing already steep tariffs on Canada by another 10 percent.[173] This, I guess, constitutes another "emergency" under the International Economic Emergency Powers Act. Yet – for the first time in history – continuing SNAP food assistance to more than forty million Americans during a government shutdown is *not* an emergency justifying use of contingency funds for that purpose.[174]

Trump Gets a Commemorative Coin?

"No coin issued under this subsection may bear the image of a living former or current President, or of any deceased former President during the 2-year period

168. Inexplicable and disappointing was how the Wall Street Journal's Editorial Board reacted to the Reagan Foundation's statement. Editorial Board, *Reagan vs. Trump on Tariffs*, WALL ST. J. (Oct. 26, 2025), https://www.wsj.com/opinion/reagan-vs-trump-on-tariffs-8295c8d5?mod=opinion_lead_pos1.

169. Ronald Reagan Presidential Foundation & Institute (@RonaldReagan), X (Oct. 23, 2025, at 7:54 PM), https://x.com/RonaldReagan/status/1981524620265046408?ftag=MSF0951a18 (capitalization in the original)

170. *Id*.

171. REAGAN LIBRARY, *President Reagan's Radio Address on Free and Fair Trade on April 25, 1987* (YouTube, Oct. 10, 2017), https://www.youtube.com/watch?v=5t5QK03KXPc&t=181s [hereinafter *Reagan's Address*].

172. Paul Wiseman, *Trump Says a Canadian Ad Misstated Ronald Reagan's Views on Tariffs. Here Are the Facts and Context*, AP NEWS (last updated Oct. 24, 2025), https://apnews.com/article/trump-canada-ad-tariff-reagan-trade-talks-f711559b0084b377d82d964893c67c78.

173. Sophia Compton, *Trump Slaps Canada with Extra 10% Tariff Over 'Fraudulent' Reagan Advertisement: 'Hostile Act'*, FOX BUS. (Oct. 25, 2025), https://www.foxbusiness.com/politics/trump-slaps-canada-extra-10-tariff-fraudulent-reagan-advertisement-hostile-act.

174. Complaint, Massachusetts v. Department of Agric., No. 1:25-cv-13165, 2025 WL 3040441, at *1-4, 44, 98 (D. Mass. Oct. 28, 2025); 138 Stat. 25, 93–94 (2024).

following the date of the death of that President."[175] That's how the U.S. Code reads.[176] But it apparently hasn't stopped U.S. Treasurer Brandon Beach from announcing that the images above were "not fake news" and that commemorative one-dollar coin celebrating the U.S.'s 250th anniversary may feature the current president's image.[177]

Aren't Rule 28(j) letters supposed to cite judicial authorities discovered after oral argument?

> Suddenly revoking the President's tariff authority under IEEPA would have catastrophic consequences for our national security, foreign policy, and economy. The President believes that our country would not be able to pay back the trillions of dollars that other countries have already committed to pay, which could lead to financial ruin.

Solicitor General Sauer's questionable post-oral argument August 11, 2025 letter to the Federal Circuit Court of Appeals[178] urging the Court to stay its ruling should it affirm the ITC's determination that the President's tariffs are illegal.[179] Doubling down on this not so subtle threat that invalidating the tariffs could trigger a second Great Depression, Secretary Bessent went on national television to warn: "The amount of money that's coming in here — I think the more deals we've done, the more money coming in, it gets harder and harder for [the Supreme Court] to rule against us."[180]

Flouting federal district court rulings

When federal district court judge Immergut, an appointee of President Trump, issued a temporary restraining order barring the U.S. from ordering Oregon National Guard members into Portland, the Administration attempted to call first California, then Texas National Guard members into service. At a second emergency hearing the judge asked the Justice Department's lawyer, "Mr. Hamilton, you are an officer of the court. Aren't the defendants simply circumventing my order?"[181] Noting that her earlier order had found that the President likely "exceeded his constitutional authority" by federalizing the troops because protests

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175. 31 U.S. Code § 5112(n)(2)(E).

176. *Id*.

177. Kit Maher, *$1 Trump Coin Draft is 'Real,' US Treasurer Says*, CNN (Oct. 3, 2025), https://www.cnn.com/2025/10/03/business/trump-coin-treasurer-250-anniversary.

178. Letter from Solicitor General D. John Sauer to Jarrett Perlow, Clerk of Court, U.S. Court of Appeals for the Fed. Cir., in *V.O.S. Selections, et al. v. Trump, et.al*., Nos. 25-1812, 25-1813, https://storage.courtlistener.com/recap/gov.uscourts.cafc.23105/gov.uscourts.cafc.23105.154.0_1.pdf Solicitor Sauer describes his filing as a Rule 28(j) letter. But the rule only permits post oral argument letters if (1) "pertinent and significant authorities come to a party's attention. . . after oral argument," (2) the party provides the "supplemental citations" and (3) specifically refers to "the page of the brief or to a point argued orally" to which these supplemental authorities apply. Fed. R. App. P. 28(j), https://www.law.cornell.edu/rules/frap/rule_28 (Solicitor Sauer's letter does not appear to meet *any* of these requirements.).

179. *Id*.

180. Jason Willick, *Scott Bessent's Revealing Admission About Trump's Tariffs*, WASH. POST (Aug. 14, 2025), https://www.washingtonpost.com/opinions/2025/08/14/scott-bessent-trump-tariffs-defense/.

181. Kelly McCleary et al., *A Federal Judge Blocked Trump from Sending the National Guard to Oregon — Again. Here's What We Know*, CNN (Oct. 6, 2025), https://www.cnn.com/2025/10/06/us/oregon-national-guard-trump-ruling-portland-hnk#:~:text=A%20Trump%2Dappointed%20federal%20judge,Here's%20what%20we%20know:.

in Portland "did not pose a 'danger of rebellion,'" the judge expanded the restraining order blocking the federalization of *any* National Guard members.[182] "This is a nation of Constitutional law, not martial law," she wrote in her prior order. "Defendants have made a range of arguments that, if accepted, risk blurring the line between civil and military federal power — to the detriment of this nation."[183]

Has Trump found the cause he needs to dismiss Federal Reserve Board Members "for cause"?

The Supreme Court has given strong hints that the independence of the Federal Reserve members might be a special case that would survive the reversal of *Humphrey's Executor*, somehow distinguishable from the many board and commission members of other federal agencies fired by President Trump – officers who also have statutory protection against dismissal without cause.[184] This has led the President to float theories that first Jerome Powell, for allegedly allowing cost overruns on remodeling of the Federal Reserve's offices – and now Lisa Cook for uncharged mortgage fraud, can be dismissed for cause.[185] As to the latter, he has already sought to fire Cook.[186]

Threats to Sitting Judges Prompt Open Letter from Retired Judges Decrying Attacks on Judicial Independence

The U. S. Marshall Service has reported an unprecedented surge in menacing messages and credible death threats to sitting federal judges – over 500 between October 2024 and September of this year.[187] These events, as well as verbal attacks by the President, who in a May post on TruthSocial denounced federal judges who have ruled against the Administration as "USA hating" and "monsters,"[188] have prompted a remarkable "open letter" from more than thirty retired federal judges. These judges, appointed by Presidents Carter, Reagan, George H.W. Bush, Clinton, George W. Bush and Obama, have described themselves as the "Article III Coalition."[189] Their letter, released on Constitution Day, bears repeating in full:

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182. *Id*.

183. Conrad Wilson, *Judge Halts Deployment of Oregon National Guard, Trump Administration Files Appeal*, OR. PUB. BROAD. (Oct. 4, 2025), https://www.opb.org/article/2025/10/04/portland-national-guard-deployment-judge-decision/#:~:text=%E2%80%9CThis%20is%20a%20nation%20of,Immergut%20wrote%20in%20her%20order.

184. Adam Liptak, *The Fate of the Fed May Turn on Two Words: 'For Cause'*, N.Y. TIMES (Aug. 27, 2025), https://www.nytimes.com/2025/08/27/us/politics/supreme-court-fed-trump.html?unlocked_article_code=1.hk8._pfV.IEeFqERrap-K.

185. Dave Berman & Bryan Mena, *Trump Appeals Ruling Blocking His Attempt to Fire Federal Reserve Governor Lisa Cook*, CNN (Sep. 10, 2025), https://www.cnn.com/2025/09/09/politics/judge-blocks-trump-effort-fire-lisa-cook-federal-reserve.

186. *Id*. While the Supreme Court has allowed all the other firings to stand before it rules on the merits, it has upheld an injunction barring the President from dismissing Cook pending a Supreme Court decision. Lawrence Hurley, *Supreme Court Allows the Fed's Lisa Cook to Stay in Office for Now as Trump Pushes to Fire Her*, NBC NEWS (Oct. 1, 2025), https://www.nbcnews.com/politics/supreme-court/supreme-court-allows-feds-lisa-cook-stay-office-trump-fire-case-rcna232933.

187. Suzanne Monyak, *Federal Judges Got Over 500 Threats Since October, Marshals Say*, BLOOMBERG L. (Sep. 10, 2025), https://news.bloomberglaw.com/us-law-week/federal-judges-got-over-500-threats-since-october-marshals-say.

188. *Id*.

189. Anthony Trombi, *Former Federal Judges Unite to Defend the Constitution on Constitution Day*, Keep Our Republic (Sept. 17, 2025), https://keepourrepublic.org/wp-content/uploads/2025/09/A3C-Constitution-Day-Press-Release.pdf.

> Since 1787 our Constitution has stood firm. Now so must we all.
> On this day in 1787, our founders put aside their differences and signed the Constitution. As former federal judges, we each took an oath to support and defend the Constitution.
> We come from different corners of America and have been appointed by presidents of both parties, but our commitment to our oath and the Constitution knows neither party nor retirement date. We are now compelled to speak out, as sitting judges cannot, because the Constitution is under attack. Sitting judges, bound by a code of ethics, can only speak sparingly through their opinions. We are no longer so constrained.
> The founders of our nation, having defeated the most powerful monarchy of the day, blazed a new trail in establishing our constitutional republic of three separate and coequal branches of government. Our founders recognized that an independent judiciary, free from political pressure, was essential to protecting Americans' newly won liberty. As Alexander Hamilton wrote, "there is no liberty, if the power of judging be not separated from the legislative and executive powers." Put plainly, a judicial branch cowed by the political branches cannot safeguard the rights of all citizens.
> Misinformation, disinformation, and fiery rhetoric distort public understanding of the judiciary's critical role in maintaining our democracy. Threats against judges and their families are obvious attempts to intimidate, harass, and pressure judges and sway their opinions, shaking the public's trust and confidence in the courts.
> This Constitution Day, we pledge to strengthen America's democracy by mobilizing a better-informed citizenry.
> We are speaking out to protect the Constitution and all that it stands for. Its principles should be celebrated as the foundation of our nation. We call upon every American to join us in upholding judicial independence for our own and future generations as our founders envisioned and the Constitution guarantees.[190]

Fox News Leads Protests to Former Host's Demand that All Pentagon News Be Cleared Through Him

In early October, Defense Secretary Hegseth announced a new policy requiring journalists to sign agreements that "information must be approved for public release by an appropriate authorizing official before it is released, even if it is unclassified" or lose their press passes.[191] But Fox News, his former employer, was having none of it, joining virtually every other major and minor news outlet in a mass walk out and protest.[192] "This policy," it said in a joint statement with other news organizations, "is without precedent and threatens core journalistic protections."[193]

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190. Article III Coalition, *Constitution Day Open Letter*, KEEP OUR REPUBLIC (Sep. 17, 2025), https://keepourrepublic.org/article-iii-coalition/.

191. Cheyanne M. Daniels, *Major Media Outlets, Including Hegseth's Former Employer Fox News, Decline to Sign New Pentagon Reporting Rules*, POLITICO (Oct. 14, 2025), https://www.politico.com/news/2025/10/14/fox-news-pentagon-press-restrictions-00608019.

192. *Id*.

193. *Id*.

No Soup—or National Security Briefings - for You![194]

Following the Administration's bombing of suspected Venezuelan drug smugglers that, as of this writing have killed more than seventy persons, the Trump Administration held a briefing for members of the Senate's Intelligence Committee, but only if they were Republicans. As CNN reported, "administration officials showed the Republicans a classified Justice Department OLC memo outlining the administration's legal justification for the strikes."[195]

Israeli Film About Mistreatment of West Bank Palestinians Nominated By *Israel's* Film Industry for 2026 Oscar, But Thousands of U.S. Artists Announce Boycott of All Israeli Artists and Film Producers.

The Sea is a 2025 Israeli film about a young Palestinian boy living in the West Bank who Israeli officials forbid from entering Israel on a school trip to the beach in Tel Aviv. The film won Israel's Ophir award, automatically qualifying it for an Oscar nomination as well. The film won over two other Israeli films critical of the current government.[196] This act prompted Israel's Minister of Culture to threaten to cut funding for the Ophir awards.[197] But adding insult to injury, the artists who worked on the film – indeed *all* Israeli artists and film producers – whether they support the current government or not, face a boycott from several thousand U.S. artists opposed to the Israeli government's conduct of the war against Hamas terrorists in Gaza.[198] Paramount Pictures condemned the boycott, pointing out what should have been the obvious – "silencing individual creative artists based on their nationality does not promote better understanding or advance the cause of peace."[199] And over twelve hundred entertainers signed an open letter condemning boycotts of artists solely because of their country of origin.[200]

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194. *What Does the Expression and Phrase "No Soup for You" Mean in a Rebuttal?*, Quora (last visited Nov. 6, 2025), https://www.quora.com/What-does-the-expression-and-phrase-No-soup-for-you-mean-in-a-rebuttal.

195. Piper Hudspeth Blackburn & Natasha Bertrand, *Trump Administration Cuts Democrats Out of a Briefing on US Military Strikes, Top Senate Dem Says*, CNN (last updated Oct. 29, 2025), https://www.cnn.com/2025/10/29/politics/democratic-senators-us-military-strikes-briefing.

196. Scott Roxborough, *Israeli Culture Minister Defunds National Film Awards After Palestinian Drama Takes Top Prize*, THE HOLLYWOOD REP. (Sep. 17, 2025), https://www.hollywoodreporter.com/movies/movie-news/israeli-culture-minister-defunds-national-film-awards-1236373398/#:~:text=Israeli%20Culture%20Minister%20Defunds%20National,By%20Scott%20Roxborough.

197. Derrick Taylor, *Israel Says It Will Defund Film Awards After Palestinian Win*, N.Y. TIMES (Sep. 17, 2025), https://www.nytimes.com/2025/09/17/movies/israel-palestine-film-oscars.html#:~:text=A%20drama%20about%20a%20Palestinian,sea%20for%20the%20first%20time. The Times headline is quite misleading. It was not a "Palestinian" win, but a win for an *Israeli* film.

198. *Id*. Hamas has since agreed to release the remaining hostages, including the bodies of those it brutalized and killed in captivity. But, no sooner than the release took place and the ceasefire had started, Hamas began public executions of Gazans who dared to challenge its continued control. Gerry Shih et al., *Hamas Reasserts Control on Streets of Gaza, Turning Guns on its Rivals*, WASH. POST (Oct. 15, 2025), https://www.washingtonpost.com/world/2025/10/15/gaza-hamas-control-clans-ceasefire/.

199. *Id*.

200. Press Release, *1,200+ Entertainment Leaders Release Open Letter Rejecting the Boycott of the Israeli Film Industry*, CREATIVE CMTY. FOR PEACE (last visited Oct. 31, 2025), https://www.creativecommunityforpeace.com/blog/2025/09/24/filmopenletter/

Noem: The Taliban have made "notable improvements." Let's send Afghan refugees back!

Since DHS Secretary Noem's declaration in May that the Taliban have made "notable improvements" justifying the termination of temporary protected status and humanitarian parole for Afghan immigrants who aided and supported the U.S.,[201] our government has detained at least 133 Afghans through July with the goal of deporting them back to Afghanistan. "Notable improvements"? Noem has stated that "requiring the return of Afghan nationals to Afghanistan does not pose a threat to their personal safety."[202] Tell that to the Afghans who fled the country with no more than the shirts on their backs. As Pope Leo XIV has said, the "inhuman treatment of immigrants" isn't pro-life.[203]

"Do I like this bill? No. In many parts of the country, there are Americans that are not going to be advantaged by this bill."

Senator Murkowski, describing the bill she voted to pass, explaining that while bad for America as a whole, exemptions for Alaskans for its worst feature made it palatable for her.[204] This begs the question, if the other senators voting for it thought it was good for everyone, why deprive Alaskans of its benefits?

"Well, we're all going to die"

Senator Joni Ernst's tone deaf response to a constituent's question about the high percentage of Iowan children and elderly that would lose Medicare and Medicaid coverage under the House-passed "big beautiful bill'.[205] Senator Ernst has since announced that she will not seek reelection.[206]

Should Hamas disarm? Mamdani refuses to answer

Under the twenty-point peace plan agreed to by the U.S., Israel, Turkey and many Middle East Muslim nations, the Hamas terrorists who have controlled Gaza would have to disarm. Days after turning over twenty living, but brutalized Israeli hostages and the remains of other Israeli hostages it had murdered *after* their abduction, Hamas began the nascent cease fire with Israel by gunning down in broad daylight fellow Gazans who had opposed its reign.[207] In the aftermath of these barbaric acts, then New York City mayoral candidate Zohran Mamdani was asked

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201. *DHS Terminating Temporary Protected Status for Afghanistan*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (May 12, 2025), https://www.uscis.gov/newsroom/news-releases/dhs-terminating-temporary-protected-status-for-afghanistan.

202. John Woodrow Cox, *He Supported the U.S. War in Afghanistan. Now He May Be Deported to the Taliban*, WASH. POST (Oct. 14, 2025), https://www.washingtonpost.com/investigations/2025/10/14/trump-immigratio-afghanistan-asylum-deportation/.

203. Claire Giangrave & Daniel Burke, *Pope Leo XIV Says 'Inhuman Treatment of Immigrants' in the U.S. Isn't 'Pro-Life'*, NPR (Oct. 1, 2025), https://www.npr.org/2025/10/01/nx-s1-5560169/pope-leo-xiv-says-inhuman-treatment-of-immigrants-in-the-u-s-isnt-pro-life#:~:text=toggle%20caption,our%20United%20States%20southern%20border.%22.

204. Robert McCoy, *Lisa Murkowski Gives Infuriating Defense of Vote for Trump Budget*, THE NEW REPUBLIC (July 1, 2025), https://newrepublic.com/post/197490/lisa-murkowski-trump-budget-sucks-vote-defense.

205. Philip Elliott, *We're All Going to Die': GOP Struggles to Defend Trump's 'Big, Beautiful Bill'*, TIME (June 2, 2025), https://time.com/7290575/joni-ernst-medicaid-big-beautiful-bill-mike-johnson/.

206. Jordain Carney et al., *Iowa's Joni Ernst Won't Seek Reelection Next Year*, POLITICO (Aug. 29, 2025), https://www.politico.com/news/2025/08/29/joni-ernst-iowa-not-running-2026-00535754.

207. *See Reagan's Address*, supra note 171.

by journalist Martha McCallum whether he agreed that Hamas should be disarmed. His answer: "I don't really have opinions about the future of Hamas and Israel beyond the question of justice and safety and the fact that anything has to abide by international law, and that applies to Hamas, that applies to the Israeli military and that applies to anyone you could ask me about." Rep. Laura Gillen, a Democrat from neighboring Long Island, called out this non-answer for what it was: "Shame! Whether or not to disarm terrorists is not a hard question, and I'm going to call out anyone who gets it wrong."[208]

More Thoughts and Prayers

Several editions ago, I remarked that our nation has been averaging nearly two mass shootings a day. That trend hasn't abated. The slaughter of Minneapolis school children in their church, the mass killing of congregants at a church in Grand Blanc, Michigan, another mass shooting in North Carolina, several congregants killed by an attacker at a synagogue in Manchester England on Yom Kippur, the holiest day in Judaism.[209] Politicians also continue to be targeted. Minnesota legislator Melissa Hortman and her husband were gunned down in their home after the alleged assailant had already shot another Minnesota state representative, John Hoffman and his wife, both of whom fortunately survived. A manifesto discovered by the police included a list of about fifty other Democratic representatives who were on his list of future victims.[210] A month earlier, Yaron Lischinsky and Sarah Lynn Milgrim, an Israeli Christian and an American born Jewish woman engaged to be married and both employed by the Israeli Embassy, were gunned down outside the National Capital Jewish Museum in Washington, D.C.[211] We've become inured to the carnage.

ADL is Attacked Right and Left

An October 2, 2025 story in the Washington Post reported that FBI Director Patel "had cut the FBI's ties with the Anti-Defamation League, a leading Jewish civil rights group that has partnered with law enforcement agencies for decades to educate authorities on extremism and antisemitism."[212] His reason was not given, but only days after the government had indicted James Comey, Patel's remarks referenced that fact that under Comey, the FBI had embedded FBI agents with ADL, announcing "that era is over."[213] It is also surely no coincidence that conservative groups had been criticizing ADL for including Turning Point USA, the organization founded by the late Charlie Kirk, as a "platform for extremists and far-right conspiracy theorists."[214] This attack on the ADL follows a publicized

208. Emma G. Fitzsimmons, *Mamdani Faces Attacks After Comments About Hamas*, N.Y. TIMES (Oct. 16, 2025), https://www.nytimes.com/2025/10/16/nyregion/zohran-mamdani-islamophobic-attacks-hamas-gaza.html?unlocked_article_code=1.uE8.241q.05sdVTsuuyrh.

209. Sana Noor Haq et al., *October 2, 2025 - Manchester Synagogue Attack*, CNN (last updated Oct. 2, 2025), https://www.cnn.com/world/live-news/manchester-uk-synagogue-attack-10-02-25.

210. Anthony Robledo, *Who are Melissa Hortman and John Hoffman, the Minnesota State Lawmakers Shot on Saturday*, USA TODAY (June 15, 2025), https://www.usatoday.com/story/news/nation/2025/06/14/melissa-hortman-john-hoffman-minnesota-lawmakers-shot/84201194007/.

211. Kathryn Palmer, *What is the Capital Jewish Museum? What to Know About Site of Fatal DC Shooting*, USA TODAY (May 22, 2025), https://www.usatoday.com/story/news/nation/2025/05/22/capital-jewish-museum-location-dc-shooting/83787510007/.

212. Andrew Jeong, *Kash Patel Ends FBI Partnership with the Anti-Defamation League*, WASH. POST (Oct. 2, 2025), https://www.washingtonpost.com/politics/2025/10/02/adl-fbi-patel-comey/.

213. *Id*.

214. *Id*.

entry in Wikipedia declaring that the ADL should not be used as source for other Wikipedia entries because of criticism from *left-leaning* organizations on how it defined antisemitism.[215] Only a few years before right wing attacks on ADL led to the FBI cutting its ties, ADL faced criticism from left wing organizations for *partnering* with police departments.[216]

Surprise Winner of Nobel Peace Prize (no, it wasn't the President)

"I don't deserve it." Those were the words of Maria Corina Machado, the Venezuelan opposition leader who has been in hiding for over a year and who has fought against Venezuelan dictator Maduro and Venezuela's long retreat from democracy.[217] "I dedicate the prize to the suffering people of Venezuela," she added, "and to President Trump for his decisive support of our cause!"[218] Upon learning of her award, the White House, which had campaigned openly for the President to receive the award after securing Hamas's release of Israeli hostages, was somewhat less gracious. "The Nobel Committee," it announced on X, "proved they place politics over peace."[219]

Speaker Johnson: "We call it the 'hate America' rally."

Twenty-five hundred "No Kings" rallies were scheduled nationwide for Saturday, October 17, 2025, to protest the rise of autocracy in America.[220] But Speaker of the House Johnson had a very different take. "We call it the 'hate America' rally that will happen Saturday." I bet you," he added, "you'll see Hamas supporters, you'll see antifa types, I bet you'll see Marxists on full display."[221] So I went to see some of the estimated seven million[222] America haters for myself. They were devious, to be sure – antifa members feigning peaceful protests from wheelchairs and walkers, Hamas supporters who had just come from synagogue, Marxists brandishing American flags or pretending to be young children. Here are some of the pictures I took:

215. Rob Eshman, *Wikipedia Called the ADL 'Unreliable.' It's a Wake-Up Call the Civil Rights Organization Badly Needs*, FORWARD (June 19, 2024), https://forward.com/opinion/625117/wikipedia-adl-unreliable-jonathan-greenblatt/.

216. *The ADL is Not an Ally*, US CAMPAIGN FOR PALESTINIAN RTS. (Sep. 14 2022), https://uscpr.org/campaigns/drop-the-adl/.

217. Gwladys Fouche & Tom Little, *Venezuela's Opposition Leader Machado Wins Nobel Peace Prize, Dedicates to Trump*, F (Oct. 10, 2025), https://www.reuters.com/world/nobel-peace-prize-winner-be-announced-year-overshadowed-by-trump-2025-10-10/.

218. *Id*.

219. *Id*.

220. *See No Thrones. No Crowns. No Kings*., No Kings (last visited Oct. 31, 2025), www.nokings.org.

221. Amy B. Wang & Katie Tarrant, *GOP Tries to Brand Anti-Trump 'No Kings' Protests as Un-American*, WASH. POST (Oct. 16, 2025), https://www.washingtonpost.com/politics/2025/10/17/no-kings-republicans-hate-america/.

222. Claudia Hernández et al., *No Kings Protests Held Across U.S., Overseas to Demonstrate Against Trump Administration*, NBC NEWS (last updated Oct. 19, 2025), https://www.nbcnews.com/news/us-news/no-kings-protest-photos-cities-demonstrations-rcna238041.

The Mets Missed the Playoffs. But Wasn't the Tigers' Prolonged Collapse Worse?

I could not close my final Editor-in-Chief's page without mentioned the anguish I felt this summer and fall as I watched the slow – no, *excruciatingly* slow collapse of the Detroit Tigers. Holders of the best record in baseball for a large part of the season, twenty-five games over .500 in August and, with a 9 ½ game lead over the Cleveland Guardians with a mere sixteen games to go, Detroit was a prohibitive 999 to one favorite to win its first Central Division title in more than a decade. It didn't. The collapse was stunning. The Tigers, with an offense for most of the season was in the top eight in baseball, averaged a mere 2 ½ runs a game for all of its awful September and, on the last day of the season, gave up its once seemingly insurmountable lead. No other team in major league history, not even the 1964 Philadelphia Phillies, had managed to squander such a large lead in so few games.

But didn't the Mets, once twenty-one games over .500, fall out of the playoffs altogether and isn't that a worse collapse? I'd say no. It's true that the Tigers, despite their many September losses, still managed to clinch the last wild card slot (because they had the tie-breaker with Houston) in the American League. And Detroit did win its wild card round against the Guardians. But its batters still struggled mightily, not only to get hits, but to hit the ball at all, striking out an average of eleven times a game during the playoffs. And the agony was only prolonged when the Tigers' Tarik Skubal, the Cy Young winner two years running, stuck out thirteen batters in six innings of game five of the second round series against Seattle, leaving with a mere 2-1 lead. That lead lasted one inning.

And the Tigers continued to strike out with runners on base for the next eight innings, losing in the longest winner-take-all playoff game, 3-2 in fifteen innings. The long-suffering Seattle fans were ecstatic. Tiger fans were just exhausted.

Despite the threats to free speech, the round ups of U.S citizens by ICE agents, the demise of free trade, Presidential promises of aid to Argentina only if its citizens elect his chosen presidential candidate (possibly part of the new Make Argentina Great Again (MAGA) movement),[223] Presidential threats to withhold federal funds from New York City if they elect a mayoral candidate he does not like,[224] and the likely end of independent administrative agencies that have troubled me these last few months, I somehow felt even worse about the Tigers' slow demise. Go figure.

But I don't want to end this, my last Editor-in-Chief's page, on such a sour note. Rather, as we approach another Thanksgiving, I want to express my deepest thanks to Bob Fleishman, who gave me the opportunity to serve as his successor and to the Energy Bar Association and the Board of the Foundation of the Energy Law Journal for giving me the privilege of editing the Journal these many years. I'm grateful, too, for the many student editors, peer review editors and authors who have given so generously their time and talent to make the Journal a source of practical scholarship of which we all can be proud. Thanks too, to Jack Hannan and the terrific staff of the EBA who have helped get the Journal out on time, time and again. Thank you, Hannah Walblay, and congratulations on completing your first volume as student editor in chief. You'll be in great hands with Kat, Nick and Mary. And, of course, I continue to give thanks to the NFL, which again will feature the Detroit Lions on national television on Thanksgiving, November 27, 2025, 12:30 PM, Eastern time.

Harvey Reiter
Editor-in-Chief
Washington DC
November 2025

223. Mike Lillis, *Jeffries Bashes Trump's $40B Pledge to Argentina: 'Corruption in Real Time'*, THE HILL (Oct. 15, 2025), https://thehill.com/homenews/house/5557267-jeffries-trump-argentina-milei/.

224. N.J. Burkett, *President Trump Renews Threats as Gov. Hochul Appears with Mamdani*, ABC7 (Oct. 15, 2025), https://abc7ny.com/post/president-trump-renews-threats-withhold-federal-funding-governor-kathy-hochul-appears-mamdani/18007545/.

IN MEMORIAM: CARMEN L. GENTILE

It is with deep sorrow that we announce the passing of Carmen L. Gentile on September 12, 2025, at his home in Lovell, Maine. Carmen, a longtime friend and colleague of many EBA members and a former EBA President, was diagnosed with cancer just two months earlier.

Carmen was 85 years old, but to many who knew him, he seemed years younger. He certainly was young at heart and vibrant in his thinking and his relationships.

Carmen loved the practice of energy law. He represented electric utilities and gas distribution companies with integrity and passion before the Federal Energy Regulatory Commission and the courts, and he often referred to himself as a "public interest lawyer" as he strived to give practical meaning to the public interest standards of the Federal Power Act.

Carmen can be considered one of the Deans of the energy bar having served as the past President of the Energy Bar Association and a regular representative to the Edison Electric Institute Legal Committee, and having represented clients, developed business strategies, written extensively, negotiated and drafted complex contracts, and settled or litigated countless cases involving nearly every aspect of federal energy regulation. Carmen's comprehensive analysis of the Mobile-Sierra Doctrine ["The Mobile-Sierra Rule: It's Illustrious Past and Uncertain Future," 21 Energy Law Journal 353 (2000)] is cited as an authoritative resource by legal scholars and federal courts. He was a fierce, but always fair, advocate for his clients.

Carmen grew up in Boston's West End and graduated from Boston Latin School and Harvard College. At the age of 22, he became a Foreign Service Officer for the U.S. State Department. Carmen always spoke fondly of his station as a vice consul at the U.S. Consulate in Palermo, Italy. He loved the country, the people, and the work. In 1967, he graduated from the University of Pennsylvania Law School and worked as a law clerk for the Chief Judge of the Massachusetts Superior Court and subsequently as an Assistant Legal Counsel to the then-governor of Massachusetts.

Carmen was a founding partner of the law firm Bruder, Gentile & Marcoux, LLP, which merged with Schiff Harden (now ArentFox Schiff) in 2013. He later continued a solo practice.

Carmen was an avid sports fan and an amateur athlete. Every Massachusetts team was a favorite. Concerning his own sports prowess, he often joked that if he played basketball long enough, he would eventually become the best player in his age group. Golf was another passion that he enjoyed for many years.

Above all, however, Carmen was most passionate about family and friends. Carmen is survived by his wife Beth-Ann, his daughters Alexis Comrack and Olivia Gentile, sons-in-law Christopher Comrack and Andy Borowitz, grand-daughters Emilia and Charlotte Comrack and Madeline Gentile-Borowitz, and his devoted dog Boss.

Information about donations, condolences, and tributes is available at www.woodfuneralhome.org. Carmen will be missed by his friends in the energy community, including the many he mentored along the way. Younger members of the energy bar who may not have known Carmen can be certain that his work in the field has influenced them immeasurably.

IN MEMORIAM: GLEN ORTMAN

It is with deep sadness that we remember our colleague and friend, Glen Ortman, whose warmth and intellect touched all who had the privilege of knowing him. Glen was a valued member of Stinson LLP, the energy law community, and a trusted mentor to many.

Glen passed away on August 3, 2025, in Alexandria, Virginia. He was a beloved husband, father, grandfather, and friend. Glen was born on May 25, 1947, in Fort Lee, New Jersey. He finished his undergraduate studies at Bowdoin College and earned his Juris Doctor from the University of Denver. Glen began his energy career at the Federal Power Commission, flourishing through a storied legal practice at Duncan, Allen & Mitchell, Verner Liipfert Bernhard Mcpherson, and Hand, Chartered, before spending his last twenty-four years of practice at Stinson LLP.

Many of us had the privilege of working with Glen. He was wicked smart – sharp, insightful, and always quick to find the heart of a complex issue. Yet, what stood out most was his generosity. Glen was always willing to share his time, his knowledge, and his laughter. He brought humor to even the most demanding days and led by example. Glen was known to bring his antics into the FERC hearing room – often supplying candy and providing music at the end of hearings – as if it was the closing ceremony at the Olympics. He always expected the best from everyone. With Glen, it was never *if* you were capable – he already knew you were. The only question was when you'd have it done.

Glen knew what truly mattered – God, family, and friends. His faith was deep, his love for his family unwavering, and his friendship sincere. He reminded us that success is not only measured by professional achievement, but also by the respect and kindness we extend to others.

Glen will be deeply missed, but his spirit and example will continue to inspire those of us fortunate enough to have worked alongside him.

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APPRAISING THE UNIQUE VALUE OF EACH FERC ENFORCEMENT SETTLEMENT AS A WAY TO HARMONIZE FERC'S PENALTY GUIDELINES WITH ITS PRO-SETTLEMENT POLICY PREFERENCE

Jeremy Medovoy[*]

Synopsis: The Federal Energy Regulatory Commission (FERC or Commission) has a long-standing policy preference for resolving investigations through settlement rather than litigation. This policy benefits FERC and investigative subjects in numerous ways, most importantly, by promoting FERC's main enforcement mission to encourage compliance with its rules and regulations. Settlements serve to expeditiously send compliance signals to industry, return unjust profits to harmed entities, and allow FERC to reallocate resources to its important compliance-related responsibilities. In contrast, litigation can lead to years of stalemates and lingering questions about compliance obligations.

Most of FERC's enforcement policies work in tandem to support its pro-settlement policy preference. For example, its Penalty Guidelines, adopted in 2010, encourage settlement by providing FERC Enforcement staff and investigative subjects a common dialogue to negotiate terms and find compromise. However, there is one aspect of FERC Enforcement cases that serves as a barrier to settlements, especially in investigations involving high-dollar allegations of complex manipulative trading schemes in natural gas and electric markets. FERC's Penalty Guidelines treat all settlements equally, irrespective of the unique costs and risks associated with litigating each case. Not all settlements are of equal value. Instead, the value varies based on an individualized appraisal of the anticipated costs of the alternative, specifically, expending time and resources in litigation and risking an unfavorable outcome. The Penalty Guidelines fail to account for this litigation risk, resulting, in some cases, in years of inefficient litigation.

This article: (1) explains why the Commission failed to account for litigation risk when developing the Penalty Guidelines model; (2) explains why such failure is inconsistent with the Commission's enforcement program; and (3) proposes a straightforward revision to the Penalty Guidelines to move them closer in line to the Commission's pro-settlement policy preference. By revising the Penalty Guidelines to afford settlement credit based on an individualized appraisal of each settlement's unique value, FERC will make it easier for investigations to settle, avoid protracted, wasteful litigation, and take better advantage of its pro-settlement policy benefits.

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I. INTRODUCTION

FERC has a strong policy preference for resolving investigations through settlement rather than litigation.[1] This pro-settlement policy benefits the Commission's enforcement program by allowing it to expeditiously alert the regulated industry to compliance expectations, return funds to harmed parties, and reallocate resources to other matters. It also helps investigative subjects learn of the Commission's compliance expectations in a timely manner, reduce costs, and save time and resources. Consistent with this policy, the Commission has adopted numerous measures to promote the settlement process since Congress expanded its penalty authority in the Energy Policy Act of 2005 (EPAct 2005). In 2010, for example, the Commission adopted the Penalty Guidelines, which provide organizations and the Commission's Enforcement staff a common dialogue to engage in settlement negotiations and provide transparency into the factors the Commission considers when determining penalties.[2] More recently, the Commission enhanced its pro-

1. *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 at P 33 (2008).

2. *See generally Policy Statement on Penalty Guidelines*, 130 FERC ¶ 61,220 (2010); *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 (2010). The Revised Policy Statement on Penalty Guidelines attaches the current version of the FERC Penalty Guidelines. *Id*.

settlement policy by giving the Enforcement Director the discretion to authorize settlement negotiations without seeking pre-approval from the Commission.[3]

While these measures help advance the Commission's preference for settlements, not all aspects of the Commission's enforcement program support its pro-settlement policy. One of the most significant barriers to the policy involves the way the Commission's Penalty Guidelines afford all settlements a one-point credit, irrespective of the unique costs and risks associated with litigating each case.[4] Not all settlements are of equal value. As with any transaction, the value of a FERC settlement varies based on an individualized assessment of the anticipated costs and risks of the alternative, specifically, expending time and resources in litigation and risking an unfavorable outcome.[5] The Penalty Guidelines fail to account for this litigation risk. Instead, they focus heavily on the alleged harm, or market "loss," caused by alleged violations without adequately considering the strength or weakness of the allegations.[6] Incorporating these harm figures into the Penalty Guidelines' formulas, without corresponding formulas accounting for the costs and likelihood of success in litigation, can lead to excessive settlement demands, prolonged negotiations, and wasteful litigation. What's worse, many of the Commission's cases that have proceeded to litigation ultimately have resulted—after years of significant expense by FERC and private subjects—in pre-trial settlements with penalty amounts that pale in comparison to the amounts FERC sought in litigation and, likely, during nonpublic settlement negotiations prior to the litigation.[7]

This article is not the first critique of the Penalty Guidelines' across-the-board one-point settlement credit and their failure to account for litigation risk. In June 2019, a group of energy trade associations submitted a white paper to the Commission, arguing that "the one-point reduction in the culpability score can be insufficient to incentivize and reward a subject for settling—particularly when the subject thinks it has meritorious legal or factual defenses to the alleged wrongdoing."[8] By failing to consider litigation risk in certain cases, this 2019 White Paper argued, "the consequences of 'losing' in court is only marginally worse than settling," and "[b]y providing only a marginal penalty reduction for settlement, the

3. *Policy Statement on Process for Resolving Investigations by Settlement*, 186 FERC ¶ 61,109 at P 20 (2024).

4. *See* 132 FERC ¶ 61,216, § 1C2.3(g)(3) ("If the organization resolved the matter without need for a trial-type hearing, subtract 1 point.").

5. *See* Peter Toll Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1, 23 (1991) ("The value placed on the time is a transaction cost that settlement can avoid incurring."); *id*. at 29 ("The consequence of litigation most influencing a client's choice of settling or proceeding to trial is risk: the risk of losing.").

6. *See* 132 FERC ¶ 61,216, § 2B1.1(b)(1) (factoring "loss" into penalty calculation on an escalating basis).

7. *See infra* Part IV, tbl. III (illustrative table of FERC Enforcement cases comparing settlement amounts to penalties sought in litigation).

8. DAVID A. APPLEBAUM & TODD L. BRECHER, ENHANCING THE TRANSPARENCY, EFFICIENCY, AND FAIRNESS OF THE FEDERAL ENERGY REGULATORY COMMISSION'S ENFORCEMENT PROGRAM 19 (2019) (White Paper prepared on behalf of energy industry trade associations) [hereinafter 2019 WHITE PAPER].

Penalty Guidelines make it more difficult to settle such cases even though settlement is the Commission's preferred resolution of enforcement cases."[9]

This article expounds on the critique from the 2019 White Paper by (1) theorizing why the Commission failed to account for litigation risk when developing the Penalty Guidelines model; (2) explaining why such failure is inconsistent with the Commission's enforcement program; and (3) proposing a straightforward revision to the Penalty Guidelines to move them closer in line to the Commission's pro-settlement policy preference. To summarize this article's conclusions on these three issues:

- The Commission's failure to consider litigation risk in the Penalty Guidelines stems primarily from two factors: (1) its general view that litigation risk is not a relevant or appropriate consideration in deciding whether to settle a government investigation, and (2) its decision to model the guidelines on the United States Sentencing Guidelines.
- As to the first factor, the Commission's view is misguided. Litigation risk is a relevant and appropriate consideration in all agency enforcement decisions because it impacts agencies' ability to send compliance signals and to successfully carry out their congressionally mandated responsibilities. With respect to the second factor, although the Sentencing Guidelines generally provide a sensible model for FERC's penalty determination process, their failure to specifically account for litigation risk, while reasonable in criminal cases, is inconsistent with the Commission's enforcement regime. This aspect of the Sentencing Guidelines is a poor fit because criminal prosecutors are significantly more risk averse than FERC and its Enforcement staff and because plea agreements more frequently result in sentences outside the Sentencing Guidelines range as compared to Penalty Guidelines departures in FERC investigations.
- To harmonize the Commission's penalty determination process with its strong policy preference for settlements and reduce the number of cases resulting in protracted, inefficient litigation, this article proposes a straightforward revision to the Penalty Guidelines to allow for an appraisal of the value of each settlement. This appraisal would result in a range of settlement credit between one and three points, correlating to a range of 20 to 60% discounts off the base penalty amount.

Part II of this article provides background on the Commission's long-standing policy preference for settlements and the impacts of the Penalty Guidelines—positive and negative—on such policy. Part III describes the factors that have led the Commission to not account for litigation risk during investigative settlement negotiations and the reasons such factors are inconsistent with its enforcement program. Part IV illustrates the effect of the Penalty Guidelines' failure to account for litigation risk by tracking the case history of a sample enforcement matter. Part

9. *Id*. at 20.

V outlines how the Commission can add a litigation risk component into the Penalty Guidelines to help promote its pro-settlement policy and reduce wasteful litigation. Finally, Part VI concludes by recommending that the Commission hold a technical conference—the first on the Penalty Guidelines since 2011—to address issues raised in this article and any others that might be warranted to improve its penalty determination process.

II. THE COMMISSION'S LONG-STANDING PREFERENCE TO RESOLVE INVESTIGATIONS THROUGH SETTLEMENT AND THE PENALTY GUIDELINES' IMPACT ON THE POLICY

A. The Commission Consistently Champions a Settlement First Policy Preference

In the wake of the Western Energy Crisis of 2000-2001 and Northeast Blackout of 2003, Congress passed EPAct 2005, granting FERC enhanced penalty authority of $1 million per day, per violation.[10] Since receiving this expanded penalty authority, the Commission has consistently emphasized its preference to implement it through negotiated settlements, rather than litigation. Nowhere is this more evident than the Commission's 2006 order outlining its process for assessing penalties under its new authority.[11] While the Commission issued this order to describe the *litigation* paths it planned to follow when pursuing penalties, it went out of its way to "emphasize that nothing in this Statement is intended to change the current practice of *negotiating the resolution* of violations, including the imposition of civil penalties, whenever possible."[12] FERC Enforcement staff reiterated this preference in its first Report on Enforcement in 2007 where it "noted that the preferred method of resolving such violations is by settlement."[13] This pro-settlement policy has permeated the Commission's enforcement program since this time,[14] and the FERC enforcement data reflects the strong preference.[15]

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10. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 22(a), 119 Stat. 594, 691 (2005); 16 U.S.C. § 825o-1 (2024) (providing penalty authority under the Federal Power Act (FPA)); 15 U.S.C. § 717t-1 (2024) (providing penalty authority under the Natural Gas Act (NGA)); 15 U.S.C. § 3414(b)(6) (2024) (providing penalty authority under the Natural Gas Policy Act of 1978). *See also* 130 FERC ¶ 61,220 at PP 5-6 (detailing FERC's enhanced penalty authority under EPAct 2005). The Commission's penalty authority increases each year under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. *See* Bipartisan Budget Act of 2015, Pub. L. 114-74, § 701, 129 Stat. 584, 599 (2015). Currently, it has authority to assess penalties of $1,584,648 per day, per violation. Order No. 906, *Civil Monetary Penalty Inflation Adjustments*, 190 FERC ¶ 61,006 at P 8 (2025).

11. *Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 (2006).

12. *Id*. at P 2 (emphasis added).

13. *Report on Enforcement*, FERC Docket No. AD07-13-000, at n.42 (Nov. 14, 2007).

14. *See, e.g.*, 123 FERC ¶ 61,156 at P 33 ("Settlement is our preferred resolution to investigations that result in a recommendation of remedial action."); 186 FERC ¶ 61,109 at P 4 ("Settlement is the preferred means for the Commission to resolve investigations that would otherwise result in a recommendation of remedial action.").

15. Since EPAct 2005, the Commission's Enforcement staff has opened 393 investigations. Out of the investigations where Enforcement staff found and pursued sanctions for violations, 152 resulted in Commission-

The Commission's pro-settlement policy preference benefits the Commission and investigative subjects in numerous important ways. For example, settlements promote the primary mission of FERC's enforcement function—to ensure compliance with its rules and regulations. While EPAct 2005 gave a significant boost to the Commission's penalty authority, the Commission consistently has emphasized that compliance—and not penalties—is the principal purpose of its enforcement program.[16] The Commission and its Enforcement staff have backed up these statements by providing guidance to industry about the tools and procedures necessary to achieve effective compliance.[17]

In addition to these policy guidance documents, settlements are one of the primary tools the Commission relies on to send compliance signals to industry. As the Commission explains, "publication of settlements permits the Commission to expeditiously alert other market participants to potential compliance pitfalls and helps avoid repetition of unlawful conduct."[18] This compliance-centric purpose of settlements is not unique to FERC. A 2022 report prepared for the Administrative Conference of the United States explained that settlements

> transmit important information to stakeholders about how agencies approach enforcement and their interpretation of laws and regulations as they apply to specific cases. Regulated entities rely on agency settlements to guide the formulation of their practices and policies and stakeholders who represent clients rely on settlements to advise their clients and advocate for them in settlement negotiations.[19]

Settlements also help with government agency efficiency. As the Commission recently emphasized, "[s]ettlements allow the Commission to devote its lim-

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approved settlements compared to 27 resulting in litigated Order to Show Cause ("OSC") proceedings. These figures come from Enforcement staff's Annual Reports on Enforcement and civil penalty matters published on the Commission's website. *See Enforcement Resources, Reports Tab*, FERC (last updated Nov. 21, 2024), https://www.ferc.gov/enforcement-resources; *Civil Penalties*, FERC (last updated Jan. 3, 2025), https://www.ferc.gov/civil-penalties.

16. *See* 132 FERC ¶ 61,216, § 1A1.1(2) ("The Commission views civil penalties as an important tool to achieve compliance. Achieving compliance, not assessing penalties, is the central goal of the Commission's enforcement efforts."); *see also Policy Statement on Compliance*, 125 FERC ¶ 61,058 at P 1 (2008); 123 FERC ¶ 61,156 at P 72 ("Ultimately, it is our desire that our enforcement efforts foster increased compliance with our governing statutes, regulations, and orders, and minimize the occurrence of future violations."); *Statement of Chairman Joseph T. Kelliher*, FERC Docket No. AD07-13-000, at 1 (Nov. 14, 2007) ("Our goal is compliance, not the collection of civil penalties. However, it is sometimes necessary to impose civil penalties in order to encourage maximum compliance.").

17. *See, e.g.*, 132 FERC ¶ 61,216, § 1B2.1 ("Effective Compliance Program"); 125 FERC ¶ 61,058 at PP 13-21; 123 FERC ¶ 61,156 at PP 57-60; FERC, STAFF WHITE PAPER ON EFFECTIVE ENERGY TRADING COMPLIANCE PRACTICES 3, 6 (FERC issued Nov. 2016).

18. 186 FERC ¶ 61,109 at P 4. *See also* FERC, STAFF WHITE PAPER ON ANTI-MARKET MANIPULATION ENFORCEMENT EFFORTS TEN YEARS AFTER EPACT 2005 4 n. 9 (FERC issued Nov. 2016) ("[W]hile staff aims to provide guidance in numerous forms . . . the ultimate and best guidance comes directly from Commission orders, *such as orders approving settlement agreements*. . . ." (emphasis added)).

19. ELYSA DISHMAN, PUBLIC AVAILABILITY OF SETTLEMENT AGREEMENTS IN AGENCY ENFORCEMENT PROCEEDINGS 4 (2022) (Report to the Administrative Conference of the United States). *See also* Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest Rulemaking Settlement*, 51 DUKE L. J. 1015, 1019 (2001) (noting that mediation and settlement in enforcement proceedings "can assist an agency in securing compliance with its regulations").

ited resources to investigating other cases, rather than expending significant resources in protracted litigation, which supports [its] mission of ensuring the jurisdictional markets remain free from fraud, manipulation, and anti-competitive conduct."[20] FERC Enforcement staff has proven in multiple cases to effectively handle the time- and resource-intensive demands of litigation. However, heavy litigation dockets can put a strain on government agencies, such as FERC, impacting their ability to devote sufficient resources to other important tasks. Indeed, settlements' role as a time- and resource-saving mechanism for government agencies has been widely recognized as a key driver of government settlements.[21] Moreover, this rationale for settlements applies equally to investigative subjects, who are able to focus their time and resources not on litigation, but on achieving compliance.[22]

Finally, "the public interest is often better served through settlements because [the Commission is] able to ensure that compliance problems are remedied faster and that disgorged profits may be returned to customers faster. . . ."[23] As a consumer-focused agency, one of FERC's primary objectives includes remedying financial harms to ratepayers, including losses resulting from other entities' violations.[24] When illicit profits are tied up in litigation, it can take years for FERC to get these funds back to harmed parties. In contrast, settlements accelerate this remedial process, returning unjust profits to victims much faster.[25]

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20. 186 FERC ¶ 61,109 at P 4; *see also* 123 FERC ¶ 61,156 at P 33 (explaining that settlements allow the Commission "to reallocate to other enforcement matters the resources that would have been spent in lengthy litigation"); 132 FERC ¶ 61,216 at P 143 ("A willingness to resolve cases without the need for a trial-type hearing saves the Commission time and resources that can be spent on other matters.").

21. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."); DISHMAN, *supra* note 19, at 4 (noting that "[s]ettlements allow agencies to resolve disputes more efficiently, conserving resources and obtaining relief for the public more expeditiously").

22. *See* 123 FERC ¶ 61,156 at P 33 (noting that settlements allow subjects to avoid "the time and costs of a hearing"); Rossi, *supra* note 19, at 1019 (explaining that settlements "also offer[] private parties the opportunity to avoid protracted litigation").

23. 123 FERC ¶ 61,156 at P 33. *See also* DISHMAN, *supra* note 19, at 4 (noting that settlements allow agencies to "obtain[] relief for the public more expeditiously").

24. *See* 132 FERC ¶ 61,216 at P 216 ("The Commission has always required disgorgement in addition to the assessment of civil penalties. . . Disgorgement involves relinquishing profits illegally obtained, and such profits are distributed to those who were harmed by the violations."); 123 FERC ¶ 61,156 at P 43 ("Requiring disgorgement of unjust profits is consistent with long-standing Commission practice, the 2005 Policy Statement, and the practice of other enforcement agencies such as the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC).").

25. *Compare, e.g., Total Gas and Power N. Am., Inc*., 190 FERC ¶ 61,014 at P 2 (2025) ($5 million restitution payment nearly nine years after initiation of FERC litigation and more than 15 years after alleged conduct began); Opinion No. 549-A, *BP Am. Inc.*, 173 FERC ¶ 61,239 at P 7 (2020) (more than $200,000 in disgorgement ordered more than seven years after initiation of FERC litigation and more than 12 years after alleged conduct began); *Competitive Energy Servs., LLC*, 173 FERC ¶ 61,176 at P 2 (2020) ($160,000 disgorgement payment more than eight years after initiation of litigation and more than 13 years after alleged conduct began), *with Big Rivers Elec. Co.*, 188 FERC ¶ 61,155 at P 2 (2024) (approving settlement including more than $300,000 in disgorgement a little more than a year after the alleged conduct began); *Vista Energy Storage, LLC*, 188 FERC ¶ 61,112 at P 2 (2024) (approving settlement including $1.67 million in disgorgement approximately two years after the alleged conduct began).

B. The Penalty Guidelines' Formulaic Approach and Their (Mostly Positive) Impact on FERC's Pro-Settlement Policy

Before describing the Penalty Guidelines' impact on the Commission's pro-settlement policy, it is helpful to provide a summary of the Penalty Guidelines' application to enforcement cases. The Commission detailed this application in its first Policy Statement on Penalty Guidelines.[26] The Penalty Guidelines consist of a series of formulas that produce a penalty range based on the combination of two elements: (1) a base penalty amount that is calculated based on the nature of the specific violation at issue; and (2) the organization's culpability score, which is calculated based on a set of specific characteristics unique to the organization, such as its prior history and commitment to compliance.[27] These two elements play out in five discrete steps that ultimately generate a penalty range.

Step one involves identifying a "base violation level" based on the type of violation at issue.[28] This level is set in the Penalty Guidelines depending on the nature of violation at issue. For example, fraud carries a base violation level of six.[29] Step two involves adjusting the base violation level based on various factors "that account for circumstances that are specific to the type of violation at issue."[30] For example, the section of the guidelines related to fraud "contains adjustments for the monetary gain or loss caused by the violation and the scope of the violation."[31] Combining the base violation level and adjustments generates a total violation level, which correlates to a dollar amount in the guidelines' "Violation Level Penalty Table."[32]

Step three generates the "base penalty," which is "the greater of: (1) the dollar amount from [the Violation Level Penalty Table]; (2) the pecuniary gain to the organization from the violation; or (3) the pecuniary loss from the violation caused by the organization."[33] Step four involves calculating a culpability score by "start[ing] with a base score of five and . . . then adjust[ing it] upward or downward depending on six separate considerations."[34] The final culpability score equates to a set of "minimum and maximum multipliers" outlined in a table in the Penalty Guidelines.[35] Finally, the "fifth and final step involves multiplying the 'base penalty' amount (from step three) by the 'minimum and maximum multipliers' (from step four) to produce the applicable penalty range."[36]

The following table (Table I) provides an illustrative example of a Penalty Guidelines calculation, assuming a hypothetical investigation involving allegations of a two-year manipulative trading scheme in an organized electric market

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26. *See* 130 FERC ¶ 61,220 at PP 37-51.
27. *See generally id*.
28. *Id*. at P 38.
29. *Id*.
30. 130 FERC ¶ 61,220 at P 39.
31. *Id*. at P 40.
32. 132 FERC ¶ 61,216, § 1C2.2(b).
33. 130 FERC ¶ 61,220 at P 42.
34. *Id*. at P 43.
35. *Id*. at P 50; 132 FERC ¶ 61,216, § 1C2.4.
36. 130 FERC ¶ 61,220 at P 51.

that resulted in market harm of $1.2 million and unjust profits of approximately $150,000. The hypothetical investigative subject is a 250-employee trading firm with a CEO who condoned the conduct and a compliance program that covers most FERC regulations. The firm did not self-report the issue but fully cooperated in the investigation.

Table I

Violation Level Calculation		
Violation Level Inputs	**Points**	**Notes**
Base Violation Level	6	§2B1.1(a) (base violation level for manipulation)
Loss from violation	16	§2B1.1(b)(1)(I) (alleged loss of $1.2M)
Duration	6	§2B1.1(b)(2)(F) (violations lasted 2 years)
Total Violation Level	**28**	§1C2.2(b) (Violation Level Penalty Table shows that a Total Violation Level of 28 corresponds to $6.3M).

Base Penalty Calculation	
Base Penalty	**Notes**
$6.3M	§1C2.2(a) (Base Penalty is the greater of (a) the amount from the Violation Level Penalty Table ($6.3M); (b) the alleged pecuniary gain ($150K); or (c) the alleged pecuniary loss ($1.2M)

Culpability Score Calculation		
Culpability Score Inputs	**Points**	**Notes**
Base Score	5	§1C2.3(a) (base culpability score)
Senior-level involvement	3	§1C2.3(b)(3) (The company has 250 employees and its CEO condoned the conduct)
Compliance credit	-2	§1C2.3(f)
Cooperation	-1	§1C2.3(g)(2)

Settlement	-1	§1C2.3(g)(3)
Total Culpability Score	**4**	**§1C2.4 (Culpability score of 4 corresponds to minimum and maximum multipliers of 0.8 and 1.6).**

Final Penalty Calculation		
Base Penalty	**Minimum and Maximum Multipliers**	**Penalty Range**
$6.3M	0.8-1.6	$6.3M x 0.8 = $5.04M $6.3M x 1.6 = $10.08M **Final range = $5.04M-$10.08M**

The Penalty Guidelines, thus, involve a detailed process of inputting relevant facts into several formulas to generate a penalty range. This fact-intensive, formulaic model generally supports the Commission's pro-settlement policy by providing Enforcement staff and investigative subjects a common and transparent language and framework for settlement negotiations. Prior to issuance of the Penalty Guidelines in 2010, the Commission determined penalties on a case-by-case basis, which the Commission itself described as "a complex process, made more difficult and time consuming by the present and inevitable lack of uniformity of the analyses in cases."[37] This complexity and lack of uniformity made for disjointed settlement negotiations in which Enforcement staff and subjects were not necessarily on the same page about the relevant factors or the weight afforded to such factors.

In contrast, the Penalty Guidelines now provide a uniform and transparent analysis to guide negotiations. Under this formulaic model, penalties are calculated based on "a set of uniform factors that are assigned transparent values and weighted similarly for similar types of violations and similar types of violators."[38] Enforcement staff and subjects may disagree on the specific weight to afford various factors, but they at least are on the same page regarding which factors to consider and the formulas used to evaluate them. It is easier and more efficient under this narrower, straightforward framework to find ways to "meet in the middle" when the scope and parameters of the penalty determination framework are known to all participants.

While this framework under the Penalty Guidelines supports the settlement process in the majority of the Commission's investigations,[39] there remains one aspect of the guidelines that has proven, in some cases, to work against settlement—specifically, their failure to conduct an individualized appraisal of the

37. *Id*. at P 30.

38. *Id*. at P 2.

39. *See supra* note 15 and accompanying text (comparing number of investigations that result in settlement versus OSC proceedings).

value of settlements based on the anticipated costs and risks of litigation. These cases typically involve allegations of market manipulation and claims of significant market harm, or "loss," which tends to be the largest driver of penalties under the Penalty Guidelines.[40] This tiered "loss" calculation is modeled on the loss table in the Sentencing Guidelines, which was designed by the U.S. Sentencing Commission "to drive the severity of sentences for fraud offenders based primarily on the magnitude of the loss."[41]

Factoring harm into penalty determinations is supported by some as a way to reflect the moral weight of the wrongdoing and serve as an appropriate deterrent.[42] However, factoring harm figures on an escalating basis and based on speculative calculations, without due consideration of the strength of such claims—the litigation risk involved with such claims—can result in excessive penalty demands that stymie settlement negotiations and lead to protracted litigation. This is particularly true of the loss table in the Penalty Guidelines because it is modeled on the tiered table in the Sentencing Guidelines, which has been widely criticized by scholars and judges for its harsh and draconian results.[43] In their law review article, *How the Economic Loss Guideline Lost its Way, and How to Save It*, Barry Boss and Kara Kapp argue that that the Sentencing Guidelines' tiered loss table "serves as a [poor] proxy for" seriousness of offenses and culpability of wrongdoers.[44] As to seriousness, they point out that "the manner in which loss is calculated in economic crimes cases is often necessarily imprecise," noting that "[m]any factors make it difficult to accurately calculate this sum."[45] For example, they explain

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40. *See* 132 FERC ¶ 61,216, § 2B1.1(b)(1) (table showing increasing levels of aggravating enhancements to incorporate into formula based on the amount of claimed market "loss"); *id*. at P 2 ("[W]e will continue to base penalties on the seriousness of the violation, measured in large part by the harm or risk of harm caused, an organization's efforts to remedy the violation, as well as other culpability factors…").

41. Barry Boss & Kara Kapp, *How the Economic Loss Guideline Lost its Way, and How to Save It*, 18 OHIO ST. J. CRIM. L. 605, 608 (2021).

42. *See* Jessica Bregant et al., *Crime Because Punsihment? The Inferential Psychology of Morality and Punishment*, 2020 U. ILL. L. Rev 1177, 1185 (2020) ("Harm is the central feature of retributive theories of punishment. Under a retributive view, punishment is morally justified—indeed, morally required—to balance the harm done by the offender."); U.S. SENT'G GUIDELINES MANUAL § 2B1.1, at 106 (2024) ("[O]rdinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes."). *But see* 2019 WHITE PAPER, *supra* note 8, at 18 (noting that unjust gain, as opposed to harm, is a "useful metric" for determining appropriate penalties and arguing that "absent compelling case-specific factors, penalties that are dozens the times the amount of gain can appear to be beyond what is required to promote deterrence and achieve compliance").

43. *See* Boss & Kapp, *supra* note 41, at 618 (arguing that "the calculation of loss often fails to directly address the underlying policy concerns justifying reliance on this factor," and that "the current loss table, which is often the determining factor in an economic crime offender's sentence, has an outsized role in influencing such sentences"); *id*. (citing numerous federal court cases to support claim that "a broad judicial consensus has developed that section 2B1.1's loss table overstates culpability in a great many cases"); David Debold & Matthew Benjamin, *"Losing Ground"—In Search of a Remedy for the Overemphasis on Loss and Other Culpability Factors in the Sentencing Guidelines for Fraud and Theft*, 160 U. PA. L. REV. PENNUMBRA 141, 154–55 (2011); Alan Ellis et al., *At a "Loss" for Justice: Federal Sentencing for Economic Offenses*, 25 CRIM. JUST. MAG., 34, 35 (Winter 2011); United States v. Adelson, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006) (stating that "the calculations under the [loss table of the] guidelines have so run amok that they are patently absurd on their face").

44. Boss & Kapp, *supra* note 41, at 615.

45. *Id*.

how courts "must, among other things, separate out the loss attributable to an economic crime from other complicating causal factors, such as independent market events."[46] This complication is true of many FERC enforcement matters, as well. For example, in a case of an alleged manipulation of an index price in the natural gas or electric market, the alleged impact on price may stem from the alleged manipulator's actions, but it may also stem from other market forces, such as weather events and transportation constraints. It is often complicated, if not impossible, to account for the various causal factors with any form of precision or accuracy. FERC Enforcement staff's market harm calculations, subject to these causal factors, are subject to reasonable and strong defenses, for which the Penalty Guidelines do not account.

Boss and Kapp also explain that the loss table "is likewise a poor proxy for relative culpability in many cases [because,] [f]or example, the loss calculation fails to account for the extent to which the offender personally profited from the offense."[47] This issue similarly affects many FERC enforcement cases. As observed in the 2019 White Paper submitted to the Commission, "[i]n many cases, Enforcement has put forward market harm calculations that substantially exceed the alleged unjust profits—resulting in penalty ranges that substantially exceed what the range would have been if unjust profits were used in the calculation."[48] This can lead to absurdly large penalties and raise doubts about the reasonableness of a case. This type of risk is not accounted for in the Penalty Guidelines. As described *infra* Part III.B.ii, these concerns with the Sentencing Guidelines' loss table have led "courts [to] routinely conclude that these Guidelines do not serve as a reliable proxy for culpability and issue sentences below the Guideline range."[49]

As applied to FERC cases, the loss table, without a corresponding accounting of litigation risk, has effectively blocked any chance of resolving investigations through settlement in many high-dollar cases. As a result, the benefits of settlement, including sending compliance signals to industry and remedying violations, take a back seat to years of discovery battles, motions practice, and delays common in complex litigation.

III. THE PRIMARY FACTORS BEHIND THE COMMISSION'S FAILURE TO ACCOUNT FOR LITIGATION RISK IN THE PENALTY GUIDELINES

Why did the Commission not account for an individualized assessment of litigation risk when it adopted the Penalty Guidelines in 2010? This failure stems primarily from two factors. First, the Commission and its Enforcement staff have a general view, reflected in orders and settlements, that litigation risk is not a relevant or appropriate consideration when deciding whether to resolve an investigation through settlement. Second, like many aspects of the Penalty Guidelines, the

46. *Id*.

47. *Id*. at 617.

48. 2019 WHITE PAPER, *supra* note 8, at 19; *see also e.g.*, *Total Gas & Power N. Am., Inc.*, 155 FERC ¶ 61,105 at P 1 (2016) (seeking penalty of $213.6 million and disgorgement of alleged unjust profits of approximately $9 million); *Barclays Bank PLC*, 141 FERC ¶ 61,084 at P 1 (2012) (proposing penalty of $435 million and disgorgement of only $34.9 million).

49. Boss & Kapp, *supra* note 41, at 620.

Commission's failure to consider litigation risk stems from its decision to model them on the Sentencing Guidelines,[50] which also do not account for litigation risk.

This section of the article details these two factors and explains why the Commission's general aversion to consider litigation risk is misguided and why the Sentencing Guidelines, while generally a good model for FERC's penalty determination process, are a poor fit with respect to their failure to consider litigation risk.

A. Factor One: FERC's General Aversion to Consider Litigation Risk During the Investigative Stage of Enforcement Matters

Although not expressly stated, the Commission and its Enforcement staff have indirectly conveyed a general view that litigation risk is an irrelevant and inappropriate factor to consider in evaluating the terms of a settlement during an investigation. For example, whereas the Commission lists avoidance of litigation risk as a benefit of settlements *for investigative subjects*, it does not list it among the benefits *to the Commission*.[51] Similarly, multiple enforcement settlement agreements resolving investigations have listed the avoidance of litigation risk as a factor for the investigative subjects deciding to settle the matters, but not as a factor for Enforcement staff or the Commission.[52] The Commission's failure to consider litigation risk during settlement discussions is also reflected in the high level of risk it has been willing to take commencing OSC proceedings in several cases seeking huge penalties and resting on factual and legal claims in unsettled areas.[53] This is not to suggest that FERC should never take difficult cases to trial. Litigating such cases can be an effective way to develop law, especially in a relatively new area like energy market manipulation. However, this benefit of establishing legal precedent should be balanced against other considerations, such as the risk of a negative outcome, the time and costs of litigation, and the fairness to investigative subjects of seeking criminal-like sanctions for hard-to-prove or novel

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50. *See* 132 FERC ¶ 61,216 at P 15 ("[W]e believe 'that the Sentencing Guidelines provide the best model to adapt to the Commission purposes because they focus on factors—such as seriousness and remediation of a violation—that reflect the requirements of EPAct 2005 and that we believe are the centerpiece of our penalty regime.'") (internal citations omitted).

51. *See* 123 FERC ¶ 61,156 at P 33 (explaining that "[f]rom the subject's point of view, settlement . . . avoids litigation risk," but not listing the same factor under list of Commission benefits); 186 FERC ¶ 61,109 at P 6.

52. *See, e.g.*, *Alliance Pipeline L.P.*, 141 FERC ¶ 61,182, at Stipulation and Consent Agreement, P 28 (2012); *National Energy & Trade, L.P.*, 134 FERC ¶ 61,072, at Stipulation and Consent Agreement, P 14 (2011); *Tenaska Mktg. Ventures*, 126 FERC ¶ 61,040, at Stipulation and Consent Agreement, P 13 (2009).

53. *See, e.g.*, *American Efficient, LLC*, 189 FERC ¶ 61,196 at P 1 (2024) (seeking penalty of $722 million in first FERC case alleging manipulation in energy efficiency market where the market administrator did not prevent the company from participating in the market); 155 FERC ¶ 61,105 at P 7 (2016) (seeking penalty of more than $213 million in case relying heavily on complicated economic theory of market harm and the credibility of two former employee whistleblowers); *BP Am. Inc.*, 144 FERC ¶ 61,100 at P 1 (2013) (seeking $28 million penalty in case relying on novel theory of jurisdiction to try to capture non-jurisdictional intrastate transactions); *Amaranth Advisors L.L.C.*, 120 FERC ¶ 61,085 at P 1 (2007) (seeking total sanctions of $300 million based on novel theory of jurisdiction to capture solely non-jurisdictional transactions).

claims.[54] During settlement negotiations, the Commission has not effectively balanced these considerations leading to years of inefficient litigation in some of its cases.

The Commission's general aversion to considering litigation risk during the settlement negotiation stage of investigations is misguided. Litigation risk is a relevant and appropriate factor for the agency to consider in each case because it impacts its enforcement policies and overall compliance message to the energy industry. Specifically, accounting for litigation risk makes it easier to reach settlements, which, in turn, allows the Commission to more expeditiously send compliance signals to industry to comply with rules. In contrast, adverse outcomes in litigation can leave questions regarding compliance obligations. This potential for unfavorable outcomes in litigation should be considered. Indeed, "[j]udicial behavior is notoriously unpredictable, and the stakes of many agency actions are significant. Just as firms gauge legal risks of corporate decisions, it seems logical that agencies must gauge the legal risks of their policy decisions."[55] It is especially important for the Commission to consider litigation risk in order to effectively implement its statutory obligations, which can be impacted by adverse judicial decisions. "Congress clearly wants agency implementations of its statutes to have legal effect. Since those implementations will not have legal effect if they are set aside by a court, this would seem to require agency analysis of whether decisions will withstand judicial scrutiny."[56]

The Supreme Court has recognized the relevance of litigation risk to agency decisions, identifying it as one of the factors that is relevant to an agency's decision on how it chooses to advance its policies. When deciding whether to pursue an enforcement matter, the Supreme Court in *Heckler v. Chaney* emphasized that

> the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, *whether the agency is likely to succeed if it acts*, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.[57]

In addition to its relevance to and impact on FERC's enforcement policies and compliance messaging, there is a second reason the Commission should consider litigation risk during investigative settlement negotiations. After failing to consider litigation risk at the settlement stage of investigations, FERC seems willing to consider it later in litigation, sometimes on the eve of trial, after years of time- and resource-intensive motions and discovery practice.[58] If the Commission

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54. As discussed *infra* Part III.B.i, there is an argument that, because of the significant litigation risk involved and the potential for criminal-like sanctions and reputational harm, the Commission should not pursue some of these case at all, or that if it does pursue them, it should be subject to a heightened burden of proof.

55. Timothy G. Duncheon, *Litigation Risk as a Justification for Agency Action*, 95 N.Y. UNIV. L. REV. 193, 209-210 (2020).

56. *Id*. at 209.

57. Heckler v. Chaney, 470 U.S. 821, 831 (1985) (emphasis added).

58. *See, e.g.*, *Amaranth Advisors L.L.C.*, 128 FERC ¶ 61,154, at Joint Offer of Settlement, at 2 (2009) (approving a joint offer of settlement of $7.5 million more than two years after issuing an OSC proposing total sanctions of almost $300 million, with the joint offer of settlement noting that "[s]ettlement avoids litigation

were to consider the same litigation risk during investigative settlement negotiations that it eventually has proven to consider during litigation, it would have a better chance of resolving investigations during the settlement negotiation stage. This, in turn, would save significant time and resources and would send valuable compliance signals to industry much earlier.

B. Factor Two: The Sentencing Guidelines on Which the Penalty Guidelines are Modeled Do Not Account for Litigation Risk

The Commission directly attributed its decision to adopt a one-point settlement credit to the Sentencing Guidelines. Specifically, the Commission explained that

> [t]his Guideline is designed to provide a reduction in the culpability score to organizations willing to resolve cases without the need for a trial-type hearing that is comparable to the reduction in the Sentencing Guidelines for acceptance of responsibility with an additional incentive for companies willing to affirmatively recognize their violations.[59]

While FERC based the one-point credit on the Sentencing Guidelines, two key differences between the criminal and civil enforcement contexts, described below, highlight why this model is not a good fit for FERC's penalty determination process.

1. Difference in Risk Aversion Between FERC and Criminal Prosecutors

The difference in risk aversion between FERC and criminal prosecutors explains why the Sentencing Guidelines do not need to account for litigation risk in the way the Penalty Guidelines should. There is a documented and well-known reality that criminal prosecutors are risk averse. Compared to their counterparts on the civil enforcement side, including FERC, criminal prosecutors stare down a lofty burden of proof and the restrictive nature of the Double Jeopardy Clause, leading them to typically pursue only the strongest of cases. Because they typically pursue only the cases they believe they can win, there is less of a need for them to consider litigation risk during settlement negotiations. James Comey, former U.S. Attorney for the Southern District of New York, provided a critical pronouncement of this phenomenon in a speech to a group of prosecutors during his tenure in the early 2000s. Comey asked them, "'[w]ho here has never had an acquittal or a hung jury? Please raise your hand.'"[60] He then continued, "'Me and my friends have a name for you guys,' . . . 'You are members of what we like to call the Chickenshit Club."[61]

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risk"); 190 FERC ¶ 61,014 at P 2 (2025) (approving settlement for no penalty and $5 million restitution payment "[i]n light of" a recent Supreme Court decision about nine years after issuing an OSC proposing a penalty of more than $213 million).

59. 132 FERC ¶ 61,216, § 1C2.3, Application Note 12. Chapter Eight of the Sentencing Guidelines, in fact, does not expressly provide credit to organizations for resolving cases without the need for a trial-type hearing (i.e., settlements), but the Commission treated the Sentencing Guidelines' "acceptance of responsibility" credit as comparable to its settlement credit. *See* U. S. Sent'g Co., Guidelines Manual (U.S.S.G.) § 8C2.5(g) (2023).

60. JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE xiv (2017).

61. *Id*.

Comey's perception was, and continues to be, reflected in stark prosecutorial statistics. The conviction rate for criminal prosecutors sat at "91 percent in [] 2012-15, compared with 87 percent in the early 1990s."[62] Turning to more recent statistics, for all districts combined, 2024 saw the sentencing of 48,666 guilty pleas and verdicts, 130 not guilty dispositions, 2,627 dismissed criminal cases, eight-one Rule 20 dispositions, and sixty cases resulting in other actions such as transfer, non-court dismissals, pretrial diversion, or suspension.[63] This means over 94% of criminal cases resulted in a guilty plea or verdict, demonstrating that criminal prosecutors' win rate, or aversion to risk, has stayed steady, or even strengthened, since Comey's speech.[64]

This reality is supported not just by statistics but has been recognized by the courts and reinforced through criminal prosecution standards and guidelines advising prosecutors to consider the strength of a case when deciding whether to pursue prosecution. Whereas FERC discusses its pursuit of matters in terms of the "[l]ikelihood that staff could assemble a legally and factually *sufficient* case,"[65] the Department of Justice Manual's guidance considers "the strength of the government's case relative to the anticipated defense case, bearing in mind legal and evidentiary problems that might be expected, as well as the credibility of witnesses."[66] Similarly, when deciding whether entering a plea agreement is appropriate, "the attorney for the government should weigh all relevant considerations, including . . . [t]he likelihood of obtaining a conviction at trial. . . ."[67] The American Bar Association likewise recognizes that a criminal prosecutor can weigh the strength of a case during proper exercise of discretion over initiation, declination, or dismissal of criminal charges.[68] These advisements are not ignored by prosecutors, who habitually implement them into actual practice, as highlighted by one perceptive district court noting that "[i]n [its] experience, the government never even commences a criminal prosecution against a corporation unless it has a very strong case."[69]

Prosecutors are thus hyper-focused, and told to focus, on their ability to win a case before pursuing it. Likely reasons for this are the demanding evidentiary standards and constraints introduced by their burden of proof and Double Jeopardy restrictions that the civil and administrative contexts do not face. "While the fact finder in both civil and criminal matters is impartial, the criminal prosecutor faces a steeper test in establishing facts."[70] Civil and administrative litigants, including

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62. *Id*. at xviii.

63. U.S. DEP'T OF JUST., EXEC. OFF. FOR U. S. ATT'YS., UNITED STATES ATTORNEY'S ANNUAL STATISTICAL REPORT 7 tbl. 2A (2024), https://www.justice.gov/usao/media/1399686/dl?inline.

64. *See id*. The guilty disposition statistics report the number of guilty dispositions sentenced during 2024, meaning the dispositions could have been obtained in a prior year from a guilty plea or guilty verdict. *Id*.

65. 123 FERC ¶ 61,156 at P 25 (emphasis added).

66. U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-27.420(B)(6) (2024).

67. *Id*. § 9-27.420(A)(6).

68. AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-4.4 (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function/.

69. United States v. Aegerion Pharms., 280 F. Supp. 3d 217, 226 (Mass. Dist. Ct. 2017).

70. Uzair Kayani, *Law Done Backwards: The Tightening of Civil and Loosening of Criminal Protections*, 42 Nova L. Rev. 179, 188 (2018).

FERC Enforcement staff, must meet the burden of a preponderance of the evidence.[71] This standard requires that when their evidence is compared and considered alongside opposing evidence, it must amass sufficient convincing force to create "the belief that what is sought to be true is more likely true than not true."[72] Put simply, "something is more likely so than not so."[73] In other words, as recently articulated by the Supreme Court, "[t]he preponderance standard allows both parties in the mine-run civil case to share the risk of error in roughly equal fashion."[74] Beyond a reasonable doubt—a criminal prosecutor's burden—is far stricter. It requires the trier of fact to find guilt "with utmost certainty."[75] It is "proof of such a convincing character that a reasonable person, after careful consideration, would not hesitate to rely and act upon that proof in life's most important decisions."[76] There is justifiable constitutional significance behind the requirement of a higher burden in the criminal context, so the existence of a stronger burden is not arbitrary, but that does not detract from the reality that beyond a reasonable doubt is a tougher hurdle, and "significantly more accurate than preponderance of the evidence."[77]

Similarly, the Fifth Amendment's Double Jeopardy Clause acts as a restraint on prosecutors.[78] "The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial."[79] This bar is placed by the Constitution to limit the continued expense, embarrassment, and worry defendants would face if prosecutors could attempt a second conviction or a second attempt following an acquittal.[80] For prosecutors, this means proceeding with only the strongest of cases due to the risk of losing all chances at conviction if the first attempt fails.

Criminal prosecutors' demonstrated risk aversion is also reflected in the fact that there has been only one prosecution under the criminal provisions of the FPA and NGA.[81] Due to the complicated nature of FERC cases, criminal prosecutors

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71. 132 FERC ¶ 61,216 at P 206; *Maxim Power Corp.*, 151 FERC ¶ 61,094 (2015) (Cmr. Clark, dissenting) ("In a market manipulation case such as the one before us, Enforcement Staff bears the burden of proving by a preponderance of the evidence that the respondent intended to engage in a deceptive course of business.").

72. United States v. Bullard, 38 Fed. Appx. 753, 755 (3d Cir. 2002).

73. *Id*.

74. E.M.D. Sales, Inc. v. Carrera, 604 U.S. 45, 50 (2025) (citation and quotations omitted).

75. *In re* Winship, 397 U.S. 358, 364 (1970).

76. JUD. COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIR., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT 82 (2023); *see also In re Winship*, 397 U.S. at 364 (explaining that the beyond a reasonable doubt standard "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue").

77. United States v. Tosh, 141 F.Supp. 2d 738, 745 (W.D. Ky. 2001).

78. U.S. CONST. amend. V; Brown v. Ohio, 432 U.S. 161, 165 (1977).

79. *Brown*, 432 U.S. at 165.

80. Ohio v. Johnson, 467 U.S. 493, 498-499 (1984).

81. *See* Press Release, Western Massachusetts Power Plant Owner and Management Companies Agree to Plead to Tampering and False Reporting; Operations & Maintenance Company Enters Into Consent Judgment, U.S. Att'ys Off. Dist. of Mass. (Mar. 30, 2016), https://www.justice.gov/usao-ma/pr/western-massachusetts-

do not appear particularly interested in pursuing criminal referrals from FERC. This is likely due to the high burdens to overcome in the criminal context and the risk that complex evidentiary and conceptual issues introduced in FERC matters could result in acquittal, even with strong evidence. The first, and only, criminal prosecution under the FPA came in 2016, nearly 100 years after Congress passed the statute.[82]

Put simply, criminal prosecutors' mentality of pursuing only the strongest cases explains why the model they use to determine appropriate sanctions does not need to consider litigation risk (i.e., because there is minimal risk in the cases they pursue). In contrast, given FERC Enforcement staff's willingness to pursue the most difficult cases, in light of their easier burden of proof, it is reasonable and fair that they should account for the specific litigation risk involved when seeking a penalty from investigative subjects. In fact, there is a case to be made that it is inappropriate for FERC and its Enforcement staff to pursue certain high-risk cases at all, for example, where they rest on particularly weak or attenuated facts or novel legal theories. In light of the severe, quasi-criminal nature of sanctions it is authorized to impose and the resultant reputational harm, there is a good argument that it is unfair that FERC pursues these types of cases under the preponderance of evidence standard used in civil cases.[83] As long as FERC continues to pursue them under this lenient standard, the Penalty Guidelines should accurately and fairly account for the cost and risks these cases carry.

2. Difference in Departures Between the Sentencing and Penalty Guidelines

Another factor reducing the need for criminal prosecutors to consider litigation risk during plea negotiations is the frequency with which criminal sanctions are imposed outside the sentences generated under the Sentencing Guidelines. Both the Sentencing Guidelines and Penalty Guidelines are purely advisory in nature and FERC and criminal prosecutors are free to depart from them.[84] However, FERC, by design, departs much less frequently. Upon adoption of the guidelines,

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power-plant-owner-and-management-companies-agree-plead-tampering ("PPMS also agreed to plead guilty to charges that it violated the Federal Power Act, the first ever criminal charges under this statute, for making false statements to the regional power grid administrator, ISO-New England, regarding the plant's availability to produce power.").

82. *Id*. In this case, Power Plant Management Services pled guilty to violating the statute after making false statements about the plant's power production availability to a regional power grid administrator. *Id*.

83. *See* Russell Ryan, *Uncivil Procedure: The Need for Heightened Due Process Protection in SEC Enforcement Prosecutions*, 38 CRIM. JUST. 12, 14 (2023) (arguing that, in light of the SEC's quasi-criminal authority, "there is no legitimate reason to continue allowing [it] to prosecute its cases under a mere preponderance-of-evidence burden of proof"). *But see* Herman & MacLean v. Huddleston, 459 U.S. 375, 389-90 (1983) (noting the proper use of the preponderance of evidence standard for cases involving "severe civil sanctions," including SEC antifraud proceedings that "included an order permanently barring an individual from practicing his profession").

84. United States v. Booker, 543 U.S. 220, 245 (2005) (declaring the Sentencing Guidelines advisory after striking down the provisions of the Sentencing Reform Act that made the Sentencing Guidelines mandatory); 132 FERC ¶ 61,216, § 1A1.1(1). ("The Commission reserves the right to depart from these Guidelines where it deems appropriate.").

FERC declared that it does "not intend to depart from the Penalty Guidelines regularly…."[85] The Commission made clear that it is for the Commission, not staff, to allow for departures when applicable.[86] This reluctance to depart from the Penalty Guidelines has persisted throughout their fifteen-year history, as illustrated by a recent Commission statement that "departures from the Penalty Guidelines are uncommon."[87] The reluctance to depart also is reflected in the relevant statistics. When adopting the Penalty Guidelines, the Commission explained that it "will set out on the record the considerations that caused [it] to conclude a departure was appropriate."[88] Since FERC began applying the Penalty Guidelines, there have been 109 cases where the Penalty Guidelines are eligible to apply.[89] Out of these 109 cases, there have been only four cases, or approximately 4% of eligible cases, where FERC has set out on the record that it is departing.[90]

In sharp contrast, there are two mechanisms in the criminal context to set sentences outside of the Sentencing Guidelines ranges—departures and variances—and they are used in a majority of criminal cases to reduce the sentences imposed under the Sentencing Guidelines. Departures to the Sentencing Guidelines are "sentences outside of the guideline range authorized by specific policy statements in the *Guidelines Manual*," while variances "are sentences outside of the guideline range that are not imposed within the guidelines framework."[91] The Sentencing Guidelines contain "a comprehensive list of departure provisions," which are "based on various circumstances of the offense, specific personal characteristics of the offender, and certain procedural history of the case."[92] For example, one section of the Sentencing Guidelines allows for a downward departure "[i]f reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes."[93] On the other hand, a court may also "determine that a sentence outside of the guideline framework is warranted based upon the statutory sentencing factors found at 18 U.S.C. §

85. 130 FERC ¶ 61,220 at P 32.

86. *Id*.

87. 186 FERC ¶ 61,109 at P 13, n.27.

88. 132 FERC ¶ 61,216 at P 32.

89. The Penalty Guidelines do not apply to penalty determinations involving individuals, hydroelectric violations, or instances with multiple types of violations falling under different sections of the Penalty Guidelines (*e.g.*, fraud and Reliability Standard violations). *See* 130 FERC ¶ 61,220 at P 32 ("[T]he Commission will continue to determine penalties based on the individual facts and circumstances for certain violations, such as for natural persons as opposed to organizations, and for cases involving multiple types of violations."); 18 C.F.R. § 385.1505 (2025) (listing relevant penalty factors for hydroelectric violations).

90. *See In re Xcel Energy Inc.*, 138 FERC ¶ 61,026 at P 13 (2012); *National Energy & Trade, L.P.*, 156 FERC ¶ 61,154 at P 26 (2016); *Vitol Inc.*, 169 FERC ¶ 61,070 at P 226 (2019); *ISO-New England, Inc.*, 180 FERC ¶ 61,223 at PP 102-104 (2022). The vast majority of FERC-approved settlements applying the Penalty Guidelines also include language noting that the approved penalty is consistent with the Penalty Guidelines. *See, e.g.*, *Northwestern Corp.*, 193 FERC ¶ 61,011 at P 32 (2025) ("The Commission also concludes that NorthWestern's civil penalty is consistent with the Revised Policy Statement on Penalty Guidelines.").

91. U.S. SENT'G COMM'N, DEPARTURES AND VARIANCES 1 (2024) [hereinafter DEPARTURES AND VARIANCES] (internal citations omitted).

92. *Id*. at 5.

93. U. S. Sent'g Co., Guidelines Manual (U.S.S.G.) § 4A1.3(b)(1) (2023).

3553(a)."[94] These are called variances, which courts consider after considering whether to apply a departure under the Sentencing Guidelines.[95]

"[D]epartures and variances have the same ultimate result (a sentence above or below the applicable guideline range),"[96] and, the statistics reflect that this result, unlike in FERC enforcement cases, occurs in most criminal cases. In fiscal year 2024, there were 61,331 total criminal cases nationally and 28,038 were within the Sentencing Guidelines range (45.7%), while 33,293 resulted in either a departure or variance from the Sentencing Guidelines range (54.3%).[97]

This tendency to sentence cases outside the Sentencing Guidelines range is prominently reflected in cases involving the economic loss table, discussed *supra* Part II.B, that the Commission modeled in its Penalty Guidelines. As detailed by Barry Boss and Kara Kapp in *How the Economic Loss Guideline Lost its Way, and How to Save It*,

> courts depart or vary below the Guidelines in the majority of cases to which the Section 2B1.1 loss enhancement applies. For example, from 2015 through 2019, more than 50 percent of sentences issued to fraud offenders were below the Guideline range. The downward variances given to such offenders, moreover, are typically significant. The mean sentences imposed on fraud offenders in 2018 and 2019 were 21 and 20 months respectively, more than 50 percent below the low end of the Guideline range.[98]

As Boss and Kapp observe, "[t]his significant trend of substantial downward variances under section 2B1.1, accordingly, underscores the substantial degree to which this particular Guideline has lost judicial confidence."[99] The Penalty Guidelines modeled their loss table, found in section 2B1.1 of the guidelines, on this same loss table from section 2B1.1 of the Sentencing Guidelines. But, FERC does not have nearly the same departure rate as criminal cases.

In sum, due to criminal prosecutors' well-documented risk aversion and the tendency of criminal cases to be sentenced outside the Sentencing Guidelines range, there is less of a need for criminal prosecutors to consider litigation risk in their plea negotiations.

IV. *BP AMERICA INC.*, DOCKET NO. IN13-15-000: AN ILLUSTRATIVE CASE STUDY OF THE IMPACT ON FERC'S PRO-SETTLEMENT POLICY OF THE PENALTY GUIDELINES' FAILURE TO SPECIFICALLY CONSIDER LITIGATION RISK

The Commission's failure to account for litigation risk in settlement negotiations has real impacts on its pro-settlement policy preference. In some cases, the failure leads to prolonged settlement negotiations, protracted litigation, and inefficient results for FERC, its staff, and the subjects of investigations. The history

94. DEPARTURES AND VARIANCES, *supra* note 91, at 2; s*ee also* Rita v. United States, 551 U.S. 338, 344 (2007).

95. DEPARTURES AND VARIANCES, *supra* note 91, at 2.

96. *Id.* at 3.

97. U.S. SENT'G COMM'N, 2024 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 29 (2025).

98. Boss & Kapp, *supra* note 41, at 621-22.

99. *Id*. at 622.

of FERC's case against BP America Inc. and its affiliates (referred to collectively as "BP") illustrates this inefficiency.

In or around late 2008 or early 2009, FERC Enforcement staff commenced an investigation to determine whether BP manipulated natural gas prices at the Houston Ship Channel trading hub, in the aftermath of Hurricane Ike in the fall of 2008.[100] Enforcement staff investigated whether BP engaged in a trading scheme to sell physical natural gas—both intrastate and interstate natural gas products—for the purpose of benefiting related financial positions.[101] After close to five years investigating this conduct,[102] Enforcement staff received settlement authority from the Commission and engaged in negotiations with BP, pursuant to the typical path of FERC investigations.[103] Although those negotiations were nonpublic, two important facts, relevant to this article, are publicly understood. First, Enforcement staff and BP's negotiations—as with all settlement negotiations between staff and organizations to resolve investigations—centered around the Penalty Guidelines.[104] Second, the negotiations failed to produce a settlement, leading staff to recommend, and the Commission ultimately to initiate, a litigated OSC proceeding against BP.[105]

In addition to these two facts, there is some level of public awareness of the relevant inputs to the Penalty Guidelines analysis discussed during the negotiations. This awareness is based on Enforcement staff's Penalty Guidelines analysis in its Staff Report and Recommendation (BP Staff Report) attached to the Commission's OSC, which issued directly after the failed settlement negotiations with BP.[106] The following analysis and calculation (below in Table II), based on the factors described in the BP Staff Report, show how Enforcement staff likely considered the various Penalty Guidelines factors during settlement negotiations.

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100. *BP Am. Inc.*, 184 FERC ¶ 61,016 at P 4 (2023).

101. *Id*.

102. BP Am., Inc. v. FERC, 52 F.4th 204, 226 (5th Cir. 2022) (referencing investigation of "about five years").

103. *See* 123 FERC ¶ 61,156 at P 34 (explaining that "[i]f the subject's response to staff's presentation of its case does not persuade staff to close the investigation, staff requests settlement authority from the Commission," and that "[i]f settlement authority is granted, staff and the subject proceed to settlement negotiations…").

104. *See* 186 FERC ¶ 61,109 at P 13 (explaining that "Enforcement staff has used the Penalty Guidelines to analyze and calculate an appropriate penalty range" for purposes of "engaging in settlement negotiations"); *2019 Annual Report on Enforcement*, FERC Docket No. AD07-13-013, at 10 (Nov. 21, 2019) (explaining how Enforcement staff's Penalty Guidelines analysis forms part of its request for authority to engage in settlement negotiations).

105. *See generally* 144 FERC ¶ 61,100 (OSC against BP). *See also* 123 FERC ¶ 61,156 at P 35 ("If Enforcement staff and the subject of the investigation are unable to reach a settlement, staff may recommend that the Commission initiate enforcement proceedings.").

106. *See Enforcement Staff Report and Recommendation*, *in* 144 FERC ¶ 61,100, at 72-73 [hereinafter "*BP Staff Report*"]. While it is possible that Enforcement staff might change parts of its Penalty Guidelines analysis between settlement negotiations and recommending an OSC proceeding, significant deviations would be unusual, especially because the OSC recommendation comes directly after the failed settlement negotiations. The one main exception is the one-point credit for settlement, which would be eliminated in the Staff Report analysis.

Table II[107]

Violation Level Calculation		
Violation Level Inputs	**Points**	**Notes**
Base Violation Level	6	§2B1.1(a) (base violation level for manipulation).
Loss from violation	20	§2B1.1(b)(1) (alleged loss of $9,480,600).
Volume of natural gas	6	§2B1.1(b)(2)(C) (violations allegedly involved more than 700,000 MMBtu of natural gas).
Total Violation Level	**32**	§1C2.2(b) (Violation Level Penalty Table shows that a Total Violation Level of 32 corresponds to $17.5M).

Base Penalty Calculation	
Base Penalty	**Notes**
$17.5M	§1C2.2(a) (Base Penalty is the greater of (a) the amount from the Violation Level Penalty Table ($17.5M); (b) the alleged pecuniary gain ($800,000); or (c) the alleged pecuniary loss ($9,480,600)

Culpability Score Calculation		
Culpability Score Inputs	**Points**	**Notes**
Base Score	5	§1C2.3(a) (base culpability score)
Prior history	2	§1C2.3(c)(2) (BP had prior adjudication of similar misconduct by another enforcement agency).
Violation of order	2	§1C2.3(d) (BP allegedly violated an order directed at it).

107. All citation references in Table II are to the *BP Staff Report*, *in* 144 FERC ¶ 61,100, at 72-73, 73 n. 209-210, 212.

Compliance credit	-1	§1C2.3(f) (BP was given a one-point credit for its compliance program).
Self-report	-2	§1C2.3(g)(1) (BP self-reported the conduct).
Cooperation	-1	§1C2.3(g)(2) (BP cooperated during investigation).
Settlement	-1	§1C2.3(g)(3) (BP would have earned the one-point credit had it settled)
Total Culpability Score	**4**	**§1C2.4 (Culpability score of 4 equates to minimum and maximum multipliers of 0.8 and 1.6).**

Final Penalty Calculation		
Base Penalty	**Minimum and Maximum Multipliers**	**Penalty Range**
$17.5M	0.8-1.6	$17.5M x 0.8 = $14M $17.5M x 1.6 = $28M **Final range = $14M-$28M**

While it is not known precisely how much FERC Enforcement staff sought in settlement negotiations, based on the above analysis, it most likely would have been between $14-$28 million, unless it sought and obtained authority to depart, which is very rare in FERC cases.[108] The BP Staff Report sought a penalty of $28 million.[109] Most importantly for purposes of this article, during the settlement negotiations, BP would have received the maximum one-point credit for settlement that *all* other settling subjects are entitled to, regardless of the costs and risks involved in their cases. In other words, under the Penalty Guidelines, Enforcement staff's case against BP—a case that relied on a complicated calculation of market harm and a legally unsettled jurisdictional theory[110]—earned the same settlement

108. *See supra* Part III.B.ii.

109. 144 FERC ¶ 61,100 at P 1.

110. *See BP Staff Report*, *in* 144 FERC ¶ 61,100, at 72 n.208 (alleging $9,480,600 in market harm based on an economic theory and calculation of "price distortion" allegedly caused by BP's trades); *id*. at 71 n.207 (alleging that BP's alleged manipulative trading in non-jurisdictional intrastate markets subjected BP to FERC's jurisdiction because the trades allegedly "altered" FERC-jurisdictional index prices).

credit as cases, for example, involving simple, *admitted* violations causing no financial harm for failing to timely file jurisdictional agreements.[111]

Enforcement staff's jurisdictional argument, alone, warranted additional settlement credit to account for the litigation risk associated with the claim. Specifically, Enforcement staff relied on an unsettled legal argument—long-asserted by the Commission, but never before decided by a court—that BP's allegedly manipulative trading "need not be subject to the Commission's NGA jurisdiction," claiming that "[i]f the Commission establishes that the scheme was 'in connection' with NGA jurisdictional sales, purchase or transportation, and scienter is found, the entity engaged in the fraudulent or manipulative conduct will have violated" FERC's Anti-Manipulation Rule.[112] Enforcement staff relied on this claim based on the Commission's interpretation of "in connection with" to mean circumstances in which "the entity . . . intended to affect, or . . . acted recklessly to affect, a jurisdictional transaction."[113] But this interpretation had never been confirmed by courts and conflicted with other relevant statutory language in the NGA.[114]

Despite being subject to this difficult, novel claim, BP still was entitled only to the 1-point settlement credit under the Penalty Guidelines. The Penalty Guidelines' failure to conduct an individualized and meaningful assessment of the litigation risk involved in the *BP* case—instead affording BP the same credit as straightforward, and even uncontested violations—does not make practical sense because all settlements are not of equal value. More importantly, it likely played a large role in preventing settlement and led to a nearly ten-year period—on top of the five years already exhausted on the investigation—of Enforcement staff and BP expending significant time and resources on a roller-coaster ride of protracted litigation. This ride included the following windy path in litigation to an eventual settlement that included a penalty of $10,750,000, a more than 60% reduction in the penalty proposed in the OSC and likely also much less than the penalty Enforcement staff sought during settlement negotiations.[115]

- **August 2013-December 2013**: Following FERC's issuance of the OSC in August 2013, BP submitted an Answer on October 4, 2013, with a 120-page brief and expert analysis of over 100 pages. Enforcement staff then submitted a reply brief on December 4, 2013 of more than eighty pages. BP submitted a response to the reply on December 19, 2013.
- **December 2013-May 2014**: OSC fully briefed and pending before FERC.

111. *See, e.g.*, *American Transmission Co.,* 160 FERC ¶ 61,030 at P 1 (2017) ($205,000 settlement with admission for failing to file jurisdictional agreements).

112. *See BP Staff Report*, *in* 144 FERC ¶ 61,100, at 71 n.207.

113. Order No. 670, *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,047 at P 22 (2006).

114. *See* 15 U.S.C. § 717(b) (2025) ("The provisions of this chapter shall apply to . . . the sale in *interstate commerce* of natural gas for resale . . . but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution. . . .").

115. This bulleted timeline comes from the public FERC docket and a detailed description of the litigation from Enforcement staff's 2015 Annual Report on Enforcement. *See 2015 Annual Report on Enforcement*, FERC Docket No. AD07-13-009, at 8-9 (Nov. 19, 2015).

- **May 15, 2014**: FERC issued an order, establishing a hearing before an administrative law judge (ALJ) to determine factual issues relevant to the Anti-Manipulation Rule and the calculation of a civil penalty and disgorgement. FERC maintained its authority over the trading conduct, holding "even if BP's conduct was not jurisdictional, nevertheless it was intertwined with, and affected, jurisdictional sales."[116]
- **May 2014-March 2015**: After FERC issued its order establishing a hearing, Enforcement staff and BP engaged in a long, extensive discovery period before commencement of the hearing. During this period, they exchanged millions of pages of written discovery, deposed twenty-three witnesses, and received voluminous additional discovery from twenty-seven third parties.
- **March 30, 2015-April 15, 2015**: The ALJ held a two-week hearing, which included direct and cross examination of many fact and expert witnesses leading to the entry of 325 exhibits and 2,657 pages of transcripts.
- **April 15, 2015-August 2015**: BP and FERC Enforcement staff filed post-hearing briefs and waited for ALJ's decision.
- **August 13, 2015**: The ALJ issued an Initial Decision, finding in favor of Enforcement staff on all substantive issues.
- **September 2015-October 2015**: BP filed exceptions to the Initial Decision and Enforcement staff filed an opposition.
- **October 2015-December 2020**: During this period of more than five years, (1) FERC issued an order affirming the ALJ's finding of manipulation and assessing a penalty of $20.16 million and disgorgement of $207,165;[117] (2) BP sought rehearing of FERC's order; (3) FERC granted rehearing purely to allow it more time for consideration; and (4) BP filed a timely appeal with the Fifth Circuit, which was held in abeyance pending FERC's decision on BP's rehearing request.
- **December 17, 2020**: FERC issued an order denying rehearing.[118]BP filed a timely appeal with the Fifth Circuit. On jurisdiction, FERC held that it was not "asserting general regulatory authority over BP's sales of non-jurisdictional natural gas under section 4," but "[i]nstead, . . . that BP's manipulative conduct directly affected natural gas transactions that [were], in fact, subject to our jurisdiction."[119]
- **October 10, 2022**: The Fifth Circuit issued an opinion, affirming FERC's finding of manipulation, but remanding to FERC for reassessment of the penalty amount after finding that a majority of the

116. 147 FERC ¶ 61,130 at P 26.
117. 156 FERC ¶ 61,031 (2016).
118. 173 FERC ¶ 61,239 (2020).
119. *Id.* at P 230.

> allegedly manipulative trades occurred in intrastate commerce and, therefore, were not jurisdictional to FERC.[120]

Most significantly, the Fifth Circuit held, "FERC asserts that it has jurisdiction over otherwise non-jurisdictional intrastate transactions if those transactions manipulate the price of interstate gas bought and sold under the NGA. But . . . the NGA clearly forbids FERC from exercising jurisdiction over intrastate transactions."[121] While invalidating most transactions based on this ruling, the court held that FERC could assert jurisdiction over eighteen separate transactions found to be in interstate commerce.[122] The court then remanded the case for FERC to reassess the penalty amount in light of this holding.[123] On remand, the matter settled for a penalty of $10.75 million.[124]

The *BP* matter provides a good illustration of the impact of failing to adequately account for litigation risk during settlement negotiations. Despite the difficult jurisdictional argument FERC faced in litigation, as well as the complicated factual allegations of fraudulent trading, the Penalty Guidelines afforded BP only the one-point settlement credit. This is not the only example where this minimal credit obstructed the settlement process, led to years of litigation, and ultimately resulted in very small settlement amounts relative to the amounts FERC initially sought during settlement negotiations and litigation. There are several enforcement cases at FERC where an individualized appraisal of the value of settlement could potentially have helped to resolve the matters earlier, avoid protracted litigation, and support the Commission's pro-settlement policy.

Table III

Case	OSC Date	OSC-Proposed Penalty Under Penalty Guidelines	Duration of Litigation Post-OSC	End Result
TOTAL Gas & Power North America, Inc., Docket No. IN12-17[125]	4/28/2016	$213.6M	4/28-2016-1/10/2025 (more than 8.5 years)	Settlement of $0 penalty; $5M restitution (100% penalty discount)

120. BP Am., Inc. v. FERC, 52 F.4th 204 (5th Cir. 2022).

121. *Id.* at 215.

122. *Id*. at 218.

123. *Id*. at 221.

124. 184 FERC ¶ 61,016 at P 2.

125. *Compare* 155 FERC ¶ 61,105 at P 1 (proposing penalty of $213.6 million), *with* 190 FERC ¶ 61,014 at P 2 (approving settlement with no penalty and $5 million in restitution).

Competitive Energy Services, Docket No. IN12-12[126]	7/17/2012	$7.5M	7/17/2012-11/25/2020 (close to 8.5 years)	Settlement of $708,158.87 penalty (more than 90% discount)
Coaltrain Energy, L.P., Docket No. IN16-4[127]	1/6/2016	$26M	1/6/2016-10/11/2022 (more than 6.5 years)	Settlement of $0 penalty; $4M in restitution (100% penalty discount)
Barclays Bank PLC, Docket No. IN08-8[128]	10/31/2012	$435M	10/31/2012-11/7/2017 (more than 5 years)	$70M (more than 80% discount)
PacifiCorp, Docket No. IN21-6[129]	4/15/2021	$42M	4/15/2021-12/30/2022 (more than 1.5 years)	$4.4M (nearly 90% discount)

V. A STRAIGHTFORWARD FIX TO FERC PENALTY GUIDELINES § 1C2.3(G)(3): A TIERED APPROACH THAT APPRAISES THE VALUE OF EACH SETTLEMENT

If FERC had afforded settlement credit to BP and the other entities listed in Table III based on an individualized appraisal of the settlements' actual value—factoring in the risks and costs of litigation—the cases may have settled earlier, and FERC could have reaped the benefits of its pro-settlement policy preference. Specifically, the Commission might have benefitted from more expeditiously sending important compliance signals to industry, returning funds to victims of the alleged wrongdoing, and reallocating valuable staff time and resources to other important enforcement matters. Subjects of investigations similarly would have benefitted, most significantly, by avoiding the high costs of protracted litigation. Instead, they wasted years on litigation, only to eventually settle at a fraction of what FERC originally sought.

126. *Compare Competitive Energy Servs., LLC*, 140 FERC ¶ 61,032 at P 1 (2012) (proposing penalty of $7.5 million), *with Competitive Energy Servs., LLC*, 173 FERC ¶ 61,176 at P 2 (2020) (approving settlement with penalty of approximately $708,000).

127. *Compare Coaltrain Energy, L.P.*, 154 FERC ¶ 61,002 at P 1 (2016) (proposing penalty of $26 million), *with Coaltrain Energy, L.P.*, 181 FERC ¶ 61,031 at P 2 (2022) (approving settlement with no penalty and $4 million in restitution).

128. *Compare* 141 FERC ¶ 61,084 at P 1 (2012) (proposing penalty of $435 million), *with Barclays Bank PLC*, 161 FERC ¶ 61,147 at P 10 (2017) (approving settlement with penalty of $70 million).

129. *Compare PacifiCorp*, 175 FERC ¶ 61,039 at P 1 (2021) (proposing penalty of $42 million), *with PacifiCorp*, 181 FERC ¶ 61,278 at P 2 (2022) (approving settlement with penalty of $4.4 million).

There is a straightforward fix to the Penalty Guidelines that would allow these types of cases to more readily reach resolution during settlement negotiations. As emphasized in this article, the Penalty Guidelines, in section 1C2.3(g)(3), currently afford all settlements a one-point credit irrespective of their value. FERC should revise this section of the guidelines as follows to assign varying gradations of credit based on an appraisal of the actual value of the settlement (proposed revisions in underline):

FERC Penalty Guidelines § 1C2.3(g)(3):[130]

If the organization resolved the matter without need for a trial-type hearing and:

> (i) the resolution resulted in the avoidance of a minor level of projected costs and minor risk of a negative outcome in litigation, subtract 1 point;
>
> (ii) the resolution resulted in the avoidance of a moderate level of projected costs and moderate risk of a negative outcome in litigation, subtract 2 points; or
>
> (iii) the resolution resulted in the avoidance of a major level of projected costs and major risk of a negative outcome in litigation, subtract 3 points.

The effect of conducting an individualized appraisal under this proposed model would be significant, allowing the Commission to more easily and quickly resolve matters and reap the benefits of its pro-settlement policy. In the *BP* matter, for example, this proposed model would give BP and FERC Enforcement staff the following ranges to discuss and negotiate, leading to enhanced transparency during negotiations and more options to help reach compromise.

Table IV

Likely Range During Settlement Negotiations Based on Factors in OSC, With 1-Point Settlement Credit[131]	Range Under Proposed Revision with 2-Point Settlement Credit	Range Under Proposed Revision with 3-Point Settlement Credit
$14-28 million	$10.5-$21 million	$7-$14 million

There is some precedent at the Commission for adapting the Sentencing Guidelines' bright-line model that exists in certain sections of the Penalty Guidelines to a scaled approach. For example, under the original Penalty Guidelines

130. 132 FERC ¶ 61,216, § 1C2.3(g)(3).

131. *See supra* tbl. II.

issued in March 2010, FERC gave three points of credit for an effective compliance program.[132] This bright-line three-point credit was based on the Sentencing Guidelines, which gives organizations three points credit "[i]f the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program."[133] However, after reviewing industry comments, FERC revised its Penalty Guidelines to allow for partial compliance credit, awarding organizations between zero and three points depending on their level of compliance.[134] In agreeing to revise its Penalty Guidelines, FERC emphasized the importance of reviewing each situation on its own merits, explaining, "[o]ur decision to grant partial compliance credit is consistent with our prior statement that 'the facts and circumstances of each situation should be evaluated to determine the appropriate amount of credit given.'"[135] Consistent with FERC's approach to conduct individualized assessments of organizations' compliance programs, it should similarly weigh the unique value of each prospective settlement when affording settlement credit. This approach would recognize that each case should be assessed based on its unique facts and circumstances.[136]

Modifying its Penalty Guidelines to afford settlement credit based on a resolution's value also is consistent with the Commission's long-standing commitment to continually evaluate the effectiveness of its enforcement program and to make improvements as warranted. Indeed, when adopting the Penalty Guidelines in 2010, it stated,

> Since Congress expanded our civil penalty authority in EPAct 2005, we have carefully considered our responsibility to implement our new authority and to improve our application of it in light of experience. To that end, we have continuously strived to add greater fairness, consistency, and transparency to our penalty determinations, and we have always sought to consider industry's recommendations to achieve these goals.[137]

The Commission also made clear that it "anticipate[d] that the Penalty Guidelines will be adjusted and amended as necessary and appropriate in light of reason and experience, as well as to reflect changes in the law and enforcement practice and policy."[138] In light of the experience applying the Penalty Guidelines' one-

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132. 130 FERC ¶ 61,220 at P 48.

133. U. S. Sent'g Co., Guidelines Manual (U.S.S.G.) § 8C2.5(f)(1) (2023).

134. 132 FERC ¶ 61,216 at PP 115-117; *id.* § 1C2.3(f)(1) ("If the violation occurred even though the organization had in place at the time of the violation an effective compliance program, as provided in §1B2.1 (Effective Compliance Program), subtract *up to 3 points*." (emphasis added)).

135. *Id*. at P 117 (citation omitted).

136. Because the Penalty Guidelines generate a penalty range, the Commission also has some flexibility to consider each case's unique litigation risk in deciding where within the range to set its ultimate penalty demand. *See* 130 FERC ¶ 61,220 at P 32 ("[W]e also retain some discretion because the Penalty Guidelines produce a penalty *range*, rather than an absolute figure. Specific facts of each case will determine where in the range the ultimate penalty might fall."). This article's proposed revision to Penalty Guidelines § 1C2.3(g)(3) is not intended to replace this flexibility that is built into the Penalty Guidelines. Rather, it is intended to supplement this discretion, to give the Commission more durable, consistent, and transparent flexibility to consider litigation risk, and to give Enforcement staff and investigative subjects a common dialogue to engage on this critical issue.

137. 132 FERC ¶ 61,216 at P 229.

138. 130 FERC ¶ 61,220 at P 34.

point settlement credit over the last fifteen years, FERC should adapt this provision to ensure that each settlement is properly valued so that it can take greater advantage of the benefits of its pro-settlement policy preference.

VI. CONCLUSION

The Commission is prudent to consistently push a policy that encourages settlements over litigation. The benefits of this pro-settlement policy are numerous. Most importantly, the policy serves as a major boost to FERC Enforcement's primary mission to ensure compliance with the nation's energy laws. Through this policy, FERC promotes compliance by more expeditiously sending compliance signals to industry and allowing its Enforcement staff to devote its limited resources to its functions aimed at preventing and detecting unlawful conduct. The policy also promotes compliance by allowing industry to focus on compliance efforts, rather than litigation. For the most part, FERC's enforcement program works in tandem to support its pro-settlement policy.

This article points out one area where the Commission can improve its enforcement program to further support its pro-settlement policy. Affording all settlements a one-point credit works against FERC's pro-settlement policy—and, as a result, its broader compliance mission—by hindering settlements in some cases and leading to years of wasteful litigation. That all settlements are not of equal value is readily apparent from a basic sampling of FERC settlements. On one end of the spectrum, some cases involve simple, uncontested violations involving failures to file agreements or actions that clearly violate basic tariff provisions.[139] On the opposite end of the spectrum, there are complicated manipulation claims involving complex financial and physical trading patterns, blurred issues relevant to the intent of traders, and complex jurisdictional questions.[140] There also are cases in the middle, for example, involving relatively straightforward violations complicated by policy questions or questions of whether certain exceptions should apply.[141] That all categories of cases earn a one-point credit is not fair or reasonable.

Fortunately, there is a straightforward solution. As described in Part V, the Commission should revise the Penalty Guidelines to allow for individualized appraisals of the value of each settlement. This article offers one idea for revising the Penalty Guidelines to account for this appraisal, but it is not the only option. The Commission should hold a technical conference to discuss this and other reasonable options to allow for an individualized appraisal with the ultimate goal of harmonizing the guidelines with its very important pro-settlement policy. The Commission held a technical conference approximately one year after issuing the

139. *See, e.g.*, 160 FERC ¶ 61,030 at P 1 ($205,000 settlement with admission for failing to file jurisdictional agreements).

140. *See, e.g.*, 144 FERC ¶ 61,100, at 72 n.208 (alleging $9,480,600 in market harm based on an economic theory and calculation of "price distortion" allegedly caused by BP's trades).

141. *See, e.g.*, *Salem Harbor Power Development LP*, 179 FERC ¶ 61,228 at P 58 (2022) (approving penalty for alleged violations of tariff and duty of candor rule based not only on conduct of the investigative subject, but also on "the roles that multiple [other] individuals and entities played" in the alleged violations).

Penalty Guidelines "to discuss how they . . . worked in practice and to permit comments and questions from the industry."[142] The Commission has not held a technical conference on the Penalty Guidelines since this first conference in 2011. Having implemented the guidelines in cases over the past fifteen years, the Commission and industry would benefit from further discussion on the issues raised in this article and any other issues it wishes to discuss related to the Penalty Guidelines.

142. 132 FERC ¶ 61,216 at P 226. *See also Technical Conference on Penalty Guidelines*, FERC Docket No. PL10-4-000 (Nov. 2, 2011) (technical conference held on Nov. 17, 2011).

PUBLIC UTILITIES AND THE FIRST AMENDMENT PROBLEM

Eliza Martin[*]

Synopsis: Investor-owned utilities are private for-profit companies that enjoy state-granted monopolies to deliver gas and electricity and rely on government-approved rates to generate revenue. Reflecting this legal structure, utility operations and investments are highly regulated. As a result, utilities, whether investor-owned or not, are concerned about legislative and regulatory changes that could impact their business interests. Utilities have interests in a range of policy issues, including infrastructure permitting, air pollution, climate change mitigation, taxes, and land-use. These policy issues impact public spending.

This Article describes how rate-regulated utilities engage in political activities using money that they collect from their captive ratepayers through government-set rates. After *Janus v. American Federation of State, County, and Municipal Employees*, the First Amendment may prohibit federal and state regulators from authorizing utilities to charge ratepayers for any political advocacy expenses. This Article maintains that ratepayer speech and associational freedoms are impermissibly burdened when ratepayers are forced to subsidize utility political speech and activity.

There are reasons that explain why governments granted utility service monopolies to private companies, but this legal and financial ordering cannot be constitutionalized to provide utilities with a singular role in using ratepayer funds to control the future utility service model. This Article suggests an avenue by which ratepayers could ask courts to protect their speech interests while simultaneously lowering their power bills and establishing the correct filed rate.

* J.D. University of Chicago Law School. I am grateful to Gabrielle Candes, Sarah Hart-Curran, Rosa Hayes, Carrie Jenks, Robin Just, Joshua Macey, Ellie Maltby, Shannon Nelson, Ari Peskoe, and the *Energy Law Journal* editors for sharing their insights, expertise, and time. Thank you to the various journalists cited for their work reporting on state utility regulatory proceedings. The views expressed, as well as any errors, are mine alone.

I. INTRODUCTION

In 2016, one of the largest multi-state utilities in the country, FirstEnergy Corporation, found itself in trouble. An Ohio subsidiary of FirstEnergy was carrying too much debt. With cheaper renewable energy and natural gas lowering the price of electricity in interstate power markets, FirstEnergy Solutions' coal and nuclear plants were no longer competitive or profitable.[1] Instead of using private financing options, closing its plants, or selling its distressed assets, FirstEnergy attempted to force the public to keep the mismanaged subsidiary afloat.

FirstEnergy's first three attempts to find a "fix for the Ohio hole" failed.[2] In 2016, the Federal Energy Regulatory Commission (FERC) denied FirstEnergy's attempts to force ratepayers to bail out the utility through affiliate power sales

1. *See generally* Complaint at 15-17, State *ex rel.* Yost v. FirstEnergy Corp., 175 Ohio St.3d 201, 240, 240 N.E.3d 269 (2024) (No. 2022-1286), 2020 WL 5743219, https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/State-ex-rel-Yost-v-FirstEnergy-et-al-Complaint-Al.aspx; *see id*. at 16 ("In its November 2016 Annual Report to Shareholders, FirstEnergy Corp. and its affiliates reported a weak energy market, poor demand forecasts, and hundreds of millions of dollars in losses. Much of these losses could be traced back to failing nuclear power plants operated by FirstEnergy Solutions . . . Worse yet, FirstEnergy Corp. was forced to 'write down' the value of the coal and nuclear plants owned by FirstEnergy Solutions by $6.2 billion.").

2. Answering Brief for Plaintiffs-Appellees' at 4-5, 9, Diane Owens v. FirstEnergy Corp., 149 F.4th 587 (6th Cir. 2004) (Nos. 23-2940, 23-943, 23-3945, 23-3946, 23-3947) (quoting evidentiary record detailing conversations between FirstEnergy executives that describe the overarching scheme as the "Ohio hole"). *See also* SHARON JACOBS & ARI PESKOE, ENERGY EMERGENCIES VS. MANUFACTURED CRISES: THE LIMITS OF FEDERAL AUTHORITY TO DISRUPT POWER MARKETS 22-23 (Harv. Enviro. & Energy L. Prog. 2019).

agreements, which are generally prohibited under federal regulations.[3] During both the 2017 and 2018 state legislative sessions, the Ohio Legislature rejected state laws that would have forced ratepayers to subsidize FirstEnergy's nuclear plants.[4]

FirstEnergy switched tactics. In the run-up to the 2018 election cycle, FirstEnergy funneled over $60 million to Ohio politicians through a 501(c)(4) entity, Generation Now.[5] Generation Now then used FirstEnergy's funding to orchestrate the passage of state legislation that provided bailout protection to FirstEnergy's mismanaged subsidiary.[6]

FirstEnergy charged its captive ratepayers a portion of the $60 million that it directed to Generation Now.[7] In doing so, FirstEnergy forced its ratepayers to act as unwitting accomplices to the utility's efforts to secure passage of FirstEnergy's bailout legislation, which one energy consulting firm suggests will cost Ohioans "$2 billion in excess utility fees and $7 billion in health care costs stemming from pollution."[8] FirstEnergy's decision to charge ratepayers for some of its political activities—unearthed only after a random audit by federal regulators and a federal investigation of the Ohio Speaker of the House—is not anomalous in the industry.[9]

Utilities are private for-profit companies that enjoy state-granted monopolies to deliver gas and electricity. The for-profit utility business model is inherently political; reflecting contentious state decisions to provide a reasonable opportunity for privately owned utilities to recover their costs and earn a return on their capital expenses.[10] Reflecting the for-profit business model, utilities also have business

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3. *See Electric Power Supply Ass'n v. AEP Generation Res. Inc.*, 155 FERC ¶ 61,102 (2016); *Electric Power Supply Ass'n v. FirstEnergy Solutions Corp.*, 155 FERC ¶ 61,101 (2016).

4. Complaint at 17, 20, State *ex rel.* Yost v. FirstEnergy Corp., 175 Ohio St.3d 201, 240 N.E.3d 269 (2024) (No. 2022-1286), 2020 WL 5743219, https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/State-ex-rel-Yost-v-FirstEnergy-et-al-Complaint-Al.aspx (describing how FirstEnergy legislation "received virtually no support from legislators").

5. 501(c)(4) entities are a type of tax-exempt "social welfare" organization that act as vehicles for corporations to advance preferred policies by funding political activity, lobbying, and issue advocacy. 501(c)(4) entities are not required to publicly disclose donors under federal law, so they are often preferred by corporations or individuals that do not want a public record of their activity. *See generally Social Welfare Organizations*, IRS (last updated Apr. 17, 2025), https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations (last visited Sep. 21, 2025). *See infra* Part III.A(4) for further discussion of 501(c)(4) entities.

6. *See infra* Part III.A(4).

7. *See infra* Part III.A(4) for information detailing how FirstEnergy charged ratepayers for its political activity.

8. Nathanael Johnson, *How a $60 Million Bribery Scandal Helped Ohio Pass the 'Worst Energy Policy in the Country*, GRIST (Jan. 26, 2022), https://grist.org/politics/how-a-60-million-bribery-scandal-helped-ohio-pass-the-worst-energy-policy-in-the-country.

9. *See infra* Part III.A.

10. *See e.g.*, Sandeep Vaheesan, *Democratic Abundance*, LAW & POL. ECON. PROJECT (June 2, 2025), https://lpeproject.org/blog/democratic-abundance/ (arguing that "public ownership of our energy infrastructure provides our best chance of achieving truly 'just and reasonable' rates, ensuring equitable siting of necessary but often intrusive long-lived infrastructure, and elevating demand-side solutions as an essential component of controlling climate change); Chris Villarreal et al, *State-By-State Scorecard on Electricity Competition*, R ST. INST. (May 22, 2025), https://www.rstreet.org/research/state-by-state-scorecard-on-electricity-competition/ (contending that policies encouraging private utility competition offer consumer benefits); Harvey L. Reiter, *Competition*

interests in a range of debated policy issues that impact public spending, including infrastructure permitting, air pollution regulation, climate change mitigation, taxes, and land-use. Utilities, like FirstEnergy, regularly speak—lobby, litigate, advertise—on these controversial issues using money that they collect from the public through government-set rates.

Across the country, rate-regulated utilities are charging unknowing ratepayers for political activity.[11] While the percentage of political advocacy costs in any individual ratepayer bill may not be significant, households may nonetheless be forced to subsidize political activity when paying the power bill every month. These expenses amplify each utility's voice in the political process to increase long-term profits. And in a country with rising electricity rates[12] where an estimated one-in-three American households cannot afford enough electricity, every dollar counts, particularly for ratepayers living in the Southeast and Southwest.[13]

A few states have taken initial legislative and regulatory steps to stop utilities from charging their captive ratepayers for political activities.[14] This Article, however, argues that the First Amendment compels a uniform standard across all states: a utility cannot charge its captive ratepayers for any political activity.

In *Janus v. American Federation of State, County and Municipal Employees*,[15] the Supreme Court announced that the First Amendment generally bars the government from compelling people to pay money to a private organization that engages in speech on matters of substantial public concern. While courts have applied *Janus* to several other types of compelled speech, they have not yet done so in the utility context. This Article contends that the Supreme Court's *Janus* decision applies in force to utilities: it is unconstitutional for the state to authorize monopoly utilities to charge ratepayers for political speech and political activity. The First Amendment prohibits federal and state regulators from authorizing utilities to charge ratepayers for the private organization's political advocacy.

Between Public and Private Distributors in a Restructured Power Industry, 19 ENERGY L. J. 333, 339-40, 343-45 (1998) (explaining how municipal electrical utilities can place pressure on private utilities to perform well and contain costs).

11. *See infra* Part III.A.

12. *See* Noah Schwart, *Requests for Utility Rate Hikes Reach $29 Billion in 2025—Report*, S&P GLOB. (Jul. 10, 2025), https://www.spglobal.com/market-intelligence/en/news-insights/articles/2025/7/requests-for-utility-rate-hikes-reach-29b-in-2025-report-91494944.

13. *See* Carlos Batlle et al., *U.S. Federal Resource Allocations are Inconsistent with Concentrations of Energy Poverty*, 10 SCI. ADVANCES 1 (2024) ("Nearly one in three households in the United States report experiencing energy poverty . . . [and] ~20% of households reported having reduced or not purchased basic necessities to pay their energy bills.").

14. At least eighteen states have filed legislative proposals to prohibit utilities from charging customers for utility political activity, but a majority of these efforts have failed. *See* Shelby Green, *Tracking State Legislation to Get Politics Out of Utility Bills*, ENERGY & POL'Y INST. (May 30, 2025), https://energyandpolicy.org/tracking-states-getting-politics-out-of-utility-bills. Six states have passed legislation that prohibits, to varying degrees, utilities from charging ratepayers for some political activity. *See* California Ratepayer Protection Act of 2025, 2025 CAL. LEGIS. SERV. CH. 634 (West); COLO. REV. STAT.§ 40-3-114 (2023); CONN. GEN. STAT. § 16-243p (2023); An Act to Require Transparency in Public Utility Advertising Expenditures, 2023 Me. Laws 329 (codified as amended at ME. STAT. tit. 35-A, § 302 (2023)); N.H. REV. STAT. ANN. 378:30-e (2019); 2025 Md. Laws. 625.

15. 585 U.S. 878 (2018).

This Article proceeds in five parts. Part II provides an overview of public utilities and the rate-regulation process. Part III details the various political activities that utilities are engaged in before explaining how these companies fund their speech by charging captive ratepayers. Part IV describes the evolution of the Supreme Court's compelled speech and compelled association doctrine. Prior to the Supreme Court's decision in *Janus*, the Court's compelled speech doctrine permitted states to authorize utilities to charge ratepayers for speech that the companies considered germane to its purpose. Part V concludes that *Janus* prohibits states from authorizing this unworkable line-drawing exercise for utilities that engage in any political activity. When utilities charge captive ratepayers to engage in *any* speech that is political, ideological, and divisive, objecting ratepayers are harmed. After *Janus,* the First Amendment prohibits federal and state regulators from authorizing utilities to charge ratepayers for political speech. Part VI suggests that in advancing constitutional claims against utilities' rates that include political speech and political activity costs, ratepayers could reassert their collective interests against utilities.

II. RATE-REGULATED PUBLIC UTILITIES

Public utility laws grant investor-owned utilities monopoly service territories to deliver gas and electricity.[16] These laws also provide utilities with state-regulated rates that are designed to protect the financial viability of utilities and facilitate growth.[17] The result is a lucrative business model: the law shields public utilities from competition by prohibiting new entrants and providing an opportunity to secure significant revenue. Investor-owned electric utilities distribute power to approximately three-quarters of U.S. homes,[18] and utilities enjoy a market capitalization that exceeds $1 trillion.[19]

Reflecting their corporate form, investor-owned utilities are incentivized to maximize profits for shareholders and executives. But utilities, also reflecting their corporate form, pursue profit at the expense of ratepayers.[20] In the absence

16. State public utility laws also grant monopolies to electric cooperatives and publicly owned municipal utilities. Because this Article focuses on investor-owned utilities, discussion of community-owned and municipally managed utilities falls outside of the scope.

17. *See* William Boyd & Ann E. Carlson, *Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law*, 63 UCLA L. REV. 810, 836-37 (2016).

18. *See* Anodyne Lindstrom & Sara Hoff, *Investor-Owned Utilities Served 72% of U.S. Electricity Customers in 2017*, U.S. ENERGY INFO. ADMIN. (Aug. 15, 2019), https://www.eia.gov/todayinenergy/detail.php?id=40913.

19. *See Utilities—Regulated Electric*, STOCK ANALYSIS (last visited Jun. 27, 2025), https://stockanalysis.com/stocks/industry/utilities-regulated-electric (using 41 stocks to estimate a market capitalization of regulated electric utilities at $1.12 trillion); EDISON ELEC. INST., 2023 FINANCIAL REVIEW: ANNUAL REPORT OF THE U.S. INVESTOR-OWNED UTILITY INDUSTRY 7 (2024) (estimating investor-owned electric utility companies to have a total market capitalization of $890 billion at Dec. 31, 2023).

20. *See generally* Aneil Kovvali & Joshua C. Macey, *The Corporate Governance of Public Utilities*, 40 YALE J. REG. 569, 583-90 (2023). *See, e.g.*, Tim McLaughlin, *Top U.S. Power Sector CEOs Pull Down $115 Million in Performance Pay*, REUTERS (Apr. 14, 2025), https://www.reuters.com/business/energy/top-us-power-sector-ceos-pull-down-115-million-performance-pay-2025-04-14 (explaining that utility executive pay is typically tied directly to "performance targets such as total shareholder return and cash flow over a three-year period,"

of competition, public utility commissions (PUCs) are tasked with protecting the public from utilities' monopoly power.[21] Because utilities would charge monopoly prices in the absence of price controls, regulators limit and closely monitor the rates that utilities can charge captive ratepayers.[22]

The rate-setting process is at the heart of the government's oversight of utilities.[23] Regulators use rate cases to balance customers' interest in low prices and fair terms of service against utilities' interest in maximizing returns for its shareholders.[24] Generally, government-approved rates reimburse utilities for operational expenses and provide an opportunity for utilities to earn a fixed rate of return on capital expenditures, which are energy infrastructure projects like new distribution lines or transmission projects. After regulators approve rates, utilities have a legal right to seek recovery of those costs by charging ratepayers.[25]

When utilities request new rates, state PUCs determine whether rate increases should be granted, revised, or denied in a trial-type process. During rate cases, regulators review the operational expenses that utilities seek to recover from ratepayers. Regulators also scrutinize all capital investments because utilities, which can recover capital costs and earn a rate of return on investments, stand to profit from building new infrastructure.[26]

The PUC sets energy rates based on information generated by utilities. Rate cases are premised on utility accounting records about the expenses they represent to have incurred when providing service. Utilities, however, do not provide internal records to state regulators or other parties in the rate-case proceeding unless specific information is requested.[27] Instead, using self-reported data, utilities

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and noting the 2022-2024 performance pay of utility executives, including Vistra CEO's $28.9 million payout, Duke CEO's $16.4 million payout, and PSEG CEO's $12 million payout).

21. *See* Smyth v. Ames, 169 U.S. 466, 545-46 (1898).

22. Some regulatory authorities have supplemented regulation with competition. *See, e.g.*, Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, 61 Fed. Reg. 21,540, 21543 (1996) (to be codified at 18 C.F.R. pts. 35, 385); Order No. 2000, *Regional Transmission Organizations*, 89 FERC ¶ 61,285 (1999).

23. Even in states that provide retail choice, the state continues to set rates for the delivery of electricity. Distribution costs are a significant, and growing, component of customer bills. *See generally Grid Infrastructure Investments Drive Increase in Utility Spending Over Last Two Decades*, U.S. ENERGY INFORMATION ADMIN. (last visited Sep. 22, 2025), https://www.eia.gov/todayinenergy/detail.php?id=63724; Nicholas Crowley & Daniel McLeod, *Trends and Drivers of Distribution Utility Costs in the United States: A Descriptive Analysis from 2008 to 2022*, 37 ELEC. J. 1 (2024).

24. *See generally* Federal Power Comm'n v. Hope Nat. Gas, 320 U.S. 591, 596 (1944); Jersey Cent. Power & Light Co. v. FERC, 810 F.2d 1168, 1190 (D.C. Cir. 1987) (Starr, J., concurring).

25. *See* Kovvali & Macey, *supra* note 20, at 584.

26. *See generally* Harvey Averch & Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. 1052 (1962).

27. In order to request accounting records about certain expenses, regulators and interveners must be aware of the underlying activity for which they are seeking additional information. *See* Scott Judy, *PSC Finds S.C. Utility Withheld Information About Failed Nuke Project*, ENG'G NEWS-REC. (Jan. 15, 2019), https://www.enr.com/articles/46211-psc-finds-sc-utility-withheld-information-about-failed-nuke-project. Utilities can also fail to provide information to regulators even when this information has been requested in discovery. *See, e.g.*, Prepared Testimony of Thomas Long and Sylvia Ashford, Docket No. A.23-06-0008 (Cal. Pub. Serv. Comm'n Sep. 17, 2024), https://docs.cpuc.ca.gov/PublishedDocs/SupDoc/A2306008/7733/540720190.pdf (in

quantify incurred operating expenses and propose a desired return on equity. While intervenors and PUC staff respond to utilities' accounting and proposed business plans, it is the utilities that initially classify expenses and decide what is and is not political speech.

III. UTILITIES FUND THEIR POLITICAL ACTIVITIES BY CHARGING RATEPAYERS

Monopoly utilities regularly speak on, and engage in, various political activities with the goal of aligning the distribution and collection of public money to their corporate interests.[28] Because policies can affect utilities' profits, utilities and their trade associations engage in legislative and regulatory advocacy, litigation, advertising, and financial support of political candidates. These political activities necessarily implicate controversial political subjects, such as climate change, energy generation issues, the role of government in energy and environmental regulation, and infrastructure permitting. Even though many states prohibit utilities from charging customers for direct lobbying expenses, utilities can evade existing rules, and definitions of lobbying are too narrow to capture the panoply of political activity.[29] The consequence of the existing system is that utilities fund some of their political activities, as well as those of their trade organizations, through government-set energy rates charged to captive customers.

A. Utilities Engage in Political Speech and Political Activity

Utilities and their trade associations engage in a number of political activities to affect how public money is spent. These political activities bear fruit: utilities are among the most powerful actors in state and federal policymaking.[30]

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discovery, "PG&E stated that it was not able to provide the specific costs attributable to . . . these two ads and could only state that the costs were included in Planning Order #5049478 for 2022, to which PG&E booked $2,502,000 . . . PG&E records do not enable a determination of which costs in this $2.5 million are attributable to the two video ads in question."); Heather Payne, *Private (Utility) Regulators*, 50 ENV'T L. 999, 1007, 1034-36 (2020) (providing examples of utilities withholding information from regulators and noting that "simply put, fully regulated, monopolistic cost-of-service utilities are not providing enough information to enable meaningful regulation and oversight"). Monopoly utilities also withhold information from the general public, despite facing no competition. Utilities routinely invoke competitive interests as a reason to withhold information from the public. *See id*. at 1045; Entergy La., LLC, Docket No. U-37425, D. Skylar Rosenbloom Letter (La. Pub. Serv. Comm'n Oct. 30, 2024), https://lpscpubvalence.lpsc.louisiana.gov/portal/PSC/ViewFile?fileId=4y5xTw%2F15do%3D.

28. I use the term "political activity" to describe the various actions (including speaking) utilities undertake with the goal of modifying how public money is distributed or collected. This includes efforts to influence public spending through direct political influence, as well as indirect political influence through other organizations or initiatives.

29. *See infra* Part III.A, B.

30. *See generally* Joshua A. Basseches et al., *Climate Policy Conflict in the U.S. States: A Critical Review and Way Forward*, 170 CLIMATE CHANGE 1, 7 (2022) (summarizing scholarship "that attends to [investor-owned utilities'] political activities shows them to be among the most powerfully political actors in state-level climate policymaking" and noting that "[t]he sources of their influence include monopoly control of electricity distribution, unparalleled technical expertise, their lobbying force, and flexible corporate organization"); Joshua A. Basseches, *Who Pays for Environmental Policy? Business Power and the Design of State-Level Climate Policies*, 52 POL. & SOC'Y 409, 438-39 (2024) (explaining that investor-owned utilities are "so much more influential than competing business actors" because of their "(1) size/representation, (2) lobbyists, (3) technical expertise, and

1. Improper Lobbying Charges

Utilities attempt to influence policy by directly lobbying legislative and regulatory bodies.[31] While the scope of ratepayer subsidized lobbying is unknown, sporadic audits by federal and state energy regulators demonstrate that utilities regularly charge their captive customers for lobbying expenses. In some cases, regulators eventually required refunds or offsets, but they only did so after audits revealed improper charges.

"[M]ost audits" conducted by FERC reveal that utilities improperly charge ratepayers for "lobbying expenses."[32] For example, a random federal audit of multi-state utility company FirstEnergy revealed the utility's practice of charging ratepayers millions for lobbying expenses and political corruption during its multi-year effort to pass Ohio House Bill 6 and to subsequently defeat a citizen referendum that sought to repeal the legislation.[33] House Bill 6, which committed $1.3

(4) flexible forms of corporate organization"); *The U.S. Power Sector and Climate Policy*, INFLUENCEMAP (Apr. 2022), https://influencemap.org/site/data/000/018/U.S._Power_Sector_Report_Final_April2022.pdf; *See also* Trevor Culhane et al. *Who Delays Climate Action? Interest Groups and Coalitions in State Legislative Struggles in the United States*, 79 ENERGY RSCH. & SOC. SCI. 1, 10 (2021) ("We find that *Utilities* have the largest and most significant positive correlation between their interests and bill movement . . . We can see that the legislative process systematically results in outcomes that benefit certain coalitions—most notably the *Utilities*—over others."); *id*. at 12 ("Our analysis of lobbying activity reveals a broad split between the coalition advancing climate and clean energy legislation . . . and its opposition coalition (*Utilities, Power Generation, Fossil & Chemical, and Real Estate*). The utilities, similar to their role in key federal climate policy, opposed, hedged their bets on, or supported climate legislation in Massachusetts based on their ability to manage and profit from energy supply."); Christian Downie, *Fighting for King Coal's Crown: Business Actors in the U.S. Coal and Utility Industries*, 17 GLOB. ENV'T POL. 21, 34 (2017) ("[E]lectric utilities can be categorized into three broad groups that supported, hedged, or opposed [certain] regulatory initiatives. These positions closely correlated to their generation portfolios.").

31. *See, e.g.*, Michelle Griffith, *Money Spent on Lobbying in Minnesota Ballooned 18% from 2022 to 2023*, MINN. REFORMER (Oct. 1, 2024) https://minnesotareformer.com/2024/10/01/money-spent-on-lobbying-in-minnesota-ballooned-18-from-2022-to-2023/ (explaining how Xcel spent $1.33 million lobbying the Minnesota PUC in 2023 to push the PUC to approve extending operations of Xcel's Monticello nuclear plant through 2040); Kelsey Brugger, *Why the Permitting Talks Collapsed*, E&E NEWS (Dec. 23, 2024, 6:38 AM), https://www.eenews.net/articles/why-the-permitting-talks-collapsed/ (detailing how Duke Energy spent $1.16 million lobbying on a proposed Senate permitting bill in July, August, and September 2024); Morris et al., *Inside 'The Pond' – CenterPoint's Private Houston-Area Retreat Used for Lobbying Texas Politicians*, HOU. CHRON. (Aug. 14, 2024), https://www.houstonchronicle.com/news/investigations/article/centerpoint-pond-retreat-texas-lawmakers-19579557.php.

32. 2024 REPORT ON ENFORCEMENT, FERC Docket No. AD07-13-018, at 51 (Nov. 21, 2024) [hereinafter 2024 REPORT]. *See also id*. at 58 (summarizing FERC audits as revealing "improper application of merger-related costs; lobbying, charitable donation, membership dues, and employment discrimination settlement costs").

33. *See, e.g.*, Dave Anderson, *FirstEnergy Floats $13.6 Million Refund in Pennsylvania in Response to Ohio Criminal Investigation and Audits of Influence Spending Charged to Customers*, ENERGY & POL. INST. (Apr. 4, 2024), https://energyandpolicy.org/firstenergy-refund-pennsylvania/ (detailing mischarges); Potomac Edison Co., No. 9695, at 16 (Md. Pub. Serv. Comm'n Oct. 18, 2023) (granting request for an independent audit of Potomac Edison and noting at least $38,000 in improper charges); Dave Anderson, *Potomac Edison Faces Maryland Audit After Admitting it Charged Customers for FirstEnergy's Bribes and Lobbying*, ENERGY & POL. INST. (Oct. 26, 2023), https://energyandpolicy.org/firstenergy-maryland-audit/ (noting FirstEnergy admitted in a rate case that it owes $1.7 million in refunds to Maryland customers), Tom Johnson, *JCP&L To Pay Back Customers After Audit*, N.J. SPOTLIGHT NEWS (Mar. 23, 2023) https://www.njspotlightnews.org/2023/03/audit-indicates-jcpl-owes-customers-nearly-10-million/ (explaining Jersey Central Power & Light owes customers $9.6 million after lobbying costs were allocated to ratepayers).

billion in ratepayer money to bail out nuclear plants owned by a bankrupt subsidiary of FirstEnergy, eventually passed. Similarly, SoCalGas, a California gas utility, charged its ratepayers $29.1 million between 2019 and 2023 to finance its lobbying efforts to prevent building electrification policies, which would have had the effect of reducing the utility's gas sales.[34] In 2014, San Diego Gas & Electric Company charged ratepayers $114,000 for "costs incurred to support activities to influence public opinion with regard to legislation."[35] Michigan Electric Transmission Company charged its transmission customers $57,673 for lobbying costs from 2015 to 2018.[36] West Virginia Public Service Commission Staff maintain that subsidiaries of FirstEnergy also classified over $50 million in lobbying expenses and political donations for recovery from captive West Virginia ratepayers.[37] Southwestern Electric Power Company (SWEPCO), a multi-state electric utility that serves customers in Arkansas, Louisiana, and Texas, charged its Louisiana ratepayers for "expenses related to Regulatory and Legislative Actions in the State of Louisiana."[38]

Utilities also charge ratepayers for the salaries of employees who work on direct lobbying efforts.[39] Often, these employees work in "government affairs" or "government relations," and directly lobby elected officials. Other employees, and often company executives, also indirectly engage in political activity during the course of their jobs but fail to classify this discrete time as lobbying.

For example, Atmos Energy, one of the nation's largest natural gas utilities lobbied aggressively in Colorado against pro-electrification building code changes. In July 2021, Gunnison's City Council passed a robust climate plan designed to reduce the county's carbon emissions through electrification of all new residential and commercial structures by 2030. Two months later, Atmos employees, including the Vice President of Marketing and a Public Affairs Manager,

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34. Report on the Results of Operations for San Diego Gas & Electric Company & Southern California Gas Company Test Year 2024 General Rate Case, Docket No. A.22-05-015 et al., at 15-16 (Cal. Pub. Utils. Comm'n Mar. 27, 2023), https://www.publicadvocates.cpuc.ca.gov/-/media/cal-advocates-website/files/proceedings-and-filings/230327-caladvocates-a2205015-et-al-political-activites-booked-to-ratepayer-accts-redacted.pdf ("[T]he utility initially insisted that shareholders were funding C4BES' activities. However, Cal Advocates' request for evidence supporting this claim—enforced by a motion to compel—eventually revealed that SoCalGas had booked costs to create and support C4BES to a ratepayer account, and that the utility authorized $29.1 million for these efforts between 2019 and 2023.").

35. *South Dakota Gas & Elec. Co*., FERC Docket No. FA19-3-000, at 44-46 (Jul. 30, 2020).

36. *Michigan Elec. Transmission Co*., FERC Docket No. FA19-7-000, at 17-18 (Jul. 2, 2020).

37. *See* Monongahela Power Co. & Potomac Edison Co., No. 23-0460-E-42T, at 61-62 (W. Va. Pub. Serv. Comm'n Jan. 25, 2024) ("FERC found that certain labor and related cost charges to construction did not meet FERC Uniform System of Accounts (USoA) guidelines for the capitalization of A&G overhead costs from 2015 through 2021. As of December 31, 2022, the Companies have estimated the costs to be $43,418,594 for Mon Power and $7,190,323 for PE. Based on the FERC audit, the Company made an accounting error that continued from 2015 through 2021, and these costs would not have been eligible for recovery in prior nor current proceedings.").

38. *See* Cole Triedman & Cameron Brooks, Regulatory Treatment of Political Expenses in Louisiana and Around the Country, Docket No. R-36832, at 12 (La. Pub. Serv. Comm'n Oct. 25 2024), https://lpscpubvalence.lpsc.louisiana.gov/portal/PSC/ViewFile?fileId=SQev4IRt49s%3D.

39. *See, e.g.*, KARLEE WEINMANN & ITAI VARDI, POWER TRIP: HOW UTILITIES USE CUSTOMER MONEY TO FUND LOBBYING, CORPORATE BRANDING, AND LUXURY LIFESTYLE EXPENSES 10-11 (Energy & Pol. Inst. 2024).

launched a public lobbying campaign against the proposed code changes and testified against them at a council meeting. The city council voted to table discussion of electric-ready building codes for three years.[40] While Atmos' annual report to the state energy regulator disclosed payments that the utility made as part of its lobbying effort against building electrification codes, it only disclosed payment to a single registered lobbyist and did not include a prorated portion of its employee's salaries to reflect the lobbying activity.[41] Because Atmos charges ratepayers for the salaries of its employees, the utility likely forced ratepayers to subsidize the lobbying conducted by utility employees as they influenced Gunnison's proposed building codes. Similarly, in 2023 and 2024, National Grid employees with the titles, "Vice President for U.S. Policy and Regulation" and "Director of Policy and Regulatory Strategy," submitted comment letters responding to a policy designed to establish a declining cap on greenhouse gas emissions.[42] Ratepayers "paid for the labor costs of writing and submitting that comment letter."[43]

2. Industry Trade Associations

The individual and collective policy goals of utilities are often advanced through powerful trade associations, such as the Edison Electric Institute (EEI), the American Gas Association, and the U.S. Chamber of Commerce.[44] Utility trade associations engage in political activity because they can coordinate efforts to craft and respond to policy that threatens to cut into the profits of their member utilities. Trade associations also fund outside political organizations, litigation, and regulatory advocacy to amplify policy coordination.[45]

To this end, utility trade associations are engaged in lobbying by supporting national policy campaigns and coordinating state-level policy initiatives.[46] For example, the U.S. Chamber of Commerce, which counts all investor-owned utilities as members, organized an effort to defeat the Build Back Better Act, a $3.5 trillion reconciliation package that directed public funds, including $550 billion to

40. Nick Bowlin, *The Natural Gas Pushback*, HIGH COUNTRY NEWS (Mar. 21, 2023), https://www.hcn.org/issues/55.4/the-natural-gas-pushback.

41. *See* Joe Smyth, *New Bill Aims to Stop Colorado Utilities from Spending Ratepayer Money on Politics*, ENERGY & POL. INST. (Apr. 20, 2023), https://energyandpolicy.org/new-bill-aims-to-stop-colorado-utilities-from-spending-ratepayer-money-on-politics.

42. *See* Niagara Mohawk Power Corp., Nos. 24-E-0322 & 24-G-0323, at 109-10 (N.Y. Pub. Serv. Comm'n Sep. 26, 2024), ttps://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={B0B73392-0000-C64B-858D-B9C25480D349} (discussed by WEINMANN & VARDI, *supra* note 39, at 11).

43. *See id*. at 111.

44. *See generally* Robert Brulle & Christian Downie, *Following the Money: Trade Associations, Political Activity and Climate Change*, 175 CLIMATIC CHANGE 1, 2 (2022) ("[T]rade associations [in the United States] spent $3.4 billion on political activities related to climate change between 2008 and 2018 . . . We find that trade associations spent $2.16 billion on advertising and promotion, $729 million on lobbying, $394 million on grants and $105 million on political contributions.").

45. *See generally Center for Biological Diversity's Opening Comments*, FERC Docket No. RM 22-5-000, at 6-7 (Feb. 22, 2022) [hereinafter *Biological Diversity's Opening Comments*].

46. *See, e.g.*, *Initial Comments of Edison Electric Institute*, FERC Docket No. RM22-5-000, at 13 (Feb. 22, 2022) [hereinafter *Initial Comments of Edision*] (explaining how "EEI provides member companies with a significant range of services that benefit electricity customers, beyond any lobbying activity that we report consistent with federal requirements," including "tracking, summarizing, sharing, and participating in various proceedings across the regulatory landscape.").

respond to the effects of climate change.[47] In 2022, EEI reported being "involved in forty-one states and D.C. last year helping our member companies deal with state regulators and the issues, and we spend a lot of time with state regulators trying to educate them on the importance of these [regulatory proceedings and rate case] decisions."[48] EEI also reported having "directly engaged with state policymakers" on controversial policies.[49] The trade association has also taken credit for delaying the implementation of the Clean Power Plan and achieving "less stringent" standards for new coal-fired power plants.[50]

To fund their various political activities, trade associations charge dues to member utilities. Investor-owned utilities then decide whether and how they will charge these dues to ratepayers. Utilities often record a portion, if not the entirety, of these dues as "operating costs," which are costs that are then passed onto ratepayers unless the state interrogates the expenses and disqualifies their recovery during a rate case.[51] Due to existing rules, some utilities charge ratepayers for all industry association dues, even when the entirety of these funds are used by trade associations for political activities, including lobbying on legislation. In 2020 for example, one research group claimed that industry associations charged utility ratepayers for at least $91,602,933 in dues, although the "actual amount of spending is likely far higher."[52]

Federal audits reveal that utilities regularly charge customers for trade association direct lobbying expenses, despite federal rules against this practice. For example, National Grid's "utility subsidiaries improperly included the lobbying component of industry association payments in their wholesale transmission rates."[53] National Grid did so repeatedly. From 2013 to 2015, National Grid "recorded the entirety [of its gas industry association] payment, including the lobbying

47. *See* U.S. Chamber Staff, *U.S. Chamber's 2022 Accomplishments on Behalf of Business*, U.S. CHAMBER OF COM. (Jan. 6, 2023), https://www.uschamber.com/about/2022-accomplishments-on-behalf-of-business ("Throughout 2022, the U.S. Chamber has advocated in Congress for federal policies that allow businesses to support jobs, growth, and opportunity. We defeated the original 'Build Back Better' reconciliation effort and successfully lobbied members of the House and Senate to reject $2.6 trillion in harmful tax increases from the final bill.").

48. *Comment of the Harvard Electricity Law Initiative*, FERC Docket No. RM 22-5, at 7 (Feb. 22, 2022) [hereinafter *Comment of the Harvard Initiative*].

49. *See id*. at 6. *See also* Ari Peskoe, *Unjust, Unreasonable, and Unduly Discriminatory: Electric Utility Rates and the Campaign Against Rooftop Solar*, 11 TEX. J. OIL, GAS & ENERGY L. 101, 150-64 (2016); *Comment of the Harvard Initiative*, *supra* note 48.

50. *See* EDISON ELEC. INST., 2015 RESULTS IN REVIEW (Huffington Post 2016), https://big.assets.huffingtonpost.com/eeibooklet.pdf.

51. Most state and FERC accounting rules consider trade association dues to be presumptively recoverable. *See Delmarva Power & Light Co.*, 58 FERC ¶ 61,169, 61,509 (1992) (stating FERC "has allowed utilities to allocated EEI contributions to wholesale customers only to the extent the contributions are for research and development programs to which wholesale customers themselves could not contribute. However, that portion of EEI contributions used for lobbying activities may not, under any circumstances, be included in the utility's cost-of-service.").

52. *Comments of E9 Insight*, FERC Docket No. RM 22-5-000, at 1 (Feb. 22, 2022) (detailing itemization of utility expenses, including "Industry Association Dues").

53. *Nat. Grid USA*, FERC Docket No. FA16-2-000, at 24 (Nov. 15, 2019).

portion" as an office supply and expense, which it charged to ratepayers.[54] Similarly, a subsidiary of Entergy recorded $85,604 in lobbying expenses for industry association dues that were "recovered in the transmission formula rate."[55] San Diego Gas & Electric improperly charged ratepayers for $275,522 for the "portion of industry association membership dues paid to support associations' efforts to influence legislation."[56]

3. Advertising

Utilities, as well as their trade associations, also use advertising techniques to shape political activity.[57] Utilities advertise to build goodwill amongst a targeted audience that can ultimately shift policies on a single issue and improve the general perception of the utility by reducing the risk that the public will call for future policies that could undercut utility profits.[58]

Utilities engage in issue advertising to advance discrete policy goals. Generally, these advertisements "present the corporation's definition of the issue, structure of facts and argument, and preferred policy alternative. The corporation's view of the problem and its resolution is offered as accurate, valid, and in the public interest."[59] National Grid "used ratepayer funds to develop advertising and other materials that seek to sway public opinion on . . . the role of alternative combustion fuels such as biomethane and hydrogen."[60] In 2022, the utility released a report titled "Our Clean Energy Vision," which advocated against electrification of the building sector, and instead recommended biomethane and hydrogen "to decarbonize New York's gas supply."[61] Gas utility NW Natural engaged in a similar form of issue advocacy when it used more than $1 million in ratepayer funds to promote its decarbonization plan.[62] Similarly, from 2009 to 2011, Allegheny Energy and American Electric Power hired public relations consultants to testify before state utility commissions in support of a new transmission line that the util-

54. *Id*. at 25.

55. *Entergy Gulf States La, L.L.C*., FERC Docket No. FA15-10-000, at 28 (Feb. 21, 2018).

56. *South Dakota Gas & Elec. Co*., FERC Docket No. FA19-3-000, at 45 (Jul. 30, 2020).

57. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978) (prohibiting utilities from charging customers for some promotional and political advertising, and it instructed state utility regulators to develop advertising standards within two years of the Act's passage in 1978. Only 20 states have done adopted the Act's prohibitions on certain promotional and political advertising.) *See* WEINMANN & VARDI, *supra* note 39, at 16-17.

58. *See generally* David J. Collison, *Corporate Propaganda: Its Implications for Accounting and Accountability*, 16 Accounting, 16 AUDITING & ACCOUNTABILITY J. 853 (2003); William R. L. Anderegg & Gregory R. Goldsmith, *Public Interest in Climate Change Over the Past Decade and the Effects of the 'Climategate' Media Event*, 9 ENV'T RSCH. LETTERS 1 (2014).

59. Robert J. Brulle et al., *Corporate Promotion and Climate Change: An Analysis of Key Variables Affecting Advertising Spending by Major Oil Corporations, 1986–2015*, 159 CLIMATIC CHANGE 87, 90-91 (2020) (citing Herbert Waltzer, *Corporate Advocacy Advertising and Political Influence*, 14 PUB. REL. REV. 41 (1988)).

60. Niagara Mohawk Power Corp., Nos. 24-E-0322 & 24-G-0323, at 111 (N.Y. Pub. Serv. Comm'n Sep. 26, 2024), https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={B0B73392-0000-C64B-858D-B9C25480D349}.

61. *Id*. at 111-20.

62. WEINMANN & VARDI, *supra* note 39, at 25-26.

ity wanted to build. These contractors "ran promotional advertisements" to pressure regulators to grant the necessary permits for the project.[63] Ratepayers were initially charged over $6 million for these activities.[64]

Utilities, which face no competition due to their state-protected monopoly franchise, also charge ratepayers for goodwill advertising that is designed to increase the public reputation of the utility.[65] In turn, this promotional advertising assists utilities with controlling negative media and political attention, and therefore decreases the likelihood of future regulatory or legislative action that could run counter to the utility's profit interests.[66] For example, Pacific Gas & Electric (PG&E) requested ratepayers pay at least $2.5 million[67] for television advertisements the utility ran in support of a 10,000 mile undergrounding proposal.[68] The utility considered these "Wildfire Communications," although the advertisements failed to communicate any information about wildfires.

4. Utility Financial Contributions to Political Action Committees and 501(c)(4) Organizations

Utility companies and their trade associations may also direct ratepayer funds to political action committees and 501(c)(4) organizations that engage in political activities. Utilities are likely motivated to fund these entities because they can

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63. Newman v. FERC, 27 F.4th 690, 694 (D.C. Cir. 2022).

64. *See id*. at 696. *See also Potomac-Appalachian Transmission Highline, LLC & PJM Interconnection, L.L.C*., 152 FERC ¶ 63,025 at P 8, 26-27 (2015).

65. *See, e.g.*, Susan Phillips, *PGW Spends Millions to Promote Natural Gas. Advocates Accuse the Utility of 'Greenwashing'*, WHYY (Sep. 22, 2025), https://whyy.org/articles/pgw-natural-gas-campaigns-greenwashing (discussing how Philadelphia Gas Works charged ratepayers $4.2 million on promotional campaigns, including on billboards, as well as radio and bus stop advertisements).

66. *See generally* Michael Barnett & Andrew John Hoffman, *Beyond Corporate Reputation: Managing Reputational Interdependence*, 11 CORP. REPUTATION REV. 1 (2008) (discussing how companies, promote themselves as representing norms in an effort to manage overall industry sector reputation).

67. In discovery, "PG&E stated that it was not able to provide the specific costs attributable to . . . these two ads and could only state that the costs were included in Planning Order #5049478 for 2022, to which PG&E booked $2,502,000 . . . PG&E records do not enable a determination of which costs in this $2.5 million are attributable to the two video ads in question." *See* Prepared Testimony of Thomas Long & Sylvie Ashford, Docket No. A.23-06-008, at 78 (Cal. Pub. Serv. Comm'n Sep. 17, 2024), https://docs.cpuc.ca.gov/PublishedDocs/SupDoc/A2306008/7733/540720190.pdf

68. *See id*. at 76-77 ("Through discovery, [the Utility Reform Network] has learned that PG&E's requested recovery for 'Wildfire Communications' in Chapter 14 includes costs for at least two video advertisements that serve the primary purpose of promoting and enhancing the company's image for the benefit of shareholders, rather than benefitting customers . . . In response to questions asking whether the costs of each of these specific ads were included in its request, PG&E acknowledged that it was seeking recovery of the costs of this 'media content.' PG&E says the costs of these ads are included in its 2022 request under Planning Order #5049478."). *See also* Jaxon Van Derbeken, *PG&E Plan to Use Wildfire Funds on Ads Sparks Critics' Fire*, NBC BAY AREA (last updated June 7, 2024, 9:03 AM), https://www.nbcbayarea.com/news/local/pge-plan-wildfire-funds-ads-outrage/3559932/; Ari Palchta, *PG&E Ran a TV Ad Touting its Undergrounding Work. Now it Wants Customers to Pay for It*, SACRAMENTO BEE (Apr. 14, 2024) ("Many PG&E customers have likely seen an upbeat commercial promoting the utility's effort to put 10,000 miles of power lines underground to protect against wildfires . . . [PG&E] spokesperson Jennifer Robinson said in an emailed statement [ ] that PG&E billed customers for the advertisement.").

effectively use PACs and 501(c)(4)s to purchase access to elected officials, to encourage those officials to adopt policies that benefit corporate interests.[69]

There are examples of utility staff working for Political Action Committees (PACs), which raise and spend money to influence elections by directing contributions to specific candidates and political parties. For example, Ameren Corporation employees worked on behalf of PACs such as Ameren FEDPAC, the Ameren Missouri PAC, and the Ameren Illinois PAC.[70] Federal regulators, after auditing the utility, determined that ten Ameren employees spent time working on PACs: serving on PAC boards, attending PAC board meetings, and performing other administrative duties throughout the year. Ameren charged their ratepayers for the time that eight of the ten Ameren employees spent devoting to PACs.[71]

Utilities and their trade associations can also funnel money to 501(c)(4) "social welfare" organizations that engage in "issue advocacy," by funding political allies, organizing responses to other political initiatives, and underwriting organizations that support desired policy outcomes. Understanding how utilities charge ratepayers for 501(c)(4) political advocacy is difficult, if not impossible, because companies do not disclose spending to these organizations and 501(c)(4) organizations are not required to disclose donors on their annual tax returns.[72] Isolated records and investigations, however, suggest that utilities could be donating ratepayer funds to 501(c)(4) organizations that lobby on legislation.

FirstEnergy used ratepayer money to fund two 501(c)(4) entities which then directed funds to bribe Ohio politicians. From 2016 to 2019, FirstEnergy directed over $60 million to two 501(c)(4) entities, Generation Now and Partners for Progress, which worked to secure and protect utility-priority legislation. After FirstEnergy created the two entities, the utility used

> Generation Now's status as an IRS 501(c)(4) and the routing of money through [a] PAC to prevent the public and regulators from discovering their efforts to influence the outcome of the 2018 Ohio Primary Election, to make contribution to candidates in excess of allowable limits, and to avoid reporting political activity.[73]

More specifically, FirstEnergy directed ratepayer funds to the two 501(c)(4) organizations, which then used this funding to secure votes for FirstEnergy's preferred candidate for Speaker of the House and to purchase political support for House Bill 6, which "established a program under which FirstEnergy Solutions'

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69. *See generally* Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797 (1990) (finding that members of Congress are more responsive to organized business interests).

70. *Ameren Corp*., FERC Docket No. FA20-6-000 (Nov. 7, 2021).

71. *Id*. at 46.

72. Corporate donors are not required to disclose their political expenditures so long as they donate to a 501(c)(4) "social welfare" organization that engages in "issue advocacy" rather than "express advocacy" for a particular candidate. *See Social Welfare Organizations*, IRS (last updated Apr. 17, 2025), https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations.

73. Complaint at 19, 21, State *ex rel.* Yost v. FirstEnergy Corp., 175 Ohio St.3d 201, 240 N.E.3d 269 (2024) (No. 2022-1286), 2020 WL 5743219, https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/State-ex-rel-Yost-v-FirstEnergy-et-al-Complaint-Al.aspx.

two Ohio nuclear power plants would become eligible for rate-payer funded subsidies of $9 per megawatt hour produced."[74] After HB 6 passed, FirstEnergy transferred over $40 million to Generation Now to stifle a citizen effort to repeal the legislation through a ballot referendum.[75] While we do not know how much of the $60 million FirstEnergy expended to pass and protect favorable utility legislation was charged to ratepayers, state proceedings have revealed that FirstEnergy improperly charged ratepayers millions for a significant portion.[76]

Consumers Energy, a Michigan utility, contributed $43.5 million to Citizens for Energizing Michigan's Economy (CEME), a 501(c)(4) organization.[77] CEME then used this money on television, radio, internet, and other advertisements that targeted lawmakers who supported rooftop solar policies that would hurt Consumers' profits.[78] In 2019, the Michigan Public Service Commission (MPSC) prohibited Consumers from directing any of its "corporate treasury monies to an Internal Revenue Code 501(c)(4) entity" until at least January 1, 2020.[79] Of course, it is not clear whether "corporate treasury monies" are ratepayer dollars, but the presence of this language in the MPSC's order suggests that the language functionally bans the practice of Consumers charging ratepayers for funds that the utility directed to 501(c)(4) organizations.[80] Otherwise, the language would be superfluous: state regulators already purport to prohibit utilities from recovering political organization contributions in customer rates.[81]

Arizona Public Service Company (APS) also may have used ratepayer funds to attack Arizona's clean energy policies through a 501(c)(4) entity. After the state adopted a 2008 net metering policy that spurred rooftop solar development, which APS perceived as a threat to its utility franchise,[82] the utility directed $12.8 million to at least fifteen 501(c)(4) organization to fund a public relations campaign attacking clean energy laws. Of the $12.8 million spent by these organizations, $3.2

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74. *Id*. at 22-24.

75. *Id*. at 25.

76. *See supra* note 33 and accompanying text.

77. *See* Andy Balaskovitz, *Michigan Regulators Clamp Down on Utility's Political* Spending, CANARY MEDIA (Jan. 28, 2019), https://energynews.us/2019/01/28/michigan-regulators-clamp-down-on-utilitys-political-spending.

78. *See* Tracy Samilton, *FTC Petition: Utility Industry, Including DTE, Consumers, is Unfairly Fighting Rooftop Solar*, MICH. PUB. (May 23, 2022, 10:18 AM), https://www.michiganradio.org/environment-climate-change/2022-05-23/ftc-petition-utility-industry-including-dte-consumers-is-unfairly-fighting-rooftop-solar. *See also* Peskoe, *supra* note 49.

79. Balaskovitz, *supra* note 77 (quoting settlement agreement between Consumers, commission staff, and other groups).

80. *See also* Comments of the Attorney General, No. U-18238, at 3 (Mich. Pub. Serv. Comm'n Feb. 10, 2023), https://mi-psc.my.site.com/sfc/servlet.shepherd/version/download/0688y000006mj7uAAA ("The Attorney General finds that the [rate case standard filing requirements] are currently deficient in providing sufficient information and insight on expenses incurred by the utilities to influence public policy and achieve rate case outcomes. The Attorney General recommends that the Commission requires the utilities to disclose . . . contributions to 501(c)(3) and to each non-profit organization, including those organizations receiving contributions from the utility's affiliated 501(c)(3) charitable foundations.").

81. Balaskovitz, *supra* note 77 (quoting then-MPSC Chairman Sally Talberg as saying "[c]ontributions to political organizations are not a cost of utility service and are not included in rates set by the Michigan Public Service Commission").

82. *See generally* LEAH STOKES, SHORT CIRCUITING POLICY 164-93 (Oxford Univ. Press, 2020).

million was directed by the 501(c)(4) entities to support candidates in public utility commission races.[83] The utility also spent $704,000 in a state Secretary of State race, giving $437,000 to support a candidate who was the son of an outgoing utility regulator. Eventually, the FBI, the Arizona Attorney General, and the Arizona Corporation Commission (ACC) opened investigations into APS political activity funding. It is still unknown whether ratepayer funds were directed to 501(c)(4) organizations,[84] but former Arizona Commissioner Bill Mundell said "that the company gets nearly all its money from utility customers."[85]

B. Existing Statutes and Regulations Fail to Protect Ratepayers from Associating with and Subsidizing Utilities' Political Activities

Existing state laws and regulatory procedures are insufficient for protecting ratepayers from associating with, and subsidizing, utilities' political activities. Regulators, either through controlling statutory language or existing regulations, already prohibit utilities from charging ratepayers for a narrow set of political activities. Nonetheless, utilities continue to charge ratepayers for some portion of their political activities as there are no penalties for doing so, and because the regulations fail to capture the breadth of political activities.

Most utilities use the Uniform System of Accounts (USofA) to delineate expenses that can be included in utility rates and therefore recovered from ratepayers (above the line) from those expenses that cannot be included in rates and therefore must be borne by shareholders (below the line).[86] Utilities are also often regulated at the state level, and most states have adopted the USofA system or otherwise incorporated FERC's reporting and accounting rules.[87] Costs included in below the line accounts are not approved by regulators for recovery from ratepayers, and therefore are borne by shareholders. Because investor-owned utilities want to maximize profits, utilities are incentivized to interpret accounting rules so as to exclude the maximum amount of expenses from below the line accounts.

Account 426.4 is a below the line account, and it is where utilities record their "expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordi-

83. *See* Howard Fischer Capital Media Services, *APS Admits Spending $10.7 Million in 2014 to Elect Two Regulators of its Choice*, ARIZ. DAILY STAR (Mar. 30, 2019), https://tucson.com/news/local/aps-admits-spending-10-7-million-in-2014-to-elect-two-regulators-of-its-choice/article_bc6636af-c128-5765-8906-482b92a1bf20.html; Bob Christie, *APS Finally Comes Clean About Political Spending*, KNAU ARIZ. PUB. RADIO (Apr. 26, 2019, 4:30 AM), https://www.knau.org/state-capitol-news/2019-04-26/aps-finally-comes-clean-about-political-spending.

84. *See* Howard Fischer, *Arizona Regulator Can Seek Utility Documents*, ARIZ. DAILY STAR (Sep. 27, 2022), https://tucson.com/news/state-regional/article_23e36f28-3eb1-11ed-ad0e-13b938942974.html (describing the Arizona Supreme Court's rejection of APS arguments that the state regulatory commission had no authority to examine the utility's corporate accounts to determine whether APS spent, and may spend in the future, ratepayer money to elect candidates of the utility's choice by directing funds to 501(c)(4) organizations).

85. Christie, *supra* note 83.

86. *See generally* 18 C.F.R. pts. 101, 201 (2025).

87. *See Comments of the State Agencies*, FERC Docket No. RM 22-5-000, at 89 (Feb. 22, 2022) (collecting sample of state regulations adopting and incorporating the USofA for utilities).

nances . . . or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials."[88] The two Account 426.4 inclusion clauses require utilities to self-report costs incurred to influence public opinion and public officials.[89]

There is no "bright line rule or specific guideline[] that delineate[s] between above the line and below the line expenses for informing and influencing the public."[90] As a result, utilities can interpret the USofA rules to require ratepayers to fund political activity. For example, when trade associations bill member utilities, they disclose only a self-identified percentage of the trade association's total budget spent on "lobbying and political activities," as calculated by the trade association using a narrow definition from the federal tax code.[91] This definition includes costs incurred for "influencing legislation," which the tax code notes includes "communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of legislation."[92]

Notably, this definition *does not* include communications with FERC commissioners, nor does it include expenses that trade associations incur when they attempt to directly or indirectly influence state governors, state utility regulators, and staff at state and federal regulatory agencies. The definition also does not cover trade association activity that aims to indirectly influence legislators, such as costs, described by EEI, for "driv[ing] the conversation about our nation's energy future during the Republican and Democratic national conventions."[93] This definition also fails to capture the practice of trade associations directing funds to other political organizations. In 2020 alone, EEI directed funds to the Americans for Tax Reform, the American Legislative Exchange Council, the National Endangered Species Act Reform Coalition, and more.[94] EEI did not list these as lobbying expenses even though the beneficiary organizations engaged in efforts to direct public funds and regularly speak about controversial public policy issues, such as

88. 18 C.F.R. § 367.4264 (2025) ("This account must include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation, or ordinances) or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations."). *See also id*. at § 367.9301(e) (redirecting "expenses for advertising activities, which are designed to solicit public support or the support of public officials in matters of a political nature" to Account 426.4).

89. Newman v. FERC, 27 F.4th 690, 698 (D.C. Cir. 2022) (holding that Account 426.4 includes utility expenditures aimed at directly and indirectly influencing public officials).

90. Notice of Inquiry, *Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses*, 177 FERC ¶ 61,180 at P 5 (2021) [hereinafter NOI].

91. *See Comment of the Harvard Initiative*, *supra* note 48, at app. A.

92. *See* 26 U.S.C. § 162(e)(1)(A), (e)(3)(A).

93. *See Comment of the Harvard Initiative*, *supra* note 48, at 7, app. B.

94. *See Biological Diversity's Opening Comments*, *supra* note 45, at 6-7.

"climate change" and state clean energy credits.[95] As a result of this existing system, utilities record only a very small percentage of trade association political activity in below-the-line Account 426.4. The remainder of trade association political activity is charged to ratepayers through Account 930.2.

C. Utilities Charge Ratepayers Through Government-Set Rates

Utilities often recover their political activity costs from ratepayers through state regulatory processes. When an individual utility requests new rates, the state PUC determines whether the utility's rate increase should be granted, revised, or denied based on cost information submitted by the individual utility company. A utility can exploit this informational asymmetry by providing insufficiently detailed, or in some cases false, information to regulators.

During rate-cases or rate stabilization plans, utilities can fail to provide sufficient detail accounting records for state regulators to identify and account for the political activity that utilities are seeking to recover from ratepayers.[96] For example, in a 2019 rate case, Cleco, a Louisiana utility, proposed to recover $99.5 million for "administrative functions," but did not explain the administrative expenses, let alone detail their benefit to ratepayers.[97] While it is possible that Cleco's $99.5 million costs did not include any political activity expenses, it is impossible to know this with certainty because Cleco did not provide any details and state regulators did not demand this information. Similarly, in a 2016 Florida Power & Light (FP&L) rate case, the utility requested that ratepayers cover the entirety of the utility's $9.5 million EEI dues from 2015 to 2018. Despite EEI's known political activities, FP&L did not disaggregate EEI's expenses in its rate request before the Public Service Commission. The utility's inclusion of the entirety of the $9.5 million EEI dues was not challenged during the utility's rate hearing, and as a result, FP&L ratepayers were responsible for the entirety of the cost.[98]

Sporadic federal and state audits demonstrate that utility companies regularly charge customers for inappropriate political activity expenses. In fact, "most [federal] audits find that public utilities recorded non-operating expenses and func-

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95. *See, e.g.*, *id*. at 7 n.22 (citing an example of the American Legislative Exchange Council's anti-climate lobbying efforts in Texas); *The Affordable, Reliable and Clean Energy Security Act*, ALEC (Sep. 24, 2024), https://alec.org/model-policy/the-affordable-reliable-and-clean-energy-security-act (providing model legislation to define natural gas as "green energy," which would "apply to all programs in the state that fund any 'green energy' or 'clean energy' initiatives" and noting passage in several states); *American Legislative Exchange Council*, LOBBYMAP (last updated 2024), https://lobbymap.org/influencer/American-Legislative-Exchange-Council-ALEC (explaining how ALEC publishes slate of "model policies" designed to provide framework for state-level climate policy that prolongs the use of fossil fuels, and also submitted regulatory comments to the Virginia Air Pollution Control Board requesting the Board rescind the state's decision to join the Regional Greenhouse Gase Initiative").

96. *See supra* note 67 and accompanying text.

97. *See* Triedman & Brooks, *supra* note 38.

98. *See* Jerry Iannelli, *Study Says FPL Charges Customers Millions in Lobbying Fees Every Year*, MIA. NEW TIMES (May 11, 2017), https://www.miaminewtimes.com/news/fpl-charged-customers-95-million-in-lobbying-fees-from-2015-to-2018-energy-and-policy-institute-says-9338218 (describing study from Energy & Policy Institute finding).

tional operating and maintenance expenses in . . . expense accounts, leading to inappropriate inclusion of such costs in revenue requirements produced by their formula rates."[99] State audits also find improper accounting of utility political activity.[100]

There is little to deter utilities from charging ratepayers for political activities. Political activity costs are only excluded from rates if regulators, PUC staff, or intervenors in a rate case catch violations. As utilities continually fail to provide detailed expense information or open their complete accounting records in rate cases, regulators and consumer advocates lack visibility into rate requests, which makes it extremely difficult to follow political expenses. Similarly, political activity can only be excluded *ex post* if regulators audit a utility company. Audits, however, occur rarely given the time and expense of the taxpayer funded process, which burdens already over-extended and underfunded regulatory agencies. Moreover, even if regulators identify utilities that are charging ratepayers for political activity, utilities are generally only required to issue a refund to customers, which does not function as an effective deterrence mechanism.

IV. THE MODERN EVOLUTION OF THE SUPREME COURT'S COMPELLED SPEECH AND COMPELLED ASSOCIATION DOCTRINE

The First Amendment protects the right to speak and "the right to refrain from speaking."[101] Most of the Supreme Court's free speech cases "have involved restrictions on what can be said, rather than laws compelling speech," but compelled speech is "at least as threatening."[102] In the modern Court's account, compelling payment in certain contexts can be like compelling people themselves to speak, which raises serious First Amendment concerns.

Historically, the Court's compelled speech doctrine allowed state and federal utility regulators to authorize utilities to charge ratepayers for certain "germane" expenses relating to "the reasonable cost of doing business and to the provision of utility services," which could include some utility political activity.[103] *Janus*, however, discarded the germaneness test in favor of adopting an absolute prohibition

99. 2024 REPORT, *supra* note 32, at 51. *See, e.g.*, *id.* at 58 (summarizing FERC audits as revealing "improper application of merger-related costs, lobbying, charitable donations, membership dues, and employment discrimination of settlement costs, improper labor overhead capitalization rates . . . ."); Southern Cal. Gas Co., Decision No. 24-12-074, at 7 (Cal. Pub. Utils. Comm'n Dec. 23, 2024), https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M550/K485/550485071.pdf ("The decision [to use one-way balancing accounts] highlights a pattern of misclassification of costs at Sempra Utilities, where the company has charged ratepayers for lobbying, political activities, and expenses related to outside legal firms. These costs have been improperly booked as above-the-line expenses when forecasting future costs."); Decision Different of Commissioner Rectschafeen, Rulemaking No. 13-11-005, at 29 (Cal. Pub. Utils. Comm'n Apr. 18, 2022) ("As an experienced utility, SoCalGas should have known that its billing of lobbying against reach codes implicated several basic legal principles that are central to its duties to the Commission and to customers . . . Thus, aside from billing ratepayers for lobbying contrary to the intent of the Commission, SoCalGas appears on the face of the record to have misled staff about the direction of its lobbying…").

100. *See infra* Part III.B.

101. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

102. Janus v. American Fed'n of State, Cnty., and Mun. Emps., 585 U.S. 878, 892 (2018).

103. *In re* Cahill v. Public Serv. Comm'n, 76 N.Y.2d 102, 112-13 (1990), *cert denied*, New York Tel. Co. v. Cahill, 498 U.S. 939 (1990).

on any compelled subsidy of a private organization's speech on issues of public concern.

A. The Germaneness Standard: Authorizing Certain Compelled Political-Speech

Beginning in the 1950s, the Supreme Court theorized that compelling payment for speech raises First Amendment concerns. In the Court's account, compelling payment is like compelling people themselves to speak.[104] Adopting this premise in *Abood v. Detroit Board of Education*,[105] the Court held that if a state conditioned employment on union membership, the union could not use its dues payments to fund political speech on issues "not germane to [the union's] duties as a collective bargaining representative."[106] Continuing, the Court explained that while mandatory fees to cover collective bargaining were acceptable because of the state's interest in labor peace and efficient collective bargaining, all other "ideological activities unrelated to collective bargaining," such as "the expression of political views" or spending "on behalf of political candidates," were not germane. These costs could therefore not be funded through mandatory fees because they risked conflicting with individual beliefs.[107]

The *Abood* Court recognized that there would be "difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited."[108] While challenging, the Court maintained that identification of activities germane to collective bargaining was necessary to not "restrict[] the Union's ability to require every employee to contribute to the cost of collective-bargaining activities."[109]

Following the *Abood* decision, courts and FERC extended the germaneness reasoning to the utility context. In a series of decisions, federal and state courts applied the germaneness test in order to determine whether the First Amendment protected objecting ratepayers from subsidizing and associating with utility political activities.[110]

A New York state court was the first to consider an argument, raised by an objecting ratepayer, that *Abood* should be extended to a utility's rate recovery of

104. *See* Railway Emps. Dep't. v. Hanson, 351 U.S. 225 (1956).

105. 431 U.S. 209 (1977).

106. *Id*. at 235-36.

107. *Id*. at 235.

108. *Id*. at 236.

109. *Abood*, 431 U.S. at 237.

110. The issue of whether the First Amendment prohibits utilities from charging ratepayers for their political speech and activities is distinct from whether these expenses can be appropriately classified under state and federal statutes authorizing utilities to recover expenses in the public interest. While a majority of states have disallowed utilities from recovering charitable contributions from ratepayers on grounds that they are not utility expenses, these are narrow decisions that fail to prohibit all, if not most, of utility political speech and activity. *See, e.g.*, *Trunkline Gas Co*., 90 FERC ¶ 61,017, 61,065 n.68 (2000) (collecting cases); El Paso Elec. Co. v. New Mexico Pub. Serv. Comm'n, 103 N.M. 300, 706 P.2d 511 (1985) (upholding prohibition on utilities charging advertising and lobbying expenses to ratepayers because reasonable expenses included in rates mustl directly benefit ratepayers).

charitable organization expenses.[111] As a threshold issue, the court recognized that there must be "state action" for the application of the compelled speech and compelled association doctrine.[112] In *Matter of Cahill v. Pub. Serv. Comm'n*,[113] the court adopted the law of a prior decision which held that during the rate-setting process, the regulatory commission "is not merely acquiescing in an otherwise acceptable business practice, but is engaged in an active supervisory role on a continuing basis."[114] Because the prior decision established "the law of the case," the *Cahill* court considered the threshold issue of state action satisfied.[115] In an analogous First Amendment challenge to utility political expenses, the Court of Appeals for the District Court of Columbia Circuit "assume[d] state action *arguendo*," and then "move[d] directly to germaneness."[116]

Next, courts considered whether the plaintiff's claim constituted a First Amendment intrusion on an objecting ratepayer's beliefs. In *Cahill*, the court explained that "ratepayers are entitled to protection against forced financial support for causes and messages personally distasteful to them, because that would render those individuals faithless to their own beliefs."[117] The *Cahill* court analogized to *Abood*, noting that both sets of plaintiffs challenged a scheme forcing payment that ultimately benefited causes repugnant to the plaintiffs. The *Cahill* court, however, noted that the government compulsion in the utility case was more severe than that in *Abood*: unlike objecting nonunion members who could find new employment, "ratepayers are powerless against governmentally regulated monopolies and have no place else to seek indispensable public utilities services."[118]

After establishing that the state compelled protected ratepayer speech when public service commission authorized rate recovery of charitable and political contributions, courts considered whether the practice could nevertheless be justified because the contributions were "germane" to a compelling state interest.

In *Cahill*, the court rejected the utility's argument that the First Amendment intrusion could be justified by something less than a compelling state interest. As established in *Abood*, "germane" expenses were only those that the state had a compelling interest in "retriev[ing] . . . from ratepayers."[119] For purposes of utility expenses, the *Cahill* court determined that state had a compelling interest in only

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111. *In re* Cahill v. Public Serv. Comm'n, 76 N.Y.2d 102, 108 (1990) (citing *In re* Cahill v. Public Serv. Comm'n, 490 N.Y.S.2d 90 (Sup. Ct. 1985), *aff'd*, 498 N.Y.S.2d 49 (N.Y. App. Div. 1986), *aff'd*, 513 N.Y.S.2d 656 (1986), *cert denied*, New York Tel. Co. v. Cahill, 498 U.S. 939 (1990)). *See also* Richard P. Johnson, *Power to the People: The First Amendment and Utility Operating Expenses*, 69 WASH. U. L.Q. 945, 945 (1991).

112. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

113. *Cahill*, 76 N.Y.2d 102 (1990), *cert denied*, New York Tel. Co. v. Cahill, 498 U.S. 939 (1990).

114. *In re* Cahill v. Public Serv. Comm'n, 490 N.Y.S.2d 90, 94 (Sup. Ct. 1985) (citing *Metropolitan Edison Co.,* 419 U.S. at 351) (rejecting argument that rate-recovery is government acquiescence in private utility decisions and therefore does not rise to the level of state action).

115. *Cahill*, 76 N.Y.2d at 108.

116. Braintree Elec. Light Dep't v. FERC, 550 F.3d 6, 11, 14 (D.C. Cir. 2008) (passing on the unsettled question of whether the concept of state action varies with the specific right at stake but noting "the possibility that customers of a government-sanctioned monopoly might be regarded as analogous [under *Abood* and kindred cases]").

117. *Cahill*, 76 N.Y.2d at 111.

118. *Id*. at 112.

119. *Id*. at 112.

those costs necessary for, or germane to, the "reasonable cost of doing business and to the provision of utility services."[120] The court concluded that effects of the "gossamer [of] civic goodwill" from utility charitable contributions "on the elementary provision of utility services are at best speculative, and at worst clearly not a sufficient basis upon which to compromise First Amendment freedoms…"[121]

The Court of Appeals for the District of Columbia Circuit also applied the germaneness test in a ratepayer First Amendment challenge to utility political expenses. In *Braintree Elec. Light Dep't v. FERC*,[122] the court considered whether FERC erred when it authorized rate recovery for political expenses incurred by ISO New England (ISO-NE), a private non-profit entity that administers the region's energy markets and operates the bulk power transmission system.[123] After FERC approved ISO-NE's 2005 and 2006 tariffs, ISO-NE customers challenged FERC's authorization because the tariffs included costs for various lobbying expenses.[124] The plaintiffs argued that in authorizing ISO-NE's tariff, FERC sanctioned ISO-NE to charge its utility customers for lobbying costs. In doing so, FERC "in effect compelled subsidization of speech in contravention of the First Amendment."[125]

The Court of Appeals held that FERC's approval of ISO-NE's lobbying expenses did not violate the First Amendment because FERC faithfully applied *Abood*'s germaneness test, and that the lobbying expenses were "germane to ISO-NE's mission."[126] The court noted that while ISO-NE's lobbying activities resulted in the entity "adopt[ing] some highly contentious positions," ISO-NE did so only after FERC directed the ISO to develop a public position and engage in political speech on these issues.[127] Because ISO-NE's lobbying and communication expenses were germane to its mission, the Court of Appeals determined that under *Abood*, costs for these activities could be recovered from ratepayers even though they burdened First Amendment rights.

B. Discarding the Germaneness Standard: The Exacting Scrutiny Standard for Compelled Speech and Compelled Association Claims

Prior to *Janus*, the compelled speech doctrine rested comfortably on *Abood*'s germaneness test. In the utility context, this meant that state and federal regulators authorized utilities to recover "germane" expenses relating to "cost of doing business and to the provision of utility services," which could include some utility

120. *Id*. at 112-13.
121. *Cahill*, 76 N.Y.2d at 113.
122. 550 F.3d 6.
123. *See id*. at 8.
124. *See id*. at 9, 10-11.
125. *See id.* at 9.
126. *Braintree Elec. Light Dep't*, 550 F.3d at 14.
127. *Id*. at 14-15.

political activity.[128] *Janus*, however, discarded *Abood* in favor of adopting an absolute prohibition on any compelled subsidy of a private organization's speech on issues of public concern.

In *Janus*, the Court considered the constitutionality of an Illinois law authorizing public-sector unions to collect nonmember agency fees that the union used for the collective bargaining process and other activities, such as "lobbying, social and recreational activities, advertising, membership meetings and conventions, and litigation, as well as other unspecified services."[129] The case originated when an employee at the Illinois Department of Healthcare and Family Services complained that an agency fee forced him to subsidize the public union's speech. Mark Janus strongly objected to "many of the public policy positions that [the union] advocate[d] for, including the positions that it [took] in collective bargaining."[130] As a result, Mark Janus alleged that the agency fee amounted to "coerced political speech" in violation of the First Amendment.[131]

In its analysis of the plaintiff's compelled speech claim, the Court first determined that *Abood*'s germaneness line-drawing exercise was no longer workable for delineating the permissibility of costs. Recall that under *Abood*, nonmembers could be charged for a "portion of union dues attributable to activities that are germane to the union's duties as collective-bargaining representative, but nonmembers [could] not be required to fund the union's political and ideological projects."[132] Under *Abood*'s approach, the union could recover agency fees by isolating expenses associated with its public policy positions.[133] In its decision to overrule *Abood*, the *Janus* Court emphasized the difficulty, in theory and in practice, of disentangling the agency-fee provision to identify costs attributable to a union's public policy activities.

The *Janus* Court acknowledged that the union followed the chargeable-nonchargeable line practice, reporting categories of its expenses and "set[ting] out the amount in each category that is said to be attributable to chargeable and nonchargeable expenses," but the Court nevertheless determined that the chargeability standard was unworkable because of its vagueness.[134] If the union could recover "expenses… that may ultimately inure to the benefit of the members of the local bargaining unit," this broad formulation could "encompass just about anything that the union might choose to do."[135] The majority's reasoning also emphasized how challenging, laborious, and difficult it would be for a nonmember to verify charge-

128. *In re* Cahill v. Public Serv. Comm'n, 76 N.Y.2d 102, 113 (1990), *cert denied*, New York Tel. Co. v. Cahill, 498 U.S. 939 (1990).

129. Janus v. American Fed'n of State, Cnty., and Mun. Emps., 585 U.S. 878, 888 (2018) (internal citations omitted).

130. *Id*. at 888-89.

131. *Id*. at 889-90.

132. *Id*. at 887.

133. *See generally* Lehnert v. Ferris Fac. Ass'n, 500 U.S. 507, 519 (1991) (setting out three-part test for "determining which activities a union constitutionally may charge to dissenting employees").

134. *See Janus*, 585 U.S. at 923. *See generally id.* at 921-23.

135. *Id*. at 922.

ability determinations "without launching a legal challenge and retaining the services of attorneys and accountants."[136] For these reasons, the Court explained, *Abood* was unworkable.

With *Abood* abandoned, the Court next determined that serious First Amendment concerns are raised when the state compels individual funding of a private organization's speech on matters of public concern. The Court explained that this is because compulsion is analogous to a state-requirement that an individual believe, speak, or associate with this speech. The majority reasoned that union speech is a matter of great public concern because the union speaks on issues "affecting how public money is spent."[137] Specifically, the Court noted that because collective bargaining involves "the level of… state spending for employee benefits" the union's speech affects how public money is spent and is therefore a "matter of great public concern."[138] The Court also noted that union speech in collective bargaining implicates "other important matters" like "education, child welfare, healthcare, and minority rights," all of which, according to the majority, are issues that alter state and local government budgets.[139]

The Court also seemed to extend its "matters of great public concern" test to any speech "on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identify, evolution, and minority religions."[140] These "sensitive political topics," the opinion explained, are "undoubtedly matters of profound value and concern to the public" and "merit special protection."[141] The majority's reasoning is expansive: it seems to suggest that any speech on either a controversial subject or an issue that could affect public spending, is a matter of great public concern.[142]

In the Court's interpretation, compelling people to give money that is used for speech is like compelling people to speak.[143] Under the Court's account, the Illinois law "seriously impinge[d]" on individual First Amendment rights when it compelled Mr. Janus' agency-fee. [144] As a result, the Court applied an "exacting scrutiny" standard to the Illinois law.[145]

136. *Id*. at 923.

137. *Janus*, 585 U.S. at 912.

138. *Id*. at 910-11.

139. *Id*. at 912.

140. *Id*. at 91314.

141. *Janus*, 585 U.S. at 914-15.

142. *See generally id*. at 939-47 (Kagan, J., dissenting).

143. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 23435 (1977); Wooley v. Maynard, 430 U.S. 705, 714-15 (1977). For an argument that compelled subsidies to private organizations, as well as the government, is not akin to speaking. *See* William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 180-94 (2018).

144. *Janus*, 585 U.S. at 894.

145. *Id*. The Court declined to decide whether strict scrutiny should apply in compelled speech cases because in this case, "the Illinois scheme [could not] survive under even the more permissive [exacting scrutiny] standard." *Id*. at 895.

In order to survive First Amendment review, "a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'"[146] Under this analysis, the Court could have maintained the *Abood* approach of segregating union dues, or alternatively, acknowledged that union agency-fees do constitute an infringement on speech rights but reasoned that this transgression is marginal. Instead, the Court determined there are not "compelling" interests in requiring employee support for the union's speech. Even if Illinois' interests in avoiding free-riding and the "conflict and disruption that it envisioned would occur if employees in a unit were represented by more than one union" were compelling, the Court reasoned that this interest could be achieved without restricting nonmembers' First Amendment rights.[147]

The *Janus* Court concluded that "[s]tates and public-sector unions may no longer extract agency fees from nonconsenting employees."[148] "Any other attempt . . . to collect such a payment" requires that workers "affirmatively consent[] to pay."[149] This suggests that workers do not need to object to agency fees: dissent is presumed, and affirmative consent must be required to opt-in.

C. Extending Janus: State Bar Associations and a Vaccine Religious Exemption Form

Federal appeals courts have considered challenges that extend the new compelled speech doctrine to non-union contexts.[150]

In *McDonald v. Longley*,[151] the Fifth Circuit considered whether attorney First Amendment rights are violated when the State of Texas mandates membership in a state bar that engages in political and ideological activities with which an attorney objects. In *McDonald*, three Texas lawyers sued the state bar claiming that it was engaged in "political and ideological activities that [were] not germane to its interests in regulating the legal profession and improving the quality of legal

146. *Id*. at 894.

147. *Id*. at 895.

148. *Janus*, 585 U.S. at 929.

149. *Id*. at 930.

150. Appellate courts have considered whether a union's exclusive representation in collective bargaining violates the First Amendment, and each has found that First Amendment speech or associational rights were not violated because plaintiffs were free to not associate with the speech by resigning from the union and no longer paying dues. *See e.g.*, Goldstein v. Professional Staff Cong./CUNY, 96 F.4th 345, 350 (2d. Cir. 2024) (holding that *Janus* does not undermine the constitutionality of exclusive representation by public-sector unions that do not assess mandatory agency fees because plaintiffs were free to resign their membership from the union or to engage in public dissent against the union's views); Peltz-Steele v. Umass Fac. Fed'n, 60 F.4th 1, 4-8 (1st Cir. 2023); Adams v. Teamsters Union Loc. 429, No. 20-1824, 2022 WL 186045, at *2-3 (3rd Cir. 2022); Uradnik v. Inter Fac. Org., 2 F.4th 722, 725-27 (8th Cir. 2021). *But see* Road-Con, Inc. v. City of Phila., 120 F.4th 346, 355 (3rd Cir. 2024) (reversing a lower court decision that dismissed a First Amendment claim that the plaintiff's associational rights were abridged when "contractors and their employees [ ] are forced to recognize a union as the exclusive representation of employees, hire employees from a union's job-referral system, and financially contribute to unions in order to work on [certain] public projects") (citation and internal citations omitted).

151. 4 F.4th 229 (5th Cir. 2021).

services."[152] A three-judge panel upheld the majority of the challenged bar programs, but the court determined that when the Texas State Bar engages in political activities that are not germane to its mandate to regulate the legal profession, the state unconstitutionally compels the speech and association of objecting attorneys. In resurrecting the "germaneness" test, the court explained that while *Janus* overruled *Abood*'s germaneness test more generally, the Supreme Court had extended the germaneness investigation to state bar associations in a distinct case, *Keller v. State Bar of California*.[153] Despite the fact that *Keller* "rested almost exclusively on [*Abood*]" the Fifth Circuit used the germaneness line-drawing test for the compelled speech and association claims because *Keller* has "direct application in this case" and the *Janus* Court did not "abrogate[] [*Keller*] with a bang."[154]

In its analysis, the Fifth Circuit considered whether various Texas State Bar legislative activities were germane to the Bar's purpose "regulating the legal profession or improving the quality of legal services."[155] The court determined that the Bar's lobbying "efforts [ ] directed entirely at changing the law governing cases, disputes, or transactions in which attorneys might be involved" are not germane to the purposes of the association.[156] While the Texas State Bar "attempt[ed] to salvage the [lobbying] program by maintaining that only its voluntary sections engage in lobbying and that therefore plaintiffs are not compelled to associate with those initiatives," the Fifth Circuit rejected this argument.[157] In doing so, the court explained that "those positions have the imprimatur of the entire Bar" because "[n]o voluntary section may assert a position regarding legislative, judicial, or executive action unless it has first obtained permission from the Bar's Board of Directors."[158]

Turning away from the *Keller*-controlled compelled speech claim, the court next considered whether the compelled association of all attorneys with the Bar's non-germane lobbying efforts could withstand judicial scrutiny. The Fifth Circuit first cited *Janus* for the proposition that the right to "eschew association for expressive purposes" is part and parcel of the "cardinal constitutional command" that the government may not compel "individuals to mouth support for views they find objectionable."[159] The court held that that if a state bar engages in nongermane activities, then compelled membership is necessarily unconstitutional.[160] The Fifth Circuit panel emphasized other constitutional options for the Texas State Bar: the organization could ease engaging in non-germane activities or the state

152. *Id*. at 237.

153. 496 U.S. 1 (1990).

154. *McDonald*, 4 F.4th at 243 n.14.

155. *Id*. at 247-48.

156. *Id*. at 248 (emphasis omitted).

157. *Id*. at 248.

158. *McDonald*, 4 F.4th at 248-49.

159. *Id*. at 245 (internal citations omitted).

160. *Id*. at 246. (reaching this conclusion, the court assumed that membership in a state bar, irrespective of whether the public associates the bar's members with the bar's activities, has expressive meaning) *Cf.* Crowe v. Oregon State Bar, 112 F.4th 1218, 1236, 1239 n.10 (9th Cir. 2024).

could directly regulate the legal profession and instead create a voluntary bar association.[161] Continuing to "mandate[] membership in the Bar as currently structured or engaging in its current activities," however, would be unconstitutional.[162]

The Ninth Circuit also applied *Janus* to a freedom of association challenge raised by an attorney to the Oregon State Bar Association's political speech. In *Crowe v. Oregon State Bar*,[163] a three-judge panel considered "whether the First Amendment tolerates mandatory membership itself—independent of compelled financial support—in a state bar that engages in nongermane political activities."[164]

In assessing the freedom of association claim, the Ninth Circuit first determined that the attorney demonstrated an infringement on his associational rights because he objected to statements made by the Oregon State Bar (OSB) in its monthly publication that "all its members" condemned white nationalism and criticized then-President Trump.[165] The court acknowledged that despite the absence of compelled financial support, Oregon forced the attorney to associate with the political speech in two ways. First, the State Bar implied that it was speaking on behalf of all the attorneys it regulates and as a result, "a reasonable observer would attribute meaning to [attorney] membership in OSB because of the [ ] statements."[166] Crowe therefore "established that the [bar] association impaired his own expression because he objects to the message sent by his membership."[167]

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161. *McDonald*, 4 F.4th at 246.

162. *Id.* at 252. *See also* Boudreaux v. Louisiana State Bar Ass'n., 86 F.4th 620 (5th Cir. 2023). In *Boudreaux*, the Fifth Circuit again considered a compelled association claim against a state bar association. The court concluded that a bar association's social media postings related to health and wellbeing of lawyers, technology and safety, community-engagement, Pride month, and student loan debt violated a Louisiana attorney's associational freedom protected by the First Amendment. *Id*. The court explained that the germaneness standard from *Keller* "requires inherent connection to the practice of law and not mere connection to a personal matter that might impact a person who is practicing the law." *Id*. at 633. According to the court, the Louisiana Bar Association's social media postings were not reasonably related to the regulation or improvement of legal service. Because the association engaged in non-germane speech, "its mandatory membership policy violate[d] [the plaintiff's] rights to free speech and free association." *Id*. at 640. The court then entered a preliminary injunction preventing the association from requiring the plaintiff to join the bar or pay dues pending completion of the lower court's remedies phase.

163. *Crowe*, 112 F.4th 1218.

164. *Id*. at 1229 (internal citations omitted).

165. *Id*. at 1236-37 ("Crowe has shown that a reasonable observer would attribute meaning to his membership in the OSB because of the *Bulletin* statements. OSB endorsed the Specialty Bars' statement criticizing then-President Trump and suggested that all members agreed with it. Specifically, the formatting and content of the two statements made it appear as though OSB essentially adopted the Specialty Bars' statement. OSB made the editorial decision to publish the two statements side-by-side, surrounded by a single dark green border that was the same color as OSB's logo. And OSB's statement echoed the themes in the Specialty Bars' statement, using strikingly similar language. . . If OSB had made clear that its own statement reflected the views of OSB's leadership—and not its members—then there would be no infringement. But OSB suggested the opposite.").

166. *See id*. at 1236-38. The court analogized the state bar association's statements to those at issue in *Caroll v. Blinken*. Students were required to pay an annual "activity fee" to their university and a portion of this fee funded a policy advocacy organization. According to the policy organization's bylaws, any student who paid the activity fee was a member of the organization. When the organization engaged in advocacy, it claimed to represent all students at the participating campuses. 957 F.2d at 993-99 (2d Cir. 1992)..

167. *Crowe*, 112 F.4th at 1238.

After explaining that the State Bar infringed on Crowe's freedom of association, the Court applied exacting scrutiny to the plaintiff's mandated association with the State Bar. "Under exacting scrutiny, the infringement must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'"[168] The panel determined that because the Oregon State Bar's statements about white nationalism and President Trump were not germane, and the association did not offer a justification for associating its members with the statements, "that infringement does not survive exacting scrutiny."[169]

The Sixth, Seventh, and Tenth Circuits have also considered the constitutionality of state bar associations arising from requirements that attorneys join and pay mandatory dues.[170] Unlike the Fifth or Ninth Circuit cases, the plaintiffs in the cases before the three circuits did not allege that the bar association participated in any non-germane activity: the plaintiffs challenged *Keller*'s holding directly. Applying *Keller*, the Sixth, Seventh, and Tenth Circuits held that the First Amendment permits state bar associations to require membership and dues for germane activities. The courts reasoned that because *Keller* applied directly to the claims raised by the plaintiff and had not been directly overruled by the Supreme Court in *Janus* or a separate case, the compelled association and compelled speech remained justified by the state interest in legal profession regulation.[171]

In *B.W.C. v. Williams*,[172] the Eighth Circuit extended *Janus*'s reasoning to a different context: a vaccine exemption form. The Missouri government issued a form for public school students seeking to claim a religious exemption from mandatory immunizations. On the form, the Missouri Department of Health and Senior Services (DHSS) included a statement recommending that all children be immunized. Public school students and their parents challenged this statement, arguing that the requirement to sign the form violated their free speech rights because they were being forced to associate with the speech on the form recommending vaccination. The court held that the requirement to sign the form did not violate the First Amendment because the form did not require the plaintiffs to affiliate with DHSS's immunization statement. The form's text clearly set out the government's message to parents, "separated from the religious opt-out."[173] As a result, there was "little risk" recipients would believe that parents and students were compelled to "mouth support for views they find objectionable."[174] Because the DHSS form did not compel speech, restrict speech, or incidentally burden speech, the court did not address the level of scrutiny required in a compelled association case.

Federal appeals courts are being confronted with plaintiff challenges that raise the new compelled speech doctrine in non-union contexts. While compelled

168. *Id*. (internal citations omitted).

169. *Id*. at 1240-41.

170. *See* Taylor v. Buchanan, 4 F.4th 406 (6th Cir. 2021); Schell v. Chief Just. & Chief Justs. of the Okla. Sup. Ct., 11 F.4th 1178 (10th Cir. 2021); File v. Martin, 33 F.4th 385 (7th Cir. 2022).

171. *But see Taylor*, 4 F.4th at 410 (Thapar, J., concurring) ("The association claim could go forward even if the bar association allowed lawyers to opt out of funding ideological activity").

172. 990 F.3d 614 (8th Cir. 2021).

173. *Id*. at 619.

174. *Id*. (internal citation omitted).

speech challenges to state-bar associations continue to be controlled by the *Keller* analysis that incorporates the germaneness standard, there is no reason to suggest that *Janus*'s exacting scrutiny does not apply to other cases where the government mandates association with a private organization and compels objecting members to subsidize its speech.

V. UTILITIES UNCONSTITUTIONALLY COMPEL RATEPAYER SPEECH AND ASSOCIATION

Monopoly utilities charge ratepayers for political activities that they engage in with the goal of both modifying how public money is distributed on issues of public concern. Through rate-regulation, the state authorizes utilities to charge ratepayers for this speech and political activity. If *Janus* is applied, it is likely unconstitutional for monopoly utilities to charge ratepayers for any political speech or activity. Because many of the utility expenses levied onto ratepayers bear no clear relationship to the provision of reliable and safe utility service, they would fail to meet the "exacting standard" demanded by the Court after *Janus*.

Captive ratepayers injured by inflated power bills that reflect utility costs for speech and political activities to which ratepayers object, could test this theory and bring legal challenges against utility companies, as well as individual utility regulators in their official capacities, seeking prospective declaratory and injunctive relief.[175]

Pursuant to the state's grant of a monopoly franchise to a privately-owned utility company, ratepayers could allege that they are forced to pay compulsory fees to the utility as a condition of receiving electric service. Reflecting the *Janus* majority's theory of compelled payment as compelled speech and compelled association, ratepayers could raise two constitutional claims. First, ratepayers could argue that when the state compels them to take service from a utility company engaging in political speech and political expressive activity, the state infringes on individual freedom of association. Second, ratepayers could argue that the First Amendment prohibits the utility company from compelling ratepayer subsidization of its political activities. Advancing an analogous compelled subsidization claim, plaintiff ratepayers could also argue that a utility company can no longer charge ratepayers for its trade association dues. In raising these constitutional claims against rates approved by regulators that include political speech and political activity costs, captive ratepayers could establish the correct filed rate.[176]

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175. While sovereign immunity shields the state itself from suit, under *Ex Parte Young*, a lawsuit can proceed if the plaintiff is seeking prospective equitable relief against a state official acting in their official capacity who is engaging in a continuing violation of federal law. *See generally* 209 U.S. 123, 159-60 (1908). Rates approved by FERC also reflect utility political activities and speech, and state regulators are required to authorize utilities to recover FERC-regulated charges. *See* Mississippi Power & Light v. Mississippi *ex rel.* Moore 487 U.S. 354, 369-70 (1988). A plaintiff, seeking prospective equitable relief, could also bring a challenge against federal utility regulators authorizing rates that include utility political activities.

176. When regulators approve rates and terms of services, rates are considered *per se* reasonable and may not be collaterally attacked in courts. *See generally* Old Dominion Elec. Coop. v. FERC, 892 F.3d 1223, 1232 (D.C. Cir. 2018); American Tel. & Tel. Co. v. Central Off. Tel., Inc., 524 U.S. 214, 221-22 (1998) (summarizing the filed rate doctrine that applies to regulated companies' tariffs). *See also infra* Part VI.

A. Threshold Issues: State Mandated Association and Speech

In determining whether "mandated support is contrary to the First Amendment principles" a threshold inquiry must consider whether there is a state-imposed mandate requiring individuals to associate with a private organization's speech or activity.[177] The legally bestowed monopolistic nature of investor-owned utilities is unique because it mandates individual association with a private corporation's actions and speech. States enforce utilities' franchise rights through its police power, which prohibits competition and nullifies consumer choice.[178] If you need electricity, then you are required to associate with a state-designated monopolist utility as a ratepayer, and you are required to pay the rate scheme approved by the state PUC.

Consider ratepayers in the state of Georgia. If you live in Atlanta and think that Georgia Power's lobbying activities in the state legislature are inexcusable, you cannot purchase electricity from a different utility company.[179] Your only option for obtaining electricity from a company that is not Georgia Power is to relocate outside of the utility's footprint to a different part of the state.[180] Because of the state-sanctioned and state-enforced monopoly, ratepayers are compelled to associate with an investor-owned utility company or forgo any utility services, which are "a function of the state."[181] There is no other recourse for ratepayers to obtain utility services.

The state-mandated association is even greater in the monopoly utility context than in the bar association or public-sector union context. Attorneys have selected into their profession, and public-sector employees have opted to work for a state employer. Utility ratepayers have made no such choice. If ratepayers would like to have access to utility services, then they have no other course of action for obtaining utility services other than to take service from the designated monopoly utility and to pay state-set rates.

177. U.S. v. United Foods, Inc., 533 U.S. 405, 410, 413 (2001).

178. *See, e.g.*, Georgia Power Co. v. Georgia Pub. Serv. Comm'n, 675 S.E.2d 294 (Ga. Ct. App. 2009).

179. GA. CODE ANN. § 46-3-2 (2024) ("[I]t is necessary and appropriate that the state establish and implement a plan whereby every geographic area within the state shall be either assigned to an electric supplier or declared unassigned as to aby electric supplier; that, to accomplish such a plan, it is necessary that all electric suppliers within the state be subject to this part; that the commission be delegated power, authority, and jurisdiction with respect to such plan.").

180. *See 2025 Facts & Figures*, GA. POWER (last visited June 10, 2025), https://www.georgiapower.com/about/company/facts-and-figures.html.

181. Smyth v. Ames, 169 U.S. 466, 544 (1898).

Investor-owned utilities speak with "powerful political and civic consequences"[182] in a manner that "impute[s] some meaning to membership" as a ratepayer.[183] When utilities engage in political activities, "part of its expressive message is that its members [its ratepayers] stand behind its expression."[184] The ratepayers are "part of the message."[185]

Like state bar associations, utilities purport to engage in expressive political activity on behalf of their ratepayers. For example, in 2019, when a FirstEnergy Vice President testified before the Ohio House of Representative's Energy and Natural Resources Committee on House Bill 6, Ohio's nuclear and coal bailout legislation, Dave Griffing tied its captive customers to FirstEnergy's support of the legislation. In his testimony, Griffing urged HB 6's passage because the legislation "provides more savings to customers."[186] Similarly, Dominion Energy when discussing 2023 legislation establishing Dominion's two-year profit margin, it did so by framing the legislation as beneficial for the utility's customers.[187] Compelling membership therefore compels support of a utility's message. "If a [ratepayer] disagrees" with the message, "then compelling his or her [association] infringes on the freedom of association."[188]

Assuming state action and mandated association with an expressive entity, we must next consider the character of the utilities' expressive conduct. Are states compelling ratepayer association and subsidization of utilities' political speech and political conduct? Or is the expressive conduct at issue commercial[189] and

182. Knox v. Service Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 310 (2012).

183. *See* Crowe v. Oregon State Bar, 112 F.4th 1218, 1234-35 (9th Cir. 2024) (canvassing cases and explaining that "a plaintiff cannot demonstrate that his freedom of association is infringed merely by pointing to the fact that he is required to interact with an organization in some sense. Instead, he must show that the required association impairs his expression. Other cases make clear that a plaintiff can make that showing if a reasonable observer would impute some meaning to membership in the organization and the plaintiff objects to that meaning.").

184. McDonald v. Longley, 4 F.4th 229, 246 (5th Cir. 2021). *Compare id.*, *with* B.B.C. v. Williams, 990 F.3d 614, 619-20 (8th Cir. 2021) (explaining that features of the vaccine op-out form make clear that there is no risk of association with the government's message).

185. *McDonald*, 4 F.4th at 246.

186. *See* Dave Griffing, Remarks at the Energy and Natural Resources Committee, Ohio House of Representatives, at 1, 5 (May 8, 2019), https://www.documentcloud.org/documents/23599747-testimony_davegriffing_firstenergysolutions_582019/.

187. *See* Charlie Paullin, *General Assembly Deal Sets Dominion Profits for Two Years While Overhauling Regulatory System*, VA. MERCURY (Feb. 25, 2023, 6:27 PM), https://virginiamercury.com/2023/02/25/general-assembly-deal-sets-dominion-profits-for-two-years-while-overhauling-regulatory-system/ ("'This legislation is a win for customers and regulatory oversight,' said Dominion spokesperson Aaron Ruby in a statement. 'It will lower electricity bills for our customers, reduce the impact of rising fuel costs and strengthen [Virginia Service Corporation Commission] oversight.'").

188. *See McDonald*, 4 F.4th at 246.

189. *See, e.g.*, *Joint Reply Comments of PJM Interconnection et al*., FERC Docket No. RM 22-5-000 (Apr. 28, 2022) [hereinafter *Joint Reply*] (alleging that trade association expenditures are not intended to fund specific speech, but instead involve funding an initiative that enables utilities to work with government officials towards outcomes that promote reliable electric service at just and reasonable rates).

"uncontroversial"[190] speech? The characterization of utility speech and activity could be consequential for determining the standard of judicial review as certain commercial speech could be subject to intermediate scrutiny.[191] Both compelled commercial and political speech, however, are reviewed under an exacting scrutiny standard.[192]

Following *Janus*, any expressive activity that utilities engage in with the goal of both modifying the distribution or collection of public money on issues of public concern, is political. The *Janus* Court also explained that speech about "controversial" subjects, such as climate change, raises sensitive political topics and as a result, "occupies the highest rung of the hierarchy of First Amendment values and merits special protection."[193]

Any lobbying effort—whether undertaken by utility, trade association, or 501(c)(4) entity using utility funds—falls comfortably within the *Janus* Court's political speech framework. Utilities, their trade associations, and their associated 501(c)(4) entities, lobby on a breadth of local, state, and federal regulations and legislation, all of which propose to direct public money in response to issues of public concern, such as climate change and infrastructure investment.[194] Some issues, like utility service improvements and energy efficiency programs, may initially strike us as less controversial than other policy issues, such as ambitious targets for renewable energy or the role of the administrative state in promulgating environmental and energy regulations. Even these topics, however, implicate issues of public spending, and they too can be the subject of impassioned debate.

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190. National Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 768 (2018) (citing Zauderer v. Office of Disciplinary Couns., 471 U.S. 626 (1985) (proposing that "our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their commercial speech.")).

191. Commercial speech has been thought to enjoy a lesser degree of constitutional protection and courts generally do not apply "strict" scrutiny that is thought to otherwise apply outside the commercial sphere. *See* Knox v. v. Service Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 309-10, 321-22 (2012); Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562-63 (1980). *But see* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522-23 (Thomas, J., concurring) (arguing that there should be no distinction between commercial and political speech because there is not a philosophical or historical basis for doing so); *see also* Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 504-06 (Thomas, J., dissenting). Regardless of the distinction establishing commercial speech, prior precedent establishes that "exacting scrutiny" applies even under the test used for compulsory subsidization of commercial speech.

192. Janus v. American Fed'n of State, Cnty., and Mun. Emps., 585 U.S. 878, 894 ("[P]rior precedent in this area . . . had applied what we characterized as 'exacting scrutiny,' a less demanding test than the 'strict' scrutiny that might be thought to apply outside the commercial sphere. Under 'exacting scrutiny,' we noted, a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'") (internal citations omitted).

193. *Id*. at 914-15 (internal citations omitted). *See also* Brian Kennedy & Alec Tyson, *How Americans View Climate Change and Policies to Address the Issue*, PEW RSCH. (Dec. 9, 2024), https://www.pewresearch.org/science/2024/12/09/how-americans-view-climate-change-and-policies-to-address-the-issue ("A large majority of Democrats (86%) say climate change is affecting their local community at least some. By contrast, fewer than half of Republicans say this (41%). A majority of Republicans (58%) say climate change is having not too much or no impact at all on their community . . . Seven-in-ten Democrats say human activity contributes a great deal to climate change; another 22% say it contributes some. Republicans are far less likely to see a human impact . . . 44% [of Republicans] say natural patterns in the Earth's environment contribute a great deal to climate change.").

194. *See generally supra* Part III.A.

For example, utility service improvement issues may not seem particularly ideological or contentious given an expressed desire by the utility, the state, and utility customers, for all ratepayers to enjoy better service outcomes. Yet service improvement issues are contentious because the conversation necessarily implicates issues like undergrounding, utilities' redlining patterns, and community rights to self-generate. Utilities in certain states have historically failed, and arguably are continuing to fail, to invest in power delivery systems in low and medium-income communities of color.[195] These communities are forced to rely on aging infrastructure and as a result, are often the most prone to frequent outages and prolonged blackouts.[196] In turn, states can bear the direct cost of health care needs when communities are without power during extreme weather events and some states use public money to subsidize community solar to protect against utility blackouts and reduce costs.[197] The legacy and continued practice of utility redlining, as well as the state policy programs that use taxpayer money to respond to utility service failures, are hotly debated.

Trade associations and utility-associated 501(c)(4) organizations engage in other activities that extend beyond policy, legislative, and regulatory advocacy, as well as the financial support of political candidates.[198] For example, trade associations use member-dues to "identify[] and promote[] best practices [for resiliency

195. *See generally* CHANDRA FARLEY ET AL., ADVANCING EQUITY IN UTILITY REGULATION, GRID MODERNIZATION LAB'Y CONSORTIUM 20-27 (Nov. 2021), https://escholarship.org/content/qt1mr715sx/qt1mr715sx.pdf; Robert Walton, *The Energy System is 'Inherently Racist,' Advocates Say. How are Utilities Responding to Calls for Greater Equity?*, UTIL. DIVE (Oct. 26, 2022), https://www.utilitydive.com/news/energy-system-inherently-racist-utilities-responding-equity-ej-justice40/634203.

196. *See, e.g.*, Comments of the Detroit Area Advocacy Organizations, No. U-20147, at 14-25, 35-43 (Mich. Pub. Serv. Comm'n Mar. 15, 2024), https://mi-psc.my.site.com/sfc/servlet.shepherd/version/download/0688y00000CWa5oAAD (arguing that DTE's planned distribution grid investments "prioritize[e] non-[environmental justice (EJ)] communities in distribution grid conversion projects and select[] most EJ communities with the least reliable service for 4.8 kV hardening…"); Urban Core Collective's Comments on Consumers Energy Company's Electric Distribution Investment Plan, No. U-20147, at 32-35 (Mich. Pub. Serv. Comm'n Feb. 16, 2024), https://mi-psc.my.site.com/sfc/servlet.shepherd/version/download/0688y00000C2nBZAAZ ("Even with the [utility's] proposed EJ reliability flag and prioritization system, Archetype 4—which has significant overlap with EJ communities—is estimated to only receive 28 percent of the planned investments, even though it serves 40% of customers); *see generally* UTILITY REDLINING: INEQUITABLE ELECTRIC DISTRIBUTION IN THE DTE SERVICE AREA, WE THE PEOPLE MICH. (Aug. 2022), https://wethepeoplemi.org/wp-content/uploads/2022/08/DTE-Utility-Redlining-V3_20220822-FINAL.pdf.

197. *See, e.g.*, SOMAH, PROGRAM HANDBOOK 9-12 (2d. ed. 2020), https://aea.us.org/wp-content/uploads/2020/08/SOMAH_Handbook.pdf (explaining how Assembly Bill 693 created the program, funded at $100 million annually from a share of greenhouse gas auction proceeds). *See* Mario Alejandro Ariza, *Redlining Shaped the Power Grid. Communities of Color are Still Paying the Price*, FLOODLIGHT (May 15, 2025), https://floodlightnews.org/redlining-shaped-the-power-grid-communities-of-color-are-still-paying-the-price.

198. *See, e.g.*, *Joint Reply*, *supra* note 189 (alleging that trade association expenditures are not intended to fund specific speech, but instead involve funding an initiative that enables utilities to work with government officials towards outcomes that promote reliable electric service at just and reasonable rates); *Initial Comments of Edison*, *supra* note 46 (explaining "EEI provides member companies with a significant range of services that benefit electricity customers, beyond any lobbying activity that we report consistent with federal requirements," including grid resiliency and power restoration coordination, as well as meetings and conferences for "providing information, data exchange, and an opportunity for policy discussions aimed at ensuring the continued provision of affordable, reliable, and resilient clean electricity in a rapidly changing world.").

and power restoration] through benchmark efforts and forums."[199] While these discrete activities are not framed as ideological or political in nature, utility trade association activity is aimed at guaranteeing and protecting the for-profit utility revenue model, which itself is a contentious political issue that impacts public spending. In any case, utilities, trade associations, and 501(c)(4) entities engage in political activity. Following *Janus*, any attempt to differentiate between "permissible" and "impermissible" utility, trade association, and utility-associated 501(c)(4) political activity generates line-drawing issues identified by the Court as unworkable.

For purposes of classifying utilities' speech or activity, the more challenging issue is raised when utilities and their trade associations engage in goodwill or issue advertising. The Supreme Court maintains a distinction between speech proposing a commercial transaction and other varieties of speech.[200] The "core" of commercial speech is "speech which does no more than propose a commercial transaction."[201] Whether speech that combines commercial and noncommercial elements is classified as commercial turns on whether the communication is an advertisement, whether it makes references to a specific product, and whether the speaker has an economic motivation.[202] While no one factor is sufficient to designate speech as commercial, the Court has strongly implied that all are not necessary.[203]

It is conceptually difficult, however, to distinguish between commercial and political speech.[204] Consider a hypothetical utility issue advertisement. If a monopoly utility engages in a traditional paid advertising campaign to garner public support for a proposed utility-owned transmission line by highlighting the utility and the benefits of the line to its ratepayers, is this commercial or political speech? On one hand, the utility's speech could be characterized as commercial.[205] The

199. *See Issues & Policy: Reliability, Resilience & Emergency Response*, EEI (last visited Jul. 15, 2025), https://www.eei.org/en/issues-and-policy/reliability-emergency-response ("EEI supports member companies by identifying and promoting best practices through benchmark efforts and forums and finds collective solutions to business continuity programs, processes, and projects across the industry and companies . . . Electric companies affected by significant outages often to the industry's mutual assistance network—a voluntary partnership of electric companies from across the country—to help speed restoration.").

200. *See generally* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980). *But see* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522-23 (Thomas, J., concurring) (arguing that there should be no distinction between commercial and political speech because there is not a philosophical or historical basis for doing so); *see also* United States v. United Foods, Inc., 533 U.S. 405, 413 (2001) (noting that speech "need not be characterized as political before it receives First Amendment protection").

201. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) (internal citation omitted).

202. *See generally id*. at 66-67.

203. *See generally id*. at 67 n.14.

204. *See generally* Erwin Chemerinsky & Catherine Fisk, *What is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RSRV. L. REV. 1143, 1148 (2004) (explaining "the Court has explicitly held that the fact that the speech concerns public issues is not sufficient to take it out of the realm of commercial speech . . .").

205. *See* Central Hudson Gas & Elec. Corp., 447 U.S. at 566-68 ("Most business—even regulated monopolies—are unlikely to underwrite promotional advertising that is of no interest or use to consumers. Instead, a monopoly enterprise legitimately may wish to inform the public that it has developed new services or terms of doing business . . . In the absence of factors that would distort the decision to advertise, we may assume that the

speech would certainly function as a brand advertisement; the media would promote the utility's brand by tying the company's actions to a stated desire to build infrastructure because ratepayers would benefit. In the narrowest sense, the speech also refers to a specific product: utility services that are made possible by utility-owned infrastructure, like the transmission line. There is also little doubt that the utility would speak because of the economic incentives that encourage utility capital expenses; engendering goodwill amongst ratepayers reduces the risk of ratepayer opposition during the regulatory proceedings required to approve the infrastructure and recoup the utility costs and profits.

On the other hand, because of the utility's legally-protected monopoly, it seems like the company's speech—both in form and function—could be distinct from that of traditional corporate actors who engage in product promotion within a competitive marketplace.[206] In the first instance, it is possible that the utility's speech would not function as an advertisement. If the utility is acting not as a commercial actor, but instead as a political entity anticipating a regulatory challenge that could nullify a lucrative profit opportunity, then perhaps the speech should not be characterized as an advertisement.[207] Additionally, when a utility speaks, it does not do so in order to sell utility services or reach new consumers. A utility's services are prescribed by regulators, and its customers are already defined and captive, unable to make choices that reflect individual commercial decisions.

The commercial speech doctrine provides us with little clarity for disentangling utilities' political and commercial speech. Nonetheless, "the right against compelled speech is not, and cannot be restricted to ideological messages,"[208] and as a result, "exacting scrutiny" applies to both compelled commercial and compelled political claims.

B. Compelled Association Claim

When association with a private entity is compelled by the state, "exacting scrutiny" must be applied if the group is engaging in any expressive activity on issues of public concern. In order to justify the state-forced association of ratepayers with utilities' speech, the state must show that the association "serve[s] a compelling state interest that cannot be achieved through means significantly less

willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.").

206. In *Central Hudson*, the majority reasoned that "speech by electric utilities is valuable to consumers who must decide whether to use the monopoly service or turn to an alternative energy source, and if they decide to use the service how much of it to purchase." *Id*. at 585 (Rehnquist, J., dissenting). This reasoning is premised on the mistaken assumption that all consumers can select their utility service provider.

207. *See* Chemerinsky & Fisk, *supra* note 204, at 1155 ("[A]n important distinction between commercial and noncommercial speech is whether the speaker is a person or entity 'engaged in commerce.'") (citing Kasky v. Nike, Inc., 45 P.3d 234, 258 (Cal. 2002)).

208. National Assoc. of Mfrs. v. NLRB, 717 F.3d 947, 957 (D.C. Cir. 2013).

restrictive of associational freedoms."[209] After *Janus*, it is no longer sufficient for the intrusion on First Amendment rights to be "germane" to some state interest.[210]

States may have a compelling interest in providing citizens with the opportunity to purchase reliable and safe utility service at just and reasonable rates,[211] but utilities' political speech does not further the state's interest. Even though utilities often engage in lobbying and other political activity using the language of ratepayer interests, they do so in a misleading manner because the interests of ratepayers often diverge from the interests of utilities and their shareholders. Moreover, ratepayer interests are already represented by state attorneys general or offices of consumer advocates. There is no discernable correlation between the state's interest in fair and effective utility regulation and utilities and their trade associations engaging in political lobbying, advertising, and contributing to 501(c)(4) organizations.

The state's interest in providing citizens with an opportunity to purchase reliable and safe utility service could be advanced through effective ratemaking or integrated resource planning proceedings, to which utilities are a required party. If that is the case, then the state could allow utilities to participate in this narrow set of regulatory proceedings: the utility could charge ratepayers for reasonable expenses associated with participating in the proceeding. Utilities would be unable to comment or engage in the proceedings on behalf of ratepayers. This would assist in disentangling the utilities' expressive message from that of ratepayers.

If we accept the premise that state-compelled association with a private entity engaging in speech on matters of great public concern inflicts a serious First Amendment associational injury, then the available alternative indicates that this injury is unnecessary. After *Janus*, states cannot continue mandating its citizens to take utility service from a monopoly utility company that is engaging in political activities.

C. Compelled Subsidization Claims: Utilities and Trade Associations

When ratepayers object to a utility's political activity but are nonetheless compelled to subsidize the political activity, ratepayer First Amendment rights are violated because compelling people to give money to a private entity that will be

209. Knox v. Service Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 310 (2012) (citing Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)); see *also* Janus v. American Fed'n of State, Cnty., and Mun. Emps., 585 U.S. 878, 916 (2018).

210. In *Keller*, the Supreme Court observed that *Abood*'s germaneness requirement is appropriate in the exacting scrutiny framework for state bar association claims. Keller v. State Bar of Cal., 496 U.S. 1, 13 (1990). But unlike with state bar associations, the Court has never extended the *Abood* germaneness standard to utility expenses in a distinct case that remains binding on lower courts. For this reason, *Keller*'s germaneness requirement remains for state bar associations "despite its increasingly wobbly, moth-eaten foundations," but there is no such distinct germaneness standard for utilities that survives *Janus*. McDonald v. Longley, 4 F.4th 229, 253 (5th Cir. 2021).

211. *See* Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 19 (1986) (plurality opinion) ("The State's interest in fair and effective utility regulation may be compelling").

used for political speech is akin to compelling people to speak themselves.[212] After *Janus*, federal and state practices of authorizing rates after utilities self-identify and self-segregate expenses associated with its own political activity, as well as that of its trade associations, no longer satisfies the First Amendment. Specifically, the *Janus* Court overturned the *Abood* approach of "list[ing] categories of expenses and set[ting] out the amount in each category that is said to be attributable to chargeable and nonchargeable expenses."[213] This concern applies in the utility context. Ratepayers face an impossible task when trying to monitor and tie utility and trade association expenses to specific activities.

Compelled ratepayer subsidies for utility political activities do not survive exacting scrutiny. First, there is not a connection between the state's interest in providing fair and effective utility service for its citizens, and many of utilities' political activities that ratepayers are forced to subsidize. Utility and trade association lobbying activities generally do not inherently result in more effective utility service for ratepayers. Instead, utilities' lobbying is designed to maximize profits and protect the monopoly franchise model. For example, when FirstEnergy charged ratepayers for lobbying expenses and political corruption activities during its effort pass Ohio House Bill 6, its actions were not tied to rendering utility service. Instead, FirstEnergy acted to make utility service more costly for ratepayers by shifting the financial consequences of poor management decisions away from utility shareholders and onto its ratepayers. Similarly, when EEI lobbies against net metering policies, or gas utilities lobby against electrification building policies, utilities and their trade associations act in a manner to protect monopoly franchises. Because utilities can derive value from policy barriers that limit competition, they act in spite of documented evidence that competition can benefit ratepayers and that electrification improves health outcomes for state residents.

While it could be possible for state and utility interests to align on discrete "matters of great public concern," ratepayer-funded lobbying is not required to

212. The *Janus* Court accepted the premise, articulated in *Abood*, that individual rights protected by the First Amendment are disrupted when the state requires objecting individuals to support or subsidize a private organization's ideological cause. It is difficult, of course, to reconcile this premise with the reasoning that undergirds the government's authorization to collect fees and taxes from individuals protesting. *See generally* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2004) ("We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns."). *See also* Kate Andrias, *Janus's Two Faces*, 2018 SUP. CT. REV. 21, 36-38 (2019); Baude & Volokh, *supra* note 143, at 10. I make no attempt to reconcile the conflicting reasoning, but I will briefly note why I believe that utilities' speech should not be classified as government speech. First, a utility is not a "government entity" because state regulatory commissions lack substantial control over the companies. While utilities' revenue collection from ratepayers is subject to government oversight in order to protect the public from excessive rates, utilities' speech activity (governmental affairs, advertising decisions, etc.) is not. The government also lacks any control of utilities' speech and the utilities' corporate form. *Cf. Johanns*, 544 U.S. at 561 (finding government speech and noting that appointments to a Beef Promotion and Research Board were approved by the Secretary of Agriculture, as was "every word used in every promotional campaign. All proposed promotional messages were reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department"). Additionally, utilities are private for-profit corporations that take no funding "from appropriations made by the legislature." *Keller*, 496 U.S. at 11. Finally, utilities are not democratically accountable. *Cf.* Board of Regents of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000).

213. *See Janus*, 585 U.S. at 923.

realize these priorities. Instead, voluntary groups of consumer advocates can continue their current practices of engaging in political advocacy to improve service outcomes, and utility shareholders can shoulder their own political activity expenses. In 2023, Colorado, Connecticut, and Maine enacted statutes prohibiting utilities from using customer funds to support political activities,[214] and the three states have effectively managed regulatory proceedings and legislative sessions in the years since. Moreover, even if utilities maintain that certain political activity could benefit ratepayers, the *Janus* Court was clear that chargeability determinations, such as above-the-line and below-the-line USofA utility accounting rules, are no longer adequate to protect individual speech interests because the procedures are too burdensome. After *Janus*, chargeability determinations in the utility context violate the First Amendment and ratepayer dissent from these processes are presumed.

The state's interest in providing fair and effective utility service for its citizens similarly lacks a connection to the compelled ratepayer subsidization of utilities' advertising. Promotional advertising, which is designed to engender goodwill in a targeted audience, does not improve utility service to ratepayers. While some informational advertising, such as information identifying planned outages

214. *See* COL. REV. STAT. ANN. § 40-3-114 (2023); CONN. GEN. STAT. § 16-243p (2023); An Act to Require Transparency in Public Utility Advertising Expenditures, 2023 ME. LAWS 329 (codified as amended at ME. STAT. tit. 35-A, § 302 (2023)). California enacted the California Ratepayer Protection Act of 2025, which prohibits investor-owned utilities from using ratepayer money to support utility political influence activity, trade association dues, and certain promotional advertising. The Act defines "political influence activity" broadly to encompass direct or indirect influence of the political process. The Act further explains that regulators "shall assess a civil penalty, based on the severity of the violation, against a utility that violates" the prohibition on utilities charging ratepayers for prohibited activities. *See generally* 2025 CAL. LEGIS. SERV. CH. 634 (West). In 2025, Maryland enacted legislation that prevents utilities from recovering "through rates any costs associated with: membership, dues, sponsorships, or contributions to an industry trade association, group, or related entity exempt from taxation under § 501(c)(6) of the Internal Revenue Code." *See generally* MD. CODE ANN., PUB. UTIL. § 4-504(b)(1) (West 2025). This statutory language does not appear to apply to any political activity undertaken by the utility itself. *See* 2025 Md. Laws. 625. In 2019, New Hampshire enacted legislation prohibiting a utility from recovering lobbying or political activity costs undertaken directly or indirectly on behalf of a utility. *See* N.H. REV. STAT. ANN. 378:30-e (2019). The statutory language is narrow as it encompasses only those "lobbying" activities that would require registering as a lobbyist under state law. *Id*. The language does not appear to cover efforts to prevent legislation or regulatory proceedings from being initiated, or lobbying efforts that occur prior to the introduction of new legislation or regulatory proceedings. *Id*. "Political activity" only includes those activities conducted "in support of a candidate committee, a political committee, or an inaugural committee, or in support of or opposition to a candidate for public office." *Id*. The law also does not consider advertising, trade association or charitable contributions, and the direction of ratepayer funds to 501(c)(4) organizations that engage in "issue" advocacy. *See* N.H. REV. STAT. ANN. 378:30-e (2019). In 2023, the Louisiana Public Service Commission instituted a regulatory proceeding to investigate utilities' use of ratepayer funding on any "(1) activities meant to influence the outcome of any local, state, or federal legislation, ordinance, resolution, rule, measure, or other regulatory decision, (2) advertising, marketing, and/or public relations expenses that do not directly relate to a purpose or program that is required or authorized under statute or commission rule or order, and/or (3) organization or membership dues or other contributions to any organization, association, institution, corporation, or other entity that engages in lobbying or other similar activities meant to influence the outcome of any local, state, or federal legislation, ordinance, resolution, rule, measure or other regulatory decision." *See* Notice of Proceeding, Docket No. R-36832 (La. Pub. Utils. Comm'n Jun. 22, 2023), https://lpscpubvalence.lpsc.louisiana.gov/portal/PSC/ViewFile?fileId=3rw%2fqty7%2boI%3d. The Commission has not updated or clarified its rules, requirements for utility disclosure, or promulgated enforcement mechanisms.

or explaining bill-payment assistance programs, could support's the state interest in fair and effective utility service, promotional advertising does not. Advertising campaigns, which could include branding company swag for events, sponsoring sports stadiums, showcasing a monopoly utility's reliability in a printed advertisement, or discussing a utility's plan to underground transmission and distribution lines, do nothing to benefit the utility's captive ratepayers. Instead, the beneficial public relations generated by a utility's promotional advertising advances the financial interests of the private utility corporation and its shareholders by helping the utility avoid regulatory oversight or public scrutiny.

Utilities' contributions to PACs or 501(c)(4) organizations also do not improve the state's interest in fair and effective utility service. Political action committees raise and spend money to elect or defeat political candidates, and 501(c)(4) organizations engage in lobbying activity, issue advocacy, and political activity more broadly, on behalf of corporate donors. Utility preferred electoral and policy outcomes are not tied to states being able to provide citizens with the opportunity to purchase reliable and safe utility service.

To the extent that the state has a compelling interest in providing its citizens with the opportunity to purchase reliable and safe utility service at just and reasonable rates, the state can achieve that objective through means far less restrictive of speech rights. Notably, state legislators and PUCs can prohibit utilities from including any political activities—direct or indirect lobbying costs, the entirety of trade association dues, utility advertising costs, contributions to PACs and 501(c)(4) organizations—in rates. Several states already expressly forbid utilities from recovering certain political activity costs.[215] While utilities in remaining states would likely experience "unpleasant transition costs in the short term," unconstitutional "exactions cannot be allowed to continue indefinitely."[216] Any alleged financial harm incurred by the utility would be "the inability to extract mandatory dues from the plaintiffs in violation of the First Amendment, which is really 'no harm at all.'"[217]

For these reasons, government-authorized rates compelling objecting ratepayer subsidization of utility political activity fail "exacting scrutiny." Utilities use their own funds to engage in constitutionally protected political speech, but they can no longer extract funds from disapproving or unwitting ratepayers to fund their political speech, as well as the political activities of their trade associations.

VI. COHERING RATEPAYER ECONOMIC AND POLITICAL POWER

There are reasons that explain why governments adopted legal frameworks granting monopolies to private for-profit companies for the provision of utility

215. *See* COL. REV. STAT. ANN. § 40-3-114 (2023); CONN. GEN. STAT. § 16-243p (2023); An Act to Require Transparency in Public Utility Advertising Expenditures, 2023 ME. LAWS 329 (codified as amended at ME. STAT. tit. 35-A, § 302 (2023)); *See also* 2025 CAL. LEGIS. SERV. CH. 634 (West); MD. CODE ANN., PUB. UTIL. § 4-504(b)(1) (West 2025); 2025 Md. Laws. 625; N.H. REV. STAT. ANN. 378:30-e (2019); N.H. REV. STAT. ANN. 378:30-e (2019); Notice of Proceeding, Docket No. R-36832 (La. Pub. Utils. Comm'n Jun. 22, 2023), https://lpscpubvalence.lpsc.louisiana.gov/portal/PSC/ViewFile?fileId=3rw%2fqty7%2boI%3d.

216. *See Janus*, 585 U.S. at 929.

217. McDonald v. Longley, 4 F.4th 229, 255 (5th Cir. 2021).

services.[218] This legal and financial ordering, however, is not constitutionalized to provide monopoly utilities with a singular role in using ratepayer funds to control the future of the utility service model. In raising constitutional claims against rates approved by regulators that include political speech and political activity costs, ratepayers can assert their collective interests against utilities' economic and political interests.

Existing legal doctrines and regulatory practices limit ratepayer challenges to utilities' rates and practices. The Federal Power Act and relevant state laws require regulated entities to file tariffs showing all "rates and charges," as well as the "classifications, practices and regulations affecting such rates and charges" for any jurisdictional service.[219] When regulatory commissions approve a filed tariff, they "speak[] as the Legislature, and [their] pronouncement has the force of a statute."[220] Once rates are approved, the rate on file is considered "per se reasonable and cannot be the subject of legal action against the private entity that filed it."[221]

After rates are approved by a regulatory agency, ratepayers are generally unable to challenge filed rates in court.[222] In order to preserve the regulatory agency's primary rate setting jurisdiction, ratepayers can only challenge a utility's rates during the rate-case process.[223] Even when rates approved by regulatory agencies reflect improper methods or manipulated market prices, ratepayers generally cannot challenge the rate determination through fraud, antitrust, and consumer protection claims in court.[224]

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218. *See generally* Munn v. Illinois, 94 U.S. 113 (1876); Robert Bradley Jr., *The Insull Speech of 1898: Call for Public Utility Regulation of Electricity (The Origins of EEI's Support for Cap-and-Trade in Today's Energy/Climate Bill)*, MASTERRESOURCE (Apr. 29, 2010), https://www.masterresource.org/edison-electric-institute/the-insull-speech-of-1898/; Werner Troesken, *Regime Change and Corruption: A History of Public Utility Regulation*, in CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 259, 260-77 (2006).

219. 16 U.S.C. § 824d(c).

220. Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370, 385 (1932). *See also* Oklahoma Operating Co. v. Lowe, 252 U.S. 331, 339-40 (1920).

221. Alpert v. Nationstar Mortg. LLC, 983 F.3d 1129, 1129 (9th Cir. 2020) (quoting Tenore v. AT&T Wireless Servs., 962 P.2d 104, 108 (Wash. 1998)); *see generally* Entergy La., Inc. v. Louisiana Pub. Serv. Comm'n, 539 U.S. 39, 47-51 (2003); Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 18-19 (2d Cir. 1994).

222. *See* Transmission Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918, 929 (9th Cir. 2002) ("At its most basic, the filed rate doctrine provides that state law, and some federal law (e.g. antitrust law), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question.").

223. *See* Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 584-85 (1981)*; see also* Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409 (1986). One of the justifications offered for the doctrine is that in authorizing challenges to established rates, courts would functionally sanction certain ratepayers, likely the litigious and the well-resourced, to enjoy different rates than those who fail to challenge the reasonableness of rates.

224. *See, e.g.*, Breiding v. Eversource Energy, 939 F.3d 47, 56-57 (1st Cir. 2019) (holding that the filed rate doctrine barred consumers' claims that energy companies violated the Sherman Act and state consumer-protection and antitrust laws); Simon v. KeySpan Corp., 694 F.3d 196, 205-06 (2d. Cir. 2012) (noting that the filed rate doctrine applies "even when a claim is based on fraud or impropriety in the method by which the rate is determined," and that "when the filed rate doctrine applies, it is rigid and unforgiving"); H.J., Inc. v. Npurthwestern Bell Tel. Co., 954 F.2d 485, 489 (8th Cir. 1992); Taffet v. Southern Co., 967 F.2d 1483, 1494-95 (11th Cir. 1992).

Consequently, this filed rate doctrine confines ratepayer voices to state regulatory proceedings, which courts presume to be sufficient for balancing the interests of ratepayers vis-à-vis those of utilities. Of course, the modern commission rate-case proceeding reflects a process that is neither neutral nor equitable.[225] Utilities enjoy an initial procedural advantage insofar as they generate the information upon which a rate case is premised.[226] This procedural advantage compounds into a political advantage: utilities decide how they will use ratepayer funds to engage in advantageous political activity. In turn, the utilities' political advantage protects the existing utility service model.[227] Finally, utilities enjoy the legal safe harbor provided by the filed rate doctrine, which insulates commission rate decisions from further challenge. The result is a legal structure where ratepayers depend entirely on state utility regulators to respond to their voices, and to protect their associational and speech interests.[228]

To the extent that commission-approved rates continue to allow utilities to recover political costs, ratepayers can reassert their individual and collective interests by raising constitutional challenges to this practice in federal courts. If ratepayers are successful in asserting their voices, it is possible that the regulatory process could reflect a more balanced political participation process. Regulators, perhaps cognizant of potential legal challenges, may scrutinize utility political spending through stringent accounting requirements, and rate-case intervenors could benefit from the greater transparency during rate cases.

Ratepayers would still face the general challenge of responding to well-resourced utilities that can use shareholder funds to protect and realize profits. They would do so, however, in a political environment where utilities no longer purport to represent ratepayer interests.

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225. *See supra* Part III.B.

226. It is possible that ratepayers could petition state PUCs or FERC to initiate a rulemaking to amend their rules governing the recovery of political activity expenses. Whether, and how, regulatory agencies will respond to these requests is a different issue. Regardless, the constitutional injury is ongoing. For example, in March of 2021, the Center for Biological Diversity petitioned FERC to change its accounting and reporting changes to protect customers from subsidizing political activity. In December of 2021, the Commission issued a Notice of Inquiry, seeking comments on this issue. The Commission has not acted since. *See Biological Diversity's Opening Comments*, *supra* note 45.

227. When utilities lobby the regulators who decide their rate cases and cull support amongst the legislators with the authority to pass laws to protect or transform the utility industry, they do so, in part, to protect the existing regulatory process.

228. *See generally* Jedediah Purdy, *Beyond the Bosses' Constitution*, 118 COLUM. L. REV. 2161, 2182-83 (2018) (contextualizing the *Janus* opinion and noting that the "individual-rights core of the opinion is buttressed by the structural worry that the challenged regime distributes the power of political influence in a way that entrenches certain established interests . . .").

Ratepayer voices are critical to ongoing and future debates in the power industry. Given the scale of impending electric power investments to meet forecasted load growth[229] and the necessary infrastructure response to mitigate the consequences of climate change,[230] utilities' voices should not monopolize debates on issues in which ratepayers stand to bear the economic and environmental burden of these decisions.

VII. CONCLUSION

States cannot continue to mandate its citizens to subsidize, and associate with, utility and industry trade group political activity. When utilities engage in political activities using money that they collect from the public through government-set rates, the utilities and the state compel captive utility ratepayers to fund and associate with private political speech in violation of the First Amendment. In compelling association with, and financial support of, utility political activities, the state inflicts serious First Amendment injuries on objecting ratepayers.

Following the Supreme Court's decision in *Janus v. American Federation of State, County and Municipal Employees*,[231] utility ratepayer speech can no longer be burdened when utilities engage in activities with the goal of modifying how public money is distributed or collected. The modern First Amendment prohibits federal and state regulators from authorizing utilities to engage in political activity or to charge ratepayers for political speech.

229. *See, e.g.*, *AI to Drive 165% Increase in Power Demand by 2030*, GOLDMAN SACHS (Feb. 4, 2025), https://www.goldmansachs.com/insights/articles/ai-to-drive-165-increase-in-data-center-power-demand-by-2030; Cathy Kunkel, *Projected Data Center Growth Spurs PJM Capacity Prices by Factor of 10*, INST. ENERGY ECON. AND FIN. ANALYSIS (Jul. 30, 2025), https://ieefa.org/resources/projected-data-center-growth-spurs-pjm-capacity-prices-factor-10; ELIZA MARTIN & ARI PESKOE, EXTRACTING PROFITS FROM THE PUBLIC: HOW UTILITY RATEPAYERS ARE PAYING FOR BIG TECH'S POWER (Harv. Env't & Energy L. Program, 2025) (explaining the legal mechanisms that utilities use to socialize the costs of serving data centers to other ratepayers).

230. *See, e.g.*, *Electricity Grid Resilience: Climate Change is Expected to Have Far-Reaching Effects and DOE and FERC Should Take Actions*, U.S. GOV'T ACCOUNTABILITY OFF. (Mar. 10, 2021), https://www.gao.gov/products/gao-21-423t; U.S. GLOB. CHANGE RSCH. PROGRAM, FIFTH NATIONAL CLIMATE ASSESSMENT 279-81 (A.R. Crimmins, C.W. Avery, D.R. Easterling, K.E. Kunkel, B.C. Stewart, T.K. Maycock eds., 2023) (explaining efforts to enhance energy system resilience).

231. *See generally* 585 U.S. 878 (2018).

UTILITIES' DUTY TO SERVE IN AN ERA OF END-USE ELECTRIFICATION

Cole Jermyn & Michael Zimmerman[*]

Synopsis: Load growth has returned to utilities' distribution systems. At the same time as data centers and manufacturing are driving up electricity demand at the transmission and generation level (a subject that would warrant its own article), end-use electrification—the electrification of sectors historically reliant on fossil fuels, such as transportation and building space and water heating—is responsible for a growing need for utilities to expand and upgrade distribution infrastructure. This trend is placing new pressures on utilities to adapt their forecasting, planning, and building practices to serve these new loads. This article considers how the duty to serve, a bedrock component of public utilities' legal obligations, should inform the specific expectations placed on utilities by their regulators for modifying or expanding their distribution facilities to serve these loads. This includes consideration of the specific characteristics of these loads, as well as utilities' tools to forecast, plan for, and accommodate them. Lastly, this article discusses the extent to which utilities' existing legal duty to serve will—or may already—obligate them to anticipate and prepare for future end-use electrification loads.

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I. INTRODUCTION

Electric utilities have a duty to serve their customers. This duty, derived from both the common law origins of public utility regulation and the state statutes outlining the responsibilities of utilities and the agencies that regulate them, generally obligates utilities to connect new customers in their service territory to the electric grid and to continue providing adequate service.[1] The duty is not limitless, but utilities must generally make all "reasonable" extensions of service customers request, even when an individual extension may not be profitable.[2]

And those grid connections are suddenly a hot commodity. After several decades of little to no growth in total electricity demand in the U.S., demand is growing once again.[3] A rapid expansion of artificial intelligence data center deployments, newfound growth in electrified domestic manufacturing, and electrification of home heating and transportation[4] are driving a scramble for utilities and regulators to determine utility system needs.[5] The heterogeneity of these load sources further complicates this task: large industrial and data center loads that elect to connect to the grid typically take service directly from the transmission system, and therefore primarily affect transmission and generation systems; whereas end-use electrification's impacts arise most acutely on distribution systems.[6] These systems are subject to different regulatory regimes and thus pose

1. *See generally* Munn v. Illinois, 94 U.S. 113 (1877) (relying heavily on English common law in finding that states have the authority to regulate private businesses providing public services); Kristin George Bagdanov, *Decarbonizing the Obligation to Serve*, BLDG. DECARBONIZATION COAL. 23-36 (Mar. 5, 2025), https://building-decarb.org/wp-content/uploads/FINAL_Decarbonizing-the-Obligation-to-Serve_Oct2024.pdf (providing the statutory duty to serve provision of all 50 states and Washington, D.C.).

2. *See* Jim Rossi, *The Common Law "Duty to Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1252-53 (1998); *See* New York *ex. rel*. New York & Queens Gas Co. v. McCall, 245 U.S. 345, 351 (1917) ("Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render. To correct this disposition to serve where it is profitable and to neglect where it is not, is one of the important purposes for which these administrative commissions, with large powers, were called into existence. . . . ").

3. *See* Stéphanie Bouckaert & Timothy Goodson, *The Mysterious Case of Disappearing Electricity Demand*, INT'L ENERGY AGENCY (Feb. 14, 2019), https://www.iea.org/commentaries/the-mysterious-case-of-disappearing-electricity-demand.

4. As of this writing, the extent to which each of these sources contributes to electric demand growth remains unclear, particularly given wide variability in data center load forecasts. *See Tracking Electricity Consumption from U.S. Cryptocurrency Mining Operations*, U.S. ENERGY INFO. ADMIN. (Feb. 1, 2024), https://www.eia.gov/todayinenergy/detail.php?id=61364 [hereinafter *Tracking Electricity Consumption*].

5. John D. Wilson et al., *Strategic Industries Surging: Driving US Power Demand*, GRID STRATEGIES 3 (Dec. 2024), https://gridstrategiesllc.com/wp-content/uploads/National-Load-Growth-Report-2024.pdf ("The official nationwide forecast of electricity demand shot up from 2.8% to 8.2% growth over the next five years to 66 GW through 2029 -- but with an additional 61 GW of growth in preliminary updates, **nationwide electric demand is forecast to increase by 15.8% by 2029**.").

6. *See Characteristics and Risks of Emerging Large Loads*, N. AM. ELEC. RELIABILITY CORP. 9-11 (July 2025), https://www.nerc.com/comm/RSTCReviewItems/3_Doc_White%20Paper%20Characteristics%20and%20Risks%20of%20Emerging%20Large%20Loads.pdf (describing how different independent system operators (ISO)/regional transmission organizations (RTO) define large loads (e.g. by voltages above 115kV or peak loads above 75 megawatts) and how the ISO/RTO must evaluate transmission service applications by these loads).

different questions about the scope of a utility's duty to serve. These questions are important, but are too broad to cover in one article, so this piece focuses on the utility obligations to serve as they relate to the planning, construction and operation of distribution system infrastructure.

At the distribution level, where utilities work most directly under the eye of state regulators, the most significant driver of new load is end-use electrification, generally defined to include any growth in electricity consumption that replaces fossil fuel consumption.[7] This includes homes replacing furnaces running on fossil gas or home heating oil with heat pumps, electric vehicles and chargers taking the place of gasoline- and diesel-powered vehicles and fueling stations, and businesses replacing innumerable types of equipment with electrified versions. These load sources frequently come online much faster than comparably sized traditional loads. For example, an electric truck charging depot can have the same electric demand as a municipality but can be built in a fraction of the time.[8]

Early evidence suggests that utilities' historical distribution system planning and interconnection practices struggle to keep up with customers' end-use electrification. In California, the state at the forefront of transportation electrification in the U.S., fleets and charging station operators regularly report multi-year delays in connecting their chargers to the grid.[9] They are not alone, with housing, agriculture, telecommunications, and local government customers reporting similarly long timelines.[10] Other states with electrification or climate policies that encourage end-use electrification are feeling similar pressures. Regulators in several such states, including Minnesota, New York, Colorado, and Massachusetts, have acknowledged that more proactive efforts on the part of utilities to prepare their

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7. This is not to suggest that generation and transmission facility adequacy is not also a concern of state regulators, particularly in those "vertically-integrated" states where utilities provide bundled retail service. But that is outside the scope of this article.

8. *See Staff Proposal for the High DER Proceeding*, CAL. PUB. UTILS. COMM'N ENERGY DIV., at 51 (Mar. 13, 2024), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M527/K221/527221491.PDF [hereinafter *Staff Proposal*] ("the EV charging depots needed to facilitate transportation and freight electrification, which can demand the power equivalent to a small town, can be installed by developers in a matter of weeks.").

9. *See* Opening Comments of Powering America's Commercial Transportation on the Administrative Law Judge's Ruling Directing Parties to Respond to Questions on Energization Issues, Rulemaking No. 24-01-018, at 6 (Cal. Pub. Utils. Comm'n June 18, 2024), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M534/K105/534105479.PDF [hereinafter Opening Comments] ("PACT members have shared anecdotal information regarding utility responses to 2-5 MW projects in Southern California, noting that these requests are frequently quoted an energization date into 2029. Most of those projects are then put on hold, postponed, or canceled because of this lengthy energization timeline.").

10. *See, e.g.*, Comments of City and County of San Francisco on Order Instituting Rulemaking to Establish Energization Timelines, Rulemaking No. 24-01-018, at 2 (Cal. Pub. Utils. Comm'n Feb. 20, 2024), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M525/K670/525670863.PDF ("San Francisco has historically experienced delays to the energization of essential projects that required service from the electrical distribution grid."); Comments of California Broadband & Video Association in Response to Order Instituting Rulemaking to Establish Energization Timelines, Rulemaking No. 24-01-018, at 2 (Cal. Pub. Utils. Comm'n Feb. 20, 2024), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M525/K362/525362121.PDF ("In CalBroadband members' experience, it can often take up to 18 months, and sometimes much longer, for the IOUs to energize a power supply after communications service providers submit an application"); Motion for Party Status of the Agricultural Energy Consumers Association, Rulemaking No. 24-01-018, at 2 (Cal. Pub. Utils. Comm'n Feb. 29, 2024), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M526/K148/526148061.PDF ("Some AECA members have been told they must wait six years to get the power necessary.").

systems for electrification-driven load growth are needed.[11] But energization delays will not be limited to those states. While state policy and regulation is a major driver of electrification in the near-term, as electrification technologies continue to become cost-competitive even in the absence of policy support, they will increasingly pose challenges to distribution utilities across the country.

The accelerating need for utilities to upsize their distribution grids, and the cost implications of doing so, raise several questions regarding how the duty to serve should be applied in this context. What can regulators reasonably expect of utilities when it comes to forecasting these future loads? How should utilities be adapting their planning processes in light of these updated forecasts? Does the duty to serve include a timeliness component, and if so, how should it be defined? What are utilities' obligations with respect to emerging practices that can accelerate the service connection process for customers?

This article seeks to propose answers to such questions. It posits that utilities' duty to serve inherently includes the obligation to account for incoming end-use electrification, and that utilities that fail to do so will increasingly find themselves at legal risk.

The remainder of this article is structured as follows. Part I summarizes the historical basis of the duty to serve, and the used-and-useful and prudence tests as applied to public utilities. Part II discusses the impacts to the distribution grid utilities, and their regulators, can expect from end-use electrification. Part III addresses how utilities' duty to serve can be interpreted to reasonably meet the needs of customers with end-use electrification load, including anticipating future loads and providing adequate service. Part IV concludes and discusses topics warranting further scholarship.

II. HISTORY OF THE DUTY TO SERVE, USED-AND-USEFUL TEST, AND PRUDENCE TEST

A. Duty to Serve

Like much of U.S. law, utilities' duty to serve has its roots in English common law from the 19th century and earlier.[12] The duty was driven by the realities

11. *See* Order Establishing Proactive Planning Proceeding, No. 24-E-0364, at 4 (N.Y. Pub. Serv. Comm'n Aug. 15, 2024), https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={80465791-0000-C51E-B4A0-7B56E347E0F5} ("The Commission is instituting this proceeding to establish a statewide, collaborative framework for proactive planning to support the needs of New Yorkers as we focus on electrification of the transportation and building sectors to further our climate change goals."); Notice Soliciting Stakeholder Members, Docket No. CI-24-318, at 1 (Minn. Pub. Utils. Comm'n Sept. 26, 2024), https://efiling.web.commerce.state.mn.us/documents/%7BC0452F92-0000-CE12-AED7 A7BB3DD051CB%7D/download?contentSequence=0&rowIndex=6 (creating a stakeholder working group to "develop a framework for proactive upgrades and cost allocation for Commission consideration and possible adoption."); Notice of Proposed Rulemaking, Decision No. 20R-0516E, at 30 (Colo. Pub. Utils. Comm'n Nov. 25, 2020), https://www.sos.state.co.us/CCR/Upload/NoticeOfRulemaking/AddInfoAttach2020-00933.pdf; Order Approving Electric Sector Modernization Plans, Docket No. 24-10, 24-11, and 24-12, at 13-14 (Mass. Dep't of Pub. Utils. Aug. 29, 2024), https://fileservice.eea.comacloud.net/V3.1.0/FileService.Api/file//igggdddj?dFRGoJKkAru50g4f2swgdmFJ0ioKRMXdZYr4j7j/42qk9v9pxUxyG6LkaCeWBSjqbmMlNqhcSkxPf0qUr1gASPKrYE1qejvebf677PtCVStUdHoHpEGELGLGjR+ZpYgt.

12. Rossi, *supra* note 2, at 1244.

of operating certain businesses. Mills and ferries, for example, provided necessary services for the communities they served but required large capital investments that made competitive service from other entities infeasible or ultimately harmful to the provision of any service at all.[13] Allowing these services to operate as monopolies, however, ran the risk that the operator could overcharge or exclude customers, ultimately harming the public interest. To avoid this outcome, judges created a duty to serve, under which the holder of such a monopoly (also known as a franchise) serves anyone wishing to use their services.[14]

In its absorption and adaptation into U.S. law around the turn of the 20th century, the duty to serve was useful for stemming the anticompetitive practices of new monopoly-holders such as railroads.[15] At the time, railroads would regularly offer particular customers such as Standard Oil lower rates than other shippers in exchange for all of their business.[16] State courts repeatedly found that through their role as common carriers and holders of a state-granted monopoly, the duty to serve obligated railroads not only to serve all prospective customers but also to treat those customers equally with respect to their costs of service.[17] The Supreme Court endorsed a broad conception of the duty, finding in *Munn v. Illinois* that states could regulate the rates of private businesses when "necessary for the public good" and where the private property in question is "affected with a public interest."[18] And the Court went even further in *Nebbia v. New York*, finding that "there is no closed class or category of businesses affected with a public interest . . . ."[19] Instead, "'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good."[20]

U.S. courts incorporated the duty to serve into the obligations of industries we now identify as public utilities at this time as well, including water, telephone and gas utilities.[21] Even before the enactment of statutes outlining the duty and creating the regulatory agencies that would eventually enforce it, state courts widely recognized the duty to serve as it applies to these industries.[22] But, exclusive reliance on courts to enforce the duty was becoming unworkable for a number of reasons including the cost of litigation, companies' reliance on settlements to avoid adverse precedents, and courts' institutional inadequacy at defining and enforcing "reasonable" rates.[23] Statutes such as the Interstate Commerce Act sought to address this by more clearly establishing the obligations of these public interest-

13. *Id*. at 1244-46.

14. *Id*. at 1244. In return, customers requiring such services may be required to use those services rather than those of a third party—e.g. requiring "all inhabitants of the medieval manor to grind all grain at the lord's mill." *Id*.

15. Rossi, *supra* note 2, at 1246.

16. *Id*.

17. *Id*. at 1246-48.

18. 94. U.S. 113, 125-26 (1877).

19. 291 U.S. 502, 536 (1934).

20. *Id*.

21. Rossi, *supra* note 2, at 1248-49.

22. *Id*.

23. *Id*. at 1250.

affected businesses, and eventually states established regulatory agencies to define and enforce these obligations outside of the judicial system.[24]

Under this regulatory system, these agencies—typically known as public utility commissions (PUCs) or public service commissions (PSCs)[25]—enforce a version of the following: utilities are granted a utility franchise (i.e. monopoly) to provide safe and adequate service to all interested parties in a particular service territory.[26] In return, the PUC has the authority over the rates a utility charges its customers, which must be just and reasonable.[27] Every state now has a statute in place defining the duty to serve.[28] Some of these statute are explicit in invoking utility's duty; Alabama's statute, for example, states that "[e]very utility shall render adequate service to the public and shall make such reasonable improvements, extensions and enlargements of its plants, facilities and equipment as may be necessary to meet the growth and demand of the territory which it is under the duty to serve."[29] In other states, the statute focuses on the PUC's authority and responsibilities. For instance, Georgia law states that "[t]he commission may, either by general rules or by special orders in particular cases, require all companies under its supervision to establish and maintain such public services and facilities as may be reasonable and just."[30]

Housed within the overarching framework of nondiscriminatory service in exchange for just and reasonable rates set by each of these state laws are the obligations of utilities to connect and serve new customers.[31] Regardless of the specific statutory formulation, by the end of the 20th century the duty to serve was generally regarded as containing three related obligations: (1) an obligation to extend service to new customers within the service territory, (2) an obligation to provide service that is adequate, and (3) an obligation to continue providing that service.[32] None of these obligations is limitless, with lawmakers, regulators, and courts all weighting in at different times to define when these obligations apply

24. *Id*.

25. Other titles include "corporation commission," "board of public utilities," and "department of public utilities" to name a few. *See Public Utilities Commissions*, COMPARE POWER (last visited Sep. 15, 2025), https://comparepower.com/public-utility-commissions/.

26. Bagdanov, *supra* note 1, at 6.

27. *Id*.

28. *See id*. at 23-36; Heathery Payne, *Unservice: Reconceptualizing the Utility Duty to Serve in Light of Climate Change*, 56 U. Rich. L. Rev. 603, 660-61 (2022).

29. ALA. CODE § 37-1-49 (2025).

30. GA. CODE ANN. §46-2-20(c) (2025).

31. State laws vary in how it describes this nondiscrimination requirement, with some statutes stating that service must be "nondiscriminatory" or "without discrimination", while others prohibit utility actions that are "unjustly" or "unduly" discriminatory. *See* D.C. CODE §1-204.93 (2025); 220 ILL. COMP. STAT. 5/8-101 (2025); WYO. STAT. ANN. § 37-3-112 (2025); KAN STAT. ANN. § 66-101(b) (2025). As a practical matter, a "nondiscriminatory" standard still accommodates a degree of reasonable discrimination among customers; for example, utilities may still sort customers into different rate classes based on relevant shared characteristics.

32. Rossi, *supra* note 2, at 1243 ("As applied today in most states, the public utility duty to serve entails several obligations, among them duties to interconnect and extend service if requested, to provide continuing reliable service, to provide advanced notice of service disconnection, and to continue service without full payment."); *See also The Duty of a Public Utility to Render Adequate Service: Its Scope and Enforcement*, 62 COLUM. L. REV. 312, 313-22 (1962) [hereinafter *Duty of a Public Utility*] (discussing the obligation to render service to customers, the scope of adequacy of service, and the requirements related to abandonment of service).

and the qualifications utilities can place on meeting them. The general formulation of the duty to serve, however, remains very much alive in statutory language and PUC decisions nationwide.

B. Prudence and Used-and-Useful Tests

Often alongside, and at times in tension with, the duty to serve are the requirements that a utility's investments be "prudent" and "used-and-useful" to be eligible for cost recovery. Prudence is a backwards-looking analysis that seeks to determine whether the utility's decision-making was reasonable given the information available at the time it made those decisions.[33] Used-and-useful, in contrast, is a present-oriented analysis to determine whether a utility investment is actually serving customers (used) and is providing benefits to those customers by lowering costs or increasing service quality (useful).[34]

In fulfilling these expectations, utilities must balance the need to minimize costs with the duty to serve customers safely and reliably. Utilities could spend significantly more money than they do today to make their systems as safe and reliable as possible, but this would come at the expense of enormous increases in the rates customers must pay for service, which may render such investments imprudent. Conversely, the utility could cut investment drastically. This would reduce customers' rates but risks degrading system reliability and safety, thereby violating the utility's duty to serve. PUCs apply these tests as part of their consideration of utilities' requested rates to ensure that customers are benefitting from reasonable utility investments before paying for those investments. Utility regulators generally presume a utility's investments to be used and useful and prudent unless presented with evidence to the contrary.[35]

These competing obligations are also complicated by the fact that many utility investments are necessarily "lumpy." That is to say, utilities often cannot practicably or cost-effectively increase service by only the marginal amount a customer requests by building *just enough* generation, transmission, and distribution

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33. Jim Lazar et al., *Electricity Regulation In the US: A Guide*, REGUL. ASSISTANCE PROJECT, at 31 (2d. ed. 2016), https://www.raponline.org/wp-content/uploads/2023/09/rap-lazar-electricity-regulation-US-june-2016.pdf ("Once a power plant or other capital project is completed, the commission may conduct a prudence review to determine if it has been constructed or implemented as proposed, according to sound management practices, and at a reasonable cost and with reasonable care.").

34. *Id*. at 50 ("In general, used means that the facility is actually providing service, and useful means that without the facility, either costs would be higher or the quality of service would be lower."); *see also* James J. Hoecker, *Used and Useful: Autopsy of a Ratemaking Policy*, 8 ENERGY L.J. 303, 310 (1987) ("The corpus of regulatory and court opinion prescribes that a utility's operating expenses may not be recovered in rates and that even prudently-incurred costs of plant will not be included in rate base, unless a benefit from such expenditures inures to the benefit of present ratepayers."). While the used-and-useful test is still widely employed, however, it is not dispositive. In *Jersey Central Power & Light Co. v. FERC*, the D.C. Circuit found that regulators' ultimate focus must be on whether a rate and the cost recovery it allows for is just and reasonable, and while "not precluded from employing 'used and useful,' or any other specific rate-setting formula" these formulas cannot form an "impregnable barrier" to utilities' cost recovery requests. 810 F.2d 1168, 1187 (D.C. Cir. 1987).

35. Lazar et al., *supra* note 33, at 50-52.

infrastructure to serve that customer.[36] A utility's investments in new wires, transformers, and substations usually require it to add capacity in larger blocks than an individual customer may require.[37] Historic application of the prudency and used-and-useful tests recognize this practical necessity. When a utility brings a new substation into service, for example, it typically won't enter service at full capacity but rather will have excess "headroom" available to serve additional load growth. Such headroom, even if not strictly needed in the immediate term, may nevertheless be deemed used-and-useful where it enhances system flexibility or reliability, or serves as a reasonable hedge against changing future needs. In fact, a new substation that enters service already at full capacity may signal significant errors in the utility's forecasting and planning.[38] The balance for utilities and their regulators to strike, then, is finding the appropriate amount of headroom to plan for as part of any investment to minimize long-term costs while ensuring safety and reliability.

III. CURRENT CONTEXT OF END-USE ELECTRIFICATION

The U.S. is quickly exiting a relatively stable era of electricity consumption. The last two decades have seen enormous changes in electricity generation, most notably the decline of coal and the rise of renewables and fossil gas.[39] But in the midst of these changes, the total amount of electricity delivered to customers has barely shifted. After seeing steady growth in demand between 1950 and 2005, the trendline has been almost flat in the twenty years since, largely due to improved energy efficiency in both the industrial and residential sectors.[40] Now, however, all signs point to the country leaving this interglacial period of steady demand and entering an era of uncertain but robust load growth. This new load growth is being driven by three main factors:

- End-use electrification, which refers to the electrification of end uses that have historically relied on fossil fuels, driven by both economic factors and policies around decarbonization. This includes

36. William J. Baumol & J Gregory Sidak, *The Pig in the Python: Is Lumpy Capacity Investment Used and Useful?*, 23 ENERGY L.J. 383, 385 (2002) ("A utility, for example, cannot add one kilowatt of generation capacity at a time, but rather must add all of the capacity inherent in a single generator or a single power plant.").

37. Some smaller investments are available that can allow for more marginal increases in available capacity in certain circumstances. Voltage regulators, for example, can be used to address unacceptable drops in voltage resulting from new interconnections along a circuit, rather than requiring an upgrade to the entire circuit's wiring. *See Voltage Regulators: Fundamental of Power Distribution Voltage Regulators*, EATON (last visited Sep. 15, 2025), https://www.eaton.com/us/en-us/products/medium-voltage-power-distribution-control-systems/voltage-regulators/voltage-regulators--fundamentals-of-voltage-regulators.html. But solutions like this are only available to address specific system limitations (voltage regulators can't prevent a circuit from exceeding its thermal limits), and eventually equipment must be upgraded or expanded.

38. *See* Baumol & Sidak, *supra* note 36, at 385-86 (explaining how during periods of growing demand, "even in a world of perfect certainty about the future and zero lag in plant construction, the so-called excess capacity becomes an inescapable feature of the obligation to serve customers.")

39. *Electricity Explained: Electricity in the United States*, U.S. ENERGY INFO. ADMIN. (Mar. 26, 2024), https://www.eia.gov/energyexplained/electricity/electricity-in-the-us.php.

40. *Id.*; Bouckaert & Goodson, *supra* note 3.

the electric vehicles, which displace gasoline and diesel consumption;[41] electrification of space and water heating, which displace fossil gas, propane and heating oil;[42] and electrification of industrial processes, which displace oil, gas, and coal;[43]

- Industrial load growth, including new and expanding processing and manufacturing work driven by a number of factors including policy goals and economic realignment resulting in "onshoring" of industries;[44] and
- Data center load growth, with artificial intelligence-driven load expected to accelerate the existing growth trend for non-AI data centers.[45] Cryptocurrency mining represents a related category of energy-hungry data processing with uncertain, potentially significant load growth that is particularly mobile.[46]

There is not yet consensus regarding which of these categories of load will be the largest driver of new electricity demand,[47] and uncertainty over federal policy regarding both data centers and end-use electrification is likely to cloud the picture further.

This load growth coincides with a renewed focus on electricity affordability. Years of rising electricity rates, and corresponding increases in customer arrears and disconnects for unpaid bills,[48] put pressure on regulators to control rate increases by restricting utility spending. To this end, shrinking utility investments

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41. *See* Vandana Gombar, *Electric Cars Have Dented Fuel Demand. By 2040, They'll Slash It*, BLOOMBERGNEF (Aug 15, 2023), https://about.bnef.com/blog/electric-cars-have-dented-fuel-demand-by-2040-theyll-slash-it/.

42. *See Heat Pump Impact Evaluation Final Report*, DNV, at 9 (Apr. 2022), https://www.nyserda.ny.gov/-/media/Project/Nyserda/Files/Publications/PPSER/Program-Evaluation/Heat-Pump-Impact-Evaluation-Report-August-2022.pdf.

43. *See* Daniel Steinberg et al., *Electrification & Decarbonization: Exploring U.S. Energy Use and Greenhouse Gas Emissions in Scenarios with Widespread Electrification and Power Sector Decarbonization,* NAT'L RENEWABLE ENERGY LAB., at 2 (2017), https://www.nrel.gov/docs/fy17osti/68214.pdf ("By substituting the use of fossil fuels, including coal, natural gas, and petroleum-based fuels, with (increasingly) lower carbon intensity generation sources, electrification and power system decarbonization can reduce emissions associated with fossil fuel combustion in end-use sectors.").

44. *See Reindustrialization, Decarbonization, and Prospects for Demand Growth*, EPRI (July 2023), https://interactive.epri.com/reindustrialization-growthdemand-2023/p/1.

45. *See* Wilson et al., *supra* note 5, at 10 (estimating data center load growing to nearly 10% of total U.S. electric load by 2029, with AI load representing 70% of new data center load).

46. *Tracking Electricity Consumption, supra* note 4.

47. Some forecasts suggest data centers will be the primary source of new load in the coming years. *See id*. at 3 (forecasting between 65 to over 90 gigawatts of new demand in the next five years, compared to 20 gigawatts each for manufacturing, and other load including electrification). Other forecasts are more bullish on electrification load growth and conservative on data center load. *See* Ben King et al., *Taking Stock 2024: US Energy and Emissions Outlook*, RHODIUM GRP., at 26 fig. 13 (July 23, 2024), https://rhg.com/research/taking-stock-2024/ (forecasting that data centers will be responsible for 22% of new electricity consumption by 2035, with transportation electrification alone outpacing data centers before 2030 and reaching 46% of new electricity consumption by 2035).

48. *See* Akielly Hu, *Rising Utility Bills Have Americans Worried*, CANARY MEDIA (Apr. 23, 2025), https://www.canarymedia.com/articles/utilities/rising-gas-electric-bills-survey; Akielly Hu, *Utilities Are Shutting Off Power to a Growing Number of Households*, GRIST (Mar. 18, 2025), https://grist.org/climate-energy/utilities-are-shutting-off-power-to-a-growing-number-of-households/.

can be counterproductive: as discussed further below, distribution system investments can mitigate or reverse rate increases where those investments spread utility costs across increased electric sales, as is commonly the case with infrastructure that supports vehicle electrification.[49] But evaluating such impacts, and incorporating them into regulatory decisions, adds a further layer of complexity in an already-fraught moment.

While each of the above drivers are expected to significantly contribute to overall load growth, end-use electrification has two key characteristics that differentiate it from data center and industrial loads. The first is end-use electrification's reliance on utilities' distribution systems. While some of this load, such as large EV charging sites and electrifying industrial loads, may connect at the transmission or sub-transmission level, much of it will rely on connections to the distribution system at primary or secondary voltages.[50] This includes smaller EV charging depots, destination charging, and most residential customers. This means that utilities should expect to serve this load all the way to the lowest levels of their systems. This also means that end-use electrifying loads will generally pay for a share of distribution, transmission, and generation costs through their utility's tariff, which may not be true for data centers connecting at the transmission level or directly to generators.[51]

Second, end-use electrification loads tend to have lower load factors, and higher load diversity factors, than industrial and data center loads, and are therefore likely to have smaller impacts on generation and transmission needs.[52] Data centers and industrial customers tend to have high load factors, meaning they have

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49. *See* Joint Compliance Filing of Southern California Edison Company (U 338-E), San Diego Gas & Electric Company (U 902 E) and Pacific Gas and Electric Company (U 93 E) Pursuant to Ordering Paragraph 2 of Decision 16-06-011, Rulemaking 23-12-008, at Attachment 1, 21-22, 41 (Cal. Pub. Utils. Comm'n Apr. 2, 2024), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M529/K073/529073552.PDF [hereinafter Joint Compliance Filing] (showing the load profile for an average residential EV charging customer peaking overnight, and the load profile for the average fleet EV charging customer peaking midday and overnight). Energy affordability is likely to continue to be a key issue not just for utilities and PUCs, but also state and federal lawmakers as the overlapping trends of load growth, an aging grid, and political conflicts over energy policy continue. *See* Brad Plumer & Rebecca F. Elliott, *Electricity Prices Are Surging. The G.O.P. Megabill Could Push Them Higher*, N.Y. TIMES (June 4, 2025), https://www.nytimes.com/2025/06/04/climate/electricity-prices-republican-big-beautiful-bill.html?searchResultPosition=6.

50. National Grid New York, for example, connects customers with demand of less than 5 MW at distribution voltages, and at least considers higher-voltage connections for customers over this threshold. Gideon Katsh et al., *Electric Highways: Accelerating and Optimizing Fast-Charging Deployment for Carbon-Free Transportation*, NAT'L GRID, at 31 (Nov. 2022), https://www.nationalgrid.com/document/148616/download.

51. *See* Eliza Martin & Ari Peskoe, *Extracting Profits from the Public: How Utility Ratepayers Are Paying for Big Tech's Power*, HARV. L. SCH. 16-21 (Mar. 2025), https://eelp.law.harvard.edu/wp-content/uploads/2025/03/Harvard-ELI-Extracting-Profits-from-the-Public.pdf (discussing how data centers connecting at the transmission level can shift costs they cause onto other ratepayers).

52. Load factor is a measure of a customer's average electric load divided by their maximum load. For example, a customer with a peak load of 10 kW and an average load of 2 kW would have a load factor of 0.2. Load diversity factor, or simply diversity factor, refers to the sum of individual noncoincident maximum loads divided by the maximum coincident load. For example, a group of EV fleets may have individual maximum loads that add up to 1 MW, but because they charge at different times of day their coincident peak load is 500 kW. Their load diversity factor would be 0.5. *See* Jignesh Parmar, *Energy Demand Factor, Diversity Factor, Utilization Factor, and Load Factor*, ELEC. ENG'G PORTAL (last updated Oct. 28, 2024), https://electrical-engineering-portal.com/demand-factor-diversity-factor-utilization-factor-load-factor.

relatively consistent electric usage, and collectively their grid capacity needs at their points of interconnection are similar to the capacity needs they create at the transmission and generation level,[53] though there may be more variability in power consumption for AI data centers in particular.[54] In contrast, loads like EV chargers or heat pumps do not run continuously. A commercial area may host several fleets of EVs, some of which charge overnight while others charge opportunistically throughout the day. Each of those fleets may need a distribution transformer capable of serving their individual maximum charging load, but the utility may not need the transmission or generation capacity to serve their collective charging load simultaneously because it is diversified.[55] This means that end-use electrification load can require significant work to prepare their distribution grid for those utilities that experience the greatest demand growth from these customers, while at the same time potentially seeing a slower pace of upgrade and expansion needs at the transmission and generation level.[56]

Although their load growth impacts may focus on different portions of the grid, collectively the coming load growth from end-use electrification, data centers, industrial loads, and more will all compete for utilities' limited attention and capacity to complete the analytical, engineering, construction work necessary to interconnect a customer. The scale of this need is significant. In California, where end-use electrification is forecast to be a large driver of distribution-level load growth,[57] estimates range from $8 to $57 billion in grid upgrades needed by 2035 to serve end-use electrification load growth.[58] In New York, the New York State

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53. Isabelle Riu et al., *Load Growth is Here to Stay, but Are Data Centers?*, ENERGY AND ENV'T ECON. 20 (July 2024), https://www.ethree.com/wp-content/uploads/2024/07/E3-White-Paper-2024-Load-Growth-Is-Here-to-Stay-but-Are-Data-Centers-2.pdf (estimating data center load factors to average 86%).

54. Ryan Quint et al., *Practical Guidance and Considerations for Large Load Interconnections*, GRIDLAB 20 (2025) (discussing how data centers used to train AI models can have "extremely intermittent power consumption" with power consumption jumping by tens of megawatts in less than one second).

55. *See Staff Proposal, supra* note 8, at 37-38 (explaining how adding up non-coincident peaks of EV charging stations can overestimate generation capacity needs).

56. *See* Paul Hibbard et al., *Heavy Duty Vehicle Electrification: Planning for and Development of Needed Power System Infrastructure*, ANALYSIS GRP. 15-16 (June 2023), https://www.analysisgroup.com/globalassets/insights/publishing/2023-hibbard-heavy-duty-vehicle-electrification.pdf (finding that a 2023 proposed rule from the U.S. Environmental Protection Agency regarding heavy-duty vehicle emissions would likely increase electrification but would likely not have driven challenges for power generation or transmission).

57. Load forecasts from the California Energy Commission do not separate residential electrification—e.g. space and water heating electrification—from other residential loads but do include specific forecasts for transportation electrification. *See* CAL. ENERGY COMM'N, *California Energy Demand Forecast: 2023 - 2040 Baseline Forecast* (Jan. 2024), https://efiling.energy.ca.gov/GetDocument.aspx?tn=254253&DocumentContentId=89618 (estimating that electricity consumption from electric vehicles will grow from less than 2% of total statewide consumption in 2025 to nearly 13% in 2040).

58. *See* PUB. ADVOC. OFFICE, *Distribution Grid Electrification Model*, at 43 (August 2023), https://www.publicadvocates.cpuc.ca.gov/-/media/cal-advocates-website/files/press-room/reports-and-analyses/230824-public-advocates-distribution-grid-electrification-model-study-and-report.pdf [hereinafter *Electrification Model*] ("We estimated the cost of upgrades to be $26 billion. This number has significant uncertainty and could be as much as $18 billion lower or $31 billion higher based mainly on the unit costs of upgrades."); *see also* KEVALA, *Electrification Impacts Study Part 1: Bottom-Up Load Forecasting and System-Level Electrification Impacts Cost Estimates*, at ES-6 (May 9, 2023), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M508/K423/508423247.PDF [hereinafter *Electrification Impacts Study*] ("Across these

Energy Research and Development Authority estimated that preparing the state's distribution systems for EV charging alone would require between $1.4 and $26.8 billion through 2050, depending on the charging assumptions used.[59]

Utilities will need to upgrade existing infrastructure, including expanding substations and converting circuits to higher voltages, while also building new assets in high-demand areas. This work takes time, as utilities navigate the permitting, property acquisition, engineering, and construction processes before a new piece of infrastructure can begin serving customers. The longer and more complex this process, the more it implicates the boundaries of utilities' duty to serve their customers, as long delays or insufficient grid capacity can stymie customers' ability to energize in line with policy goals, individual commitments, and economic realities. Without sufficient, timely utility service, some customers may have the resources to self-supply a portion of their electricity needs — e.g., through zero-emission distributed energy resources such as solar and battery storage, or polluting sources such as diesel and fossil gas generators.[60] But where such alternatives are financially or technically infeasible, customers have little choice but to stick to the status quo of fossil fuels consumption. This places utilities in the position of operating in a competitive environment within their own service territory,[61] and creates a potential for entrenchment of fossil fuel consumption. Ensuring utilities' investment decisions and operations are supportive of, rather than a hindrance to, end-use electrification is therefore essential to avoid utilities becoming a barrier to the energy transition.

IV. DUTY TO SERVE IN THE CURRENT ERA

Today, utilities' duty to serve can generally be thought of as encompassing three interlocking obligations: 1) an obligation to connect new customers within a utility's service territory, 2) an obligation that the provided service be "adequate" in meeting the needs of customers, and 3) an obligation to continue providing that

unmitigated load scenarios, Kevala estimates up to $50 billion in traditional electricity distribution grid infrastructure investments by 2035").

59. RES. INNOVATIONS, *Transportation Electrification Distribution System Impact Study*, at ES-2 (May 2022), https://www.nyserda.ny.gov/-/media/Project/Nyserda/Files/Publications/Research/Transportation/22-13-Transportation-Electricification-Distribution-System-Impact-Study.pdf ("The NPV of New York State's distribution system upgrade costs due to transportation electrification range from $1.4 billion in the LDI Managed EV charging case to $26.8 billion in the HDI Unmanaged case.").

60. In the most extreme cases, larger customers such as data centers are also funding efforts to restart mothballed nuclear power plants to meet their electricity needs. *See* Brian Martucci, *Constellation Plans 2028 Restart of Three Mile Island Unit 1, Spurred by Microsoft PPA*, UTILITYDIVE (Sep. 20, 2024), https://www.utilitydive.com/news/constellation-three-mile-island-nuclear-power-plant-microsoft-data-center-ppa/727652/.

61. Competition between regulated utilities, or between a regulated utility and an unregulated entity, is not unprecedented, as competition between electric utilities, gas utilities, and trucked fuel providers (e.g. propane and home heating oil) has taken place in different forms since the earliest days of electric utilities. *See* Joshua Lappen et al., *The Unseen Competition in the Energy Transition: Acknowledging and Addressing Inter-Utility Competition to Achieve Managed Decarbonization*, STAN. WOODS INST. FOR THE ENV'T., at 5-8 (Sep. 2024), https://woods.stanford.edu/sites/woods/files/media/file/woods-energy-transition-white-paper-v06-web.pdf.

service.[62] These obligations are not absolute, though they typically set a high bar for utilities. For example, regulators can generally require utilities to make all "reasonable" extensions of service to new customers within the service territory, excusing only those extensions where the cost of providing service is "disproportionate to the overall expected return to the utility in accommodating the new customer."[63] It is not enough that an extension may be unprofitable for a utility, so long as the extension can be made "without harming current customers."[64] Similarly, regulators typically allow utilities to shut off service to customers for nonpayment of their utility bill, though this can be constrained by the imposition of certain requirements prior to shutoff,[65] or halted entirely through moratoria like those put in place in many states during the early stages of the COVID-19 pandemic.[66]

Over the more than a century since the adoption of the duty to serve into American law and the development of the modern utility regulatory framework, the topic has been a relatively quiet corner of utility scholarship and jurisprudence. There have been, however, two recent waves of academic discourse on the implications of the duty to serve during times of significant change in the utility business. The first, around the turn of the 21st century, centered on the meaning of the duty to serve during a time of deregulation of electricity generation and growth of retail competition.[67] Faced with the prospect of utilities moving electricity through their wires that they themselves did not generate, this scholarship considered the origins of the duty to serve,[68] analogous duties applied to other industries,[69] and the goals of utility restructuring,[70] to recommend what regulators should still require of utilities in providing service to customers.[71]

A second wave, one that is still ongoing, focuses on tensions between the obligation to serve and climate change mitigation and adaptation efforts. This

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62. Rossi, *supra* note 2, at 1243 ("As applied today in most states, the public utility duty to serve entails several obligations, among them duties to interconnect and extend service if requested, to provide continuing reliable service, to provide advanced notice of service disconnection, and to continue service without full payment."); *See also Duty of a Public Utility*, *supra* note 32, at 313-322 (discussing the obligation to render service to customers, the scope of adequacy of service, and the requirements related to abandonment of service).

63. Rossi, *supra* note 2, at 1253.

64. *Id*. at 1256.

65. *See generally Disconnect Policies*, LIHEAP CLEARINGHOUSE (last updated Aug. 1, 2025), https://liheapch.acf.hhs.gov/Disconnect/disconnect.htm (detailing utility disconnect policies across the U.S.).

66. Jennifer Andre et al., *The Effects of State Utility Shutoff Moratoria on Credit Delinquencies During the COVID-19 Pandemic*, 129 J ECON. & BUS. 106170 (2024) (detailing the location and duration of utility shutoff moratoria across the U.S. in response to the COVID-19 pandemic).

67. *See generally* Rossi, *supra* note 2; Roger D. Colton, *The "Obligation to Serve" and a Competitive Electric Industry*, OAK RIDGE NAT'L LAB'Y (Nov. 1997), https://weatherization.ornl.gov/wp-content/uploads/pdf/1996_2000/ORNL_CON-459.pdf.

68. *See* Rossi, *supra* note 2, at 1244-60.

69. *See* Colton, *supra* note 67, at 5-11.

70. *See* Rossi, *supra* note 2, at 1280-87.

71. Colton, *supra* note 67, at 40-70 (discussing the obligation to connect customers, to provide service to residual classes, to make a standard offer, to provide non-discriminatory service, and to fund residual markets in the context of a restructured electricity market); Rossi, *supra* note 2, at 1288-89 (recommending the taxing of power consumption or supply to "continue financing the duty to serve" in competitive power markets).

includes work on how utilities and regulators should harden the grid against extreme weather impacts and how they should consider when and how to disconnect customers, or decline to reconnect customers, in the face of extreme weather and climate impacts.[72] It also includes efforts to spur building decarbonization through reducing or eliminating customers' fossil gas consumption, which presents tensions with gas utilities' obligation to serve customers requesting new gas service.[73] This scholarship attempts to address the situations where utilities should be allowed, or required, to cease providing services to certain customers as part of efforts to mitigate and/or adapt to the effects of climate change.[74] Some have also begun to consider what the duty to serve means for connecting to the grid new large loads like data centers, including whether and how it may threaten reliability, delay the retirement of fossil fuel generation, and drive up rates for other customers.[75] The appropriate regulatory responses to these concerns may require more fundamental considerations of the proper scope and definition of the duty to serve than what is at issue in this article.

There has not been a similar legal academic focus on what the duty to serve means for utilities' affirmative obligations in the face of end-use electrification at the distribution level, or how regulators should apply the obligation to this electric load growth in particular. On its face, it may appear that the current, simple formulation of the duty to serve is already of sufficient benefit to customers with new

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72. *See* Payne, *supra* note 28; Jim Rossi & Michael Panfil, *Climate Resilience and Private law's Duty to Adapt*, 100 N.C. L. Rev. 1135 (2022); Janice A Beecher et al., *Regulatory Imperative to Ensure Utility climate Resilience Planning*, 45 Energy L. J. 83 (2024).

73. *See* Bagdanov, *supra* note 1; Nicholas Wallace et al., *Removing Legal Barriers to Building Electrification*, STAN. WOODS INST. FOR THE ENV'T (2020), https://law.stanford.edu/wp-content/uploads/2020/10/2020-10-20_Natural-Gas-Memo_formatted.pdf; *see also* Justin Gundlach & Elizabeth B. Stein, *Harmonizing States' Energy Utility Regulation Frameworks and Climate Laws: A Case Study of New York*, 41 Energy L. J. 211 (2020).

74. *See, e.g.*, Payne, *supra* note 28, at 645-46 (discussing how in certain circumstances, such as an extreme weather event knocking out service to vulnerable properties, regulators should consider modifying the duty to serve by removing certain properties from utilities' service territories and preventing other utilities from providing those services.); Bagdanov, *supra* note 1, at 21 (recommending that regulators remove the obligation to extend service from gas utilities' duty to serve).

75. *See, e.g.*, Walton Shepherd, *VA's Data Center Talk Must Get Real to Meet Big Tech's Climate Goals*, NAT. RES. DEF. COUNCIL (Dec. 14, 2024), https://www.nrdc.org/bio/walton-shepherd/vas-data-center-talk-must-get-real-meet-big-techs-climate-goals ("For starters, a utility's duty to serve is not an all-consuming monolith that swamps all other considerations: that principle of fairness exists equally alongside other bedrock regulatory principles embodied in Virginia's statute."); Yoon Kim, *Connecting Data Centers to the Grid: An Innovative and Controversial Proposal from AEP Ohio*, CLIMATE L.: GUEST BLOG (Sep. 12, 2024), https://blogs.law.columbia.edu/climatechange/2024/09/12/guest-blog-connecting-data-centers-to-the-grid-an-innovative-and-controversial-proposal-from-aep-ohio/ ("Most states have similar statutory language to Ohio regarding the duty to serve all customers in a reasonable and non-discriminatory manner. The Ohio proceeding will be the first to decide how those century-old provisions apply to the novel issue of data center growth and what leeway public utilities may have for treating data centers differently."); Severin Borenstein, *Is there a "Duty to Serve" Hyperscale Loads?*, ENERGY INST. AT HAAS: ENERGY INST. BLOG (Dec. 2, 2024), https://energyathaas.wordpress.com/2024/12/02/is-there-a-duty-to-serve-hyperscale-loads/ ("Does non-discriminatory duty to serve mean that a new hyperscale customer has as much right to demand reliable power at any hour of the year as an incumbent customer?"); *see also* Martin & Peskoe, *supra* note 51. The Ohio PUC finalized its Data Center Power tariff in July 2025. *See* In the matter of the Application of Ohio Power Company for New Tariffs Related to Data Centers and Mobile Data Centers, No. 24-508-EL-ATA, (Ohio Pub. Utils. Comm'n July 9, 2025), https://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A25G09B43531I00509.

or increasing demand. So long as those customers are within a utility's service territory, and serving those customers would not result in significant financial harm for the utility, the utility must connect the customer to the grid and perform the necessary system work to serve them and existing customers safely and reliably. But, as is already evident in jurisdictions seeing significant end-use electrification load growth, utilities struggle to connect new loads to their systems at a pace and manner necessary to meet customer needs or policy goals. In California, where utilities are already facing significant demand for grid capacity to support end-use electrification, some customers are facing delays of several years before they can interconnect if that interconnection requires a grid upgrade.[76] These challenges will not be exclusive to California, as end-use electrification is broadly expected to drive significant load growth on distribution grids across the U.S.[77] In response, regulators in some states have begun to recognize the need for more proactive forecasting and planning efforts to prepare the grid in advance of this load, rather than in response to specific customer interconnection requests.[78] This shift is critical to ensuring utilities meet their legal obligation to customers, and represents an updated vision of the duty to serve adapted to supporting states' end-use electrification goals: *building and maintaining a grid with sufficient excess capacity at the right time in the right places to interconnect a customer requesting service, without threatening the safety and reliability of the system as a whole*. The remainder of Part III considers how to effectuate this form of the duty to serve to remove barriers to end-use electrification.

A. Anticipating Future Loads

Key to serving new electric load is first having a reasonably accurate forecast of when and where that new load will connect to the grid. While no forecast can perfectly predict this future demand, having a reasonably accurate forecast is necessary both to ensure sufficient generation, transmission, and distribution infrastructure is available to serve future load, and to avoid unnecessarily overbuilding

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76. *See* Opening Comments of Powering America's Commercial Transportation on the Administrative Law Judge's Ruling Directing Parties to Respond to Questions on Energization Issues, Rulemaking No. 24-01-018, at 6 (Cal. Pub. Utils. Comm'n June 18, 2024), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M534/K105/534105479.PDF [hereinafter Opening Comments] ("PACT members have shared anecdotal information regarding utility responses to 2-5 MW projects in Southern California, noting that these requests are frequently quoted an energization date into 2029. Most of those projects are then put on hold, postponed, or canceled because of this lengthy energization timeline.").

77. *2024 Long-Term Reliability Assessment*, N. AM. ELEC. RELIABILITY CORP., at 32 fig. 19 (last updated July, 15 2024), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_Long%20Term%20Reliability%20Assessment_2024.pdf (identifying transportation and/or building electrification as a "primary driver" of load growth in six of the thirteen U.S. Assessment Areas).

78. *See* Opening Comments*, supra* note 9; *see also* Order Instituting Rulemaking Regarding Transportation Electrification Policy and Infrastructure and Closing Rulemaking 18-12-006, Rulemaking No. 18-12-006, at 9 (Cal. Pub. Utils. Comm'n Dec. 20, 2023), https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M521/K872/521872957.PDF (finding that "in addition to improving the response process to customer requests for electric vehicle charging energization, the increased pace and scale of the distribution and transmission infrastructure needed to support this transition will require reforms to grid planning as they relate to transportation electrification. This may include improved early identification of future transportation electrification load to support existing electric grid planning processes . . . .").

and driving up customers' bills. End-use electrification can be expected to impact future loads in ways that don't align with historical load growth trends, and will require utilities to adapt their forecast assumptions and methods to ensure they aren't caught unprepared to serve this load when customers are ready to electrify.

The right and duty of a public utility to adequately prepare to serve future loads is not a new concept within the duty to serve. More than a century ago in *Northern Light & Power Co. v. Stacher*, a group of property owners challenged a utility's eminent domain action to take water rights as part of the development of a hydroelectric facility.[79] The owners argued that the utility hadn't met the requirement that it show the taking to be "necessary" because it did not specify in its filing that meeting the needs of its customers would require more electric capacity than it could supply with existing infrastructure.[80] The California Court of Appeals disagreed, finding that public utilities "have a right and it is their duty to anticipate future needs of the public" and "cannot reasonably be required to limit their preparations for future demands by their ability to provide for them out of their present supply."[81] The court expressed a prescient view of electric load growth and the difficult job for utilities of forecasting and serving that growth:

> New uses for electricity are constantly being discovered and applied. The supply which in the same community would at present be sufficient might be insufficient in a short time. Nor can public service corporations state with certainty to what extent their facilities to serve the public will be availed of. Neither can they determine, nor should they be required to determine in advance, and set forth in their complaint that their present equipment is insufficient to meet the needs of the people.[82]

The utility is not absolved from the requirement to provide evidence that that property at issue is available, appropriate, and necessary to meet the identified public need, but the court saw these as evidentiary questions, not legal ones.[83]

The California Supreme Court built on this in *Lukrawka v. Spring Valley Water Works*, articulating not just the power of a public utility to prepare for future demand, but the obligation to do so.[84] There, Spring Valley Water Works held the utility franchise to provide drinking water to the city and county of San Francisco. The plaintiffs, a group of homeowners in the city, sued the utility to extend its service to their streets after it refused to do so. The court was clear that the utility's duty to serve encompassed preparing for, and serving, reasonably anticipated growth in demand:

> The proper discharge of this public duty required not only that the company should provide a supply of water and establish a system for its distribution to meet the reasonable needs of the municipal community as it then existed, but it was under the obligation to keep in view the prospective and probable increase in population of the municipality and the necessarily increasing demand for a water supply which would be consequent therefrom; to anticipate the natural growth of the municipality it had undertaken to serve as a whole and to take

79. 109 P. 896 (Cal. Dist. Ct. App. 1910).

80. *Id*. at 902-03.

81. *Id*.

82. *Id*. at 903.

83. *N. Light & Power Co*., 109 P. 896, 903 (Cal. Dist. Ct. App. 1910).

84. 169 Cal. 318, 146 P. 640 (1915).

> reasonable measures to have under its control a sufficient supply of water and make gradual extensions of its distributive system to meet the reasonable demands for water by the growing community.[85]

There are key similarities and differences between the electric load growth seen today and the growth demanded of electric and drinking water systems in the early 20th century that these courts were responding to. Given the scale of the demand, both periods would require utilities to prepare their systems in advance rather than simply waiting for individual customer requests. But, whereas the utility systems of a century ago were largely seeing demands to expand their geographic footprints through extension of service to new areas within their franchise territory, much of the load growth seen on electric distribution systems today is happening within areas where service is already available and requires new or upgraded infrastructure where utility assets already exist today. Furthermore, the tools available to utilities today to forecast this load growth are orders of magnitude more sophisticated than those of a century ago, with new techniques, new technologies, and new data sources all available to improve the usefulness of load forecasts.[86]

The accuracy of load forecasting is constrained by both the uncertainty of the factors driving changes in load, and the limitations of utilities' capacity for data collection and analysis. By the late 20th century and into the 21st, load forecasting methods for distribution utilities largely sought to estimate future load at the level of an individual piece of equipment over a short time horizon (<five years), while using a broader geographic scale for long-term forecasts.[87] These long-term forecasts have traditionally been top-down models, which estimate future load at the service territory scale or a similar large area, and then disaggregate that figure downwards to estimated expected loads on equipment such as substations, feeders, and transformers.[88] Top-down models have the advantages of being efficient to produce and supporting consistent assumptions across a utility's operations, but can lack geographic precision because it cannot reflect heterogeneity of impacts at various locations on the utility's system.

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85. *Id*. at 325.

86. *See* U.S. DEP'T ENEERY, GUIDANCE DOCUMENT ON SPACE HEATING ELECTRIFICATION FOR LARGE COMMERCIAL BUILDINGS WITH BOILERS, at viii (Apr. 2024), https://www.energy.gov/sites/default/files/2024-04/Large%20Building%20Boiler%20Electrification%20Guidance.pdf [hereinafter GUIDANCE DOCUMENT]; Sean Morash, *Grid Planning for Building Electrification*, ENERGY SYS. INTEGRATION GRP., at 14 (Oct. 2024), https://www.esig.energy/wp-content/uploads/2024/10/ESIG-Grid-Planning-Building-Electrification-report-2024.pdf ("While utilities have time to plan for new building developments and industrial facilities, individual building retrofits can happen virtually overnight and without warning."); *see also* Daniel D. Slate et al., *Adoption of Artificial Intelligence by Electric Utilities*, 45 ENERGY L .J. 1, 10 (2024) (discussing the potential of artificial intelligence systems for improving utilities' load forecasting and interconnection study efforts); *see also e.g.,* Public Utils. Comm'n of Colo, Public Service Company of Colorado's Verified Application for Approval of Second Distribution System Plan, Direct Testimony of Jack W. Ihle, 22A-0547E, at 41-45 (Dec. 2024) (discussing "propensity-based" load forecasting that accounts for adoption rates of end-use electrification technologies).

87. *Load Forecasting for Modern Distribution Systems*, ELEC. POWER RSCH. INST., at 4-2 (Mar. 2013) https://www.epri.com/research/products/000000000001024377 [hereinafter EPRI].

88. *See* Tao Hong & Mohammad Shahidehpour, LOAD FORECASTING CASE STUDY, at 1-17 (Jan. 15, 2015), https://coefs.charlotte.edu/hong/files/2015/03/WTP-2015-NARUC-HONG-Shahidehpour.pdf.

Utilities have significantly improved their forecasting methodologies over time, with forecasters adjusting for more complex factors, such as the impact of weather on historic load data (e.g., normalizing models to avoid underestimating load after an abnormally cool summer lowered customers' air conditioning needs), and modeling additional variables beyond peak load to plan for power quality and asset life.[89] Forecasters have also moved beyond simply extrapolating known trends and adding in these adjustments, to "simulation" forecasts that attempt to actually model the factors that are influencing changes in demand.[90] These models have shown particular success at forecasting load growth driven by greenfield residential and commercial development, though newer iterations have improved at modeling load growth within developed areas as well.[91]

These forecasting methodologies remain far from producing a "perfect" forecast, which is in reality an unattainable goal. Utilities have generally over-forecasted load,[92] a bias that tends to produce a more expensive but more reliable system.[93] These methods could theoretically continue to meet utility load forecasters' needs if certain conditions are met:

1) future trends in load look like past trends in load, meaning forecasters can safely extrapolate based on ongoing trends, and rely on the same assumptions that informed prior forecasts;

2) sufficient excess capacity exists on the distribution system to absorb new small loads, meaning that any inaccuracy or uncertainty in forecasts (both of which are unavoidable to some degree) will not stop diffuse, smaller loads from quickly interconnecting; and

3) new large loads take longer to come online than it takes for the utility to complete system work required for interconnection, meaning that even when not specifically accounted for at a granular level in a utility's forecast, the utility still has time to complete necessary upgrades to interconnect that customer ahead of the customer's desired in-service date.

Unfortunately, these conditions aren't necessarily true in an era of widespread end-use electrification.

First, future loads don't necessarily look like past loads. End-use electrification loads can look very different from a grid planning and operations perspective than electric customers' current loads. A significant portion of EV charging, both personal light-duty EVs and fleets' light-, medium- and heavy-duty EVs can happen midday or overnight when vehicles are parked at home, at work, or at depots; and compared to current loads, they may be more flexible– and, therefore, more amenable to "shaping" to better fit the utility's system capacity – if the right price

89. *See* EPRI, *supra* note 87, at 4-3 to 4-4.

90. *See id*. at 3-12 to 3-14 (discussing the creation and use of simulation forecasting methods).

91. *Id*. at 3-13 to 3-14.

92. Mark Dyson & Alex Engel, *The Billion-Dollar Costs of Forecasting Electricity Demand*, RMI (Oct. 23, 2017), https://rmi.org/billion-dollar-costs-forecasting-electricity-demand/.

93. *See id*. Hong & Shahidehpour, *supra* note 88, at 2-2 tabl. 2-1.

signals are in place.[94] The electrification of buildings' space and water heating is also expected to increase overnight loads, as well as during the winter months, outside of the current peaks on many utility systems,[95] and may also allow for greater flexibility and demand response from heating loads as is already done for building cooling.[96] These trends can be advantageous for ratepayers as they can add load largely outside of the summer evening peaks their systems are built for, contributing to more efficient utilization and potentially downward pressure on rates,[97] but it also means potentially significant shifts in customers' energy consumption behavior to which utilities must adapt.[98]

Second, utility systems can lack the excess distribution grid capacity to absorb significant new loads, even if those loads may not contribute to system coincident peak.[99] The closer to the customer a piece of the distribution system is, the less relevant the system coincident peak is, and the more relevant the peak of the

94. Joint Compliance Filing*, supra* note 49, at Attachment 1, 21-22, 41 (showing the load profile for an average residential EV charging customer peaking overnight, and the load profile for the average fleet EV charging customer peaking midday and overnight).

95. *See* Morash, *supra* note 86, at 14 (discussing how systems with high levels of heating electrification today, such as Texas, see overnight loads stay higher during winter, particularly during cold snaps.).

96. *See* Jeff St. John, *Smart Thermostats are Helping Arizona's Grid Ride Out Brutal Heat*, CANARY MEDIA (Sep. 14, 2023), https://www.canarymedia.com/articles/grid-edge/smart-thermostats-are-helping-arizonas-grid-ride-out-brutal-heat (discussing Arizona utilities' use of smart thermostats to reduce peak demand from air conditioning loads).

97. *See Electrification Model*, *supra* note 58, at ES-2 ("Based on our analysis and modeling, we estimate that through 2035, the costs to upgrade electric distribution grids will be approximately $26 billion. Using this cost estimate, we find that electrification applies an overall downward pressure on rates across all three of the large electric utilities."); Sarah Shenstone-Harris et al., *Electric Vehicles are Driving Rates Down for All Customers*, SYNAPSE ENERGY ECON. INC. 1 (2024), https://www.synapse-energy.com/sites/default/files/Electric%20Vehicles%20Are%20Driving%20Rates%20Down%20for%20All%20Customer%20Update%20jan%202024.pdf ("We observe that over the last 11 years, EV drivers across the United States have contributed approximately $3.12 billion more than their associated costs, driving rates down for all customers. When we also include utility expenditures for EV programs, EV owners have contributed approximately $2.44 billion more in revenues than in costs."); *Proactive Grid Investment Assessment: Medium- and Heavy –Duty Vehicle Transportation Electrification*, BLACK & VEATCH 7 (Nov. 6, 2024), https://library.edf.org/AssetLink/atal4338qv8ucl8226qok35dmm170r4e.pdf?_gl=1*mlno75*_gcl_au*MTUyMjY4ODYxMi4xNzU3MTIxNDAw*_ga*MTI2NDIyMzExOC4xNzU3MTIxNDAw*_ga_2B3856Y9QW*czE3NTcxMjE0MDAkbzEkZzAkdDE3NTcxMjE0MDIkajU4JGwwJGgw [hereinafter *Proactive Grid Investment Assessment*] ("Proactive planning for M/HDV electric load can result in capital expenditure (CAPEX) savings in the long run due to reduced need to upgrade the same station to accommodate load growth into the future, when compared to sequential planning approaches.").

98. *See*, *e.g.*, N.Y. ISO, 2024 LOAD & CAPACITY DATA GOLD BOOK 9 (2024) ("The NYISO is projected to become a winter peaking system in future decades due to electrification, primarily from space heating and EVs. The timing of a switch to a winter peaking system is uncertain, and mainly influenced by the timing and composition of space heating electrification.").

99. For example, data for Pacific Gas & Electric and Southern California Edison, California's two largest utilities, show that over a third of both utilities' distribution line segments has zero excess capacity during at least one hour of the year, which does not necessarily align with the system-wide peak. *See* PACIFIC GAS & ELECTRIC, ICA & DATA PORTAL BI-ANNUAL REPORT – Q3 2025, at 20 (July 31, 2025), on file with author; Southern California Edison Company's (U 388-E) Integration Capacity Analysis (ICA) and Data Portal Biannual Report, Rulemaking No. 21-06-017 (Cal. Pub. Utils. Comm'n 8 July 31, 2025), on file with author.

specific customers that asset serves.[100] It follows that at the level of facilities that serve a single customer, such as a service line, the relevant design criterion is the peak load of that one customer. Because electrifying a fleet or multifamily or commercial building can represent a multi-megawatt load by itself, interconnecting these customers will often require distribution system investments even when excess capacity is available on the distribution system. For example, PG&E estimated that in the five years ending in 2023, more than 53% of all circuit upgrades and 28% of all substation upgrades were in response to energization requests from customers.[101] A study by Kevala on the impacts of electrification and distributed generation on California investor-owned utilities'' grids estimated that by 2035, 48% of all feeders in PG&E's territory would be at capacity, along with 36% of SCE's feeders and 22% of SDG&E's.[102] A 2023 study by National Grid and Hitachi Energy estimated that adding fourteen electric trucks to a feeder would overload 50% of the feeders in National Grid's New York service territory.[103] The addition of building electrification load from large multi-unit buildings in National Grid's territory in and around Buffalo, New York is also taxing the utility's five kilovolt system, undersized for today's load growth, and driving the company to extend sub-transmission lines to serve these customers.[104] As end use electrification trends spread beyond these early-adopting jurisdictions these trends are likely to continue for many of the utilities with older distribution systems that haven't seen significant need for expansion in recent years.

Finally, many large end-use electrification loads can materialize quickly, while the timeline to complete distribution system upgrades to serve new load can vary widely. Charging stations, whether serving a fleet or available for public charging, can in certain instances be acquired and installed in months.[105] On the building electrification side, new construction can still be a multi-year process, but some retrofits to existing structures can be significantly shorter.[106] At the same time, utilities face a number of pressures that can increase grid upgrade timelines

100. "Coincident peak" refers to the point in time when total electricity consumption across a utility system is at its maximum. A customer's individual peak load often will happen at a different time than the system coincident peak as their individual load profiles is unlikely to perfectly match that of the system as a whole.

101. San Diego Gas & Electric Company (U 902-E), Pacific Gas and Electric Company (U 39 E), and Southern California Edison Company (U 338-E) Response to Administrative Law Judge Ruling Directing Utility Responses to Questions Regarding Energization Timelines, Rulemaking No. 24-01-018, at 32 (Cal. Pub. Utils. Comm'n Apr. 22, 2024), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M530/K252/530252757.PDF.

102. *Electrification Impacts Study, supra* note 58, at ES-6.

103. *The Road to Transportation Decarbonization: Readying the Grid for Electric Fleets*, NAT'L GRID & HITACHI ENERGY, at 4 fig. ES-2 (Sep. 2023), https://www.nationalgrid.com/document/150356/download [hereinafter NAT'L GRID & HITACHI ENERGY].

104. *National Grid Urgent Upgrade Projects*, No. 24-E-0364, NAT. GRID 24-26 (Nov. 13, 2024), https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={60862793-0000-C755-99D5-45B99DF5AC13}.

105. *See* Cole Jermyn et al., *Building the Grid to Need*, at 14 (Jan. 2024), https://www.edf.org/sites/default/files/2024-01/BuildingGridforNeed2024.pdf.

106. *See* GUIDANCE DOCUMENT, *supra* note 86; *see also* Morash, *supra* note 86, at 14 ("While utilities have time to plan for new building developments and industrial facilities, individual building retrofits can happen virtually overnight and without warning.").

including equipment, labor, and capital availability, prioritization of other distribution system work such as reliability-driven needs, and specific circumstances of the utility such as applicable regulatory requirements, permitting timelines, and land availability. Deployment of distributed energy resources such as residential and community solar can also drive distribution upgrade needs, and work on the transmission system can put competing pressure on some staff and equipment needs. In California, long timelines for IOUs to meet customers' load interconnection requests spurred the passage of Senate Bill 410, which directed the California Public Utilities Commission (CPUC) to set targets for the average and maximum timeline for IOUs to serve these requests.[107] The large IOUs there have reported their most complex projects such as new substations taking as much as fifteen years.[108] Upgrade timelines this long make load forecasting even more challenging, as the utility must be confident far in advance that the chosen solution will provide enough additional distribution system capacity to meet the load that materializes downstream of that asset.[109]

Given how these characteristics of end-use electrification load that make the "traditional" methods of forecasting and planning for load insufficient to efficiently and effectively interconnect these loads – and facilitate the achievement of policy requirements and goals accompanying that interconnection – greater consideration is needed on the part of utilities to meet their obligation to serve this load in particular. In practice this will require a number of changes on part of utilities. As a threshold matter, utilities and their regulators will need to recognize that end-use electrification load growth can materialize in ways not adequately reflected in existing load forecasting systems, and targeted efforts may be needed. As early as 2016, when EVs still represented a miniscule share of vehicles on the road, the New York Public Service Commission directed the utilities to detail how

107. CAL PUB. UTIL CODE §933.5 (2025).

108. Rulemaking No. 24-01-018 - Public Workshop Discussing the Development of Energization Timing Targets and Processes to Report Energization Delays, at 34, 44, 48 (Cal. Pub. Utils. Comm'n Feb. 2, 2024), https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/energy-division/documents/transportation-electrification/energization/ab50_sb410-energization-workshop_02022024.pdf (stating that for SCE, distribution capacity upgrades can take 1.5-10+ years to complete, that for PG&E, distribution capacity upgrades can take 2-4 years once funding is available without delays, and that for SDG&E, distribution capacity upgrades can take 1-15 years to complete).

109. These dynamics may be even more severe for load growth from data center development, as individual data centers can have peak demands in the hundreds of megawatts or even gigawatts and developers are racing to build and interconnect them as fast as possible. *See, e.g.*, Dan Sinhoe & Zachary Skidmore, *Meta Announces 4 Million Sq. Ft., 2GW Louisiana Data Center Campus*, DATA CTR. DYNAMICS (Dec. 5, 2024), https://www.datacenterdynamics.com/en/news/meta-announces-4-million-sq-ft-louisiana-data-center-campus/ (discussing Meta's plans to build a data center with a peak demand of over two gigawatts by 2030). There remains, however, questions regarding the true magnitude and timing of data center load growth, as many of the current load requests may be duplicative applications with multiple utilities as developers seek out the cheapest, fastest interconnection. *See* Jeff St. John, *Utilities Are Flying Blind on Data Center Demand. That's a Big Problem*, CANARY MEDIA (Feb. 25, 2025) https://www.canarymedia.com/articles/utilities/utilities-are-flying-blind-on-data-center-demand-thats-a-big-problem.

they are "planning for, and enabling increased deployment of, electric vehicle supply equipment."[110] By 2017, the commission stated that it expected the utilities, as part of their biennial Distribution System Implementation Plans, to be "investigating EV-related infrastructure effects and modifications in anticipation of a potential future when the range of needs and demands for EVs is substantial."[111] Similar recognition is needed by other PUCs, tailored to the specific load growth trends anticipated in their states.

Ensuring the prudency of system investments may also require utilities to demonstrate that they relied on the best available data in their decision-making.[112] Some of utilities' existing data sources will remain relevant to forecasting end-use electrification. Building electrification, for example, encompasses both the construction of all-electric properties and the retrofitting of existing properties with electric heating and appliances.[113] Utilities' existing econometric models may already be well-suited or easily adapted to forecasting the new construction portion of this load growth given the correlation between new construction and economic conditions already baked into many load forecasts.[114] But new methodologies are needed to forecast the timeline and location of building retrofits. Emerging data sources are also available and may be particularly useful in forecasting complex loads like EVs. For example, some vehicle manufacturers collect telematics data on the vehicles they sell—including where and when they travel, where they stop, and for how long—and freely provide this data to utilities for load forecasting.[115] Some groups are adapting models initially developed for other contexts, such as traffic demand models used in transportation planning efforts, to forecast future

110. Order Adopting Distributed System Implementation Plan Guidance, No. 14-M-0101, at 25 (N.Y. Pub. Serv. Comm'n Apr. 20, 2016), https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={B1C7035C-B447-459A-8957-20BF3BDB6D0F}

111. Order on Distributed System Implementation Plan Filings, No. 14-M-0101, at 9 (N.Y. Pub. Serv. Comm'n Mar. 9, 2017), https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={35E255DD-92FF-420B-8363-895892992103}. Illinois similarly recognized this need, as well as the opportunities EVs provide, in the Climate and Equitable Jobs Act passed in 2021. *See* 20 ILL. COMP. STAT. 627/45, at P (a)(6) and (9) (finding that "[s]tatewide adoption of electric vehicles requires increasing access to electrification for all consumers," and "[w]idespread adoption of electric vehicles can improve an electric utility's electric system efficiency and operational flexibility, including the ability of the electric utility to integrate renewable energy resources and make use of off-peak generation resources that support the operation of charging equipment.").

112. *See* Payne, *supra* note 28, at 622-627 (discussing how while widely applied the prudent investment test has never had a consistent definition, and recommending in the context of grid investments threatened by climate change that prudency should first and foremost be based on what a utility knew or should have known at the time of the investment decision).

113. Morash, *supra* note 86, at 14 (discussing how building electrification includes new construction and retrofits, and how each carries different grid planning implications for utilities).

114. *See* EPRI, *supra* note 87, at 3-13 – 3-14 (discussing examples of simulation forecasting methods that have shown promise for accurately forecasting greenfield and brownfield building construction over a five year time horizon).

115. Comments on Motion of the Commission to Address Barriers to Medium- and Heavy-Duty Electric Vehicle Infrastructure, at 5-8 (N. Y. Pub. Service Comm'n June 5, 2023), https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7BE0558D88-0000-C61E-8D4E-F939213F5197%7D (discussing how the company "makes vehicle movement data available to utilities at no charge for its own telematics-equipped Class 8 vehicles.").

EV charging patterns.[116] And efforts such as the Electric Power Research Institute's eRoadMap and RMI's GridUp mapping tools attempt to aggregate these and other data sources to produce EV load forecasts with varying levels of spatial and temporal granularity.[117]

Translating this data into load projections will also require utilities to make a number of assumptions about customers' behavior, assumptions that should be reasonable and defensible. EV charging, for example, can take a variety of forms with varying implications for distribution system needs. Passenger EV owners may charge at home, at public charging stations along travel routes, or at their workplace or other destinations. Commercial EV owners may charge at their base of operations, at public or semi-public charging hubs in commercial and industrial areas and along freight routes, or at their destinations like warehouses and businesses. The exact mixture of these types of charging has significant implications for not only where charging is happening, but also how. EV charging at peoples' homes and at fleet depots, for example, may be easier to shift to overnight hours that are outside of distribution system peak windows, while on-route public charging sites along highways are more likely to see opportunistic, "unmanaged" charging.[118] Regulators should consider targeted reporting requirements for utilities to identify and justify their load forecasting assumptions to ensure they are reasonable and consistent with state policy.

B. Adequacy of Service

Once a utility has identified load to be served, whether it be through a load forecast or a specific customer's interconnection request, the obligation to serve requires the utility undertake any work necessary to connect that customer to the grid and provide adequate service.[119] The requirement that utility service be "adequate" is almost universal to the statutes outlining the duty to serve across the U.S.,[120] but the word is usually not subject to further statutory definition. At most, it is often paired with other similarly ambiguous word including "safe," "just," "efficient," and "reasonable."[121] In the absence of further statutory specificity, it has generally fallen to public utility commissions and the courts to sketch the outlines of adequate service. This work cannot, and should not, be aimed towards identifying a single, unified definition of "adequacy," as the needs and expectations of customers will depend on "the type of service rendered and the needs of the area in which the utility operates."[122] For example, in the event of a widespread

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116. *See* Shu Su et al., *Forecast of Electric Vehicle Charging Demand Based on Traffic Flow model and Optimal Path Planning*, 2017 19TH INT'L CONF. ON INTELLIGENT SYS. APPLICATION TO POWER SYS., https://ieeexplore.ieee.org/document/8071382.

117. *eRoadMAP*, EPRI, (last visited Sept. 4, 2025), https://eroadmap.epri.com/; *Electrification 101*, GRIDUP: AN RMIINITIATIVE, (last visited Sept. 4, 2025), https://gridup.rmi.org/.

118. *See* Joint Compliance Filing, *supra* note 49, at 41-42 (showing fleet charging peaking around 12pm and 11pm, while EV fast charger usage is consistently high between 9am and 7pm).

119. *See* Bagdanov, *supra* note 1, at 4.

120. *Id*. at 23-36 (showing the word "adequate" to appear in the obligation to serve statute of 42 states and Washington, D.C.).

121. *See id*.

122. *Duty of a Public Utility*, *supra* note 32, at 313-322.

outage, commissions may require utilities to prioritize service restoration for those customers who rely on electric service for essential medical equipment and public safety customers like fire, police, and ambulance services.[123] In areas where extreme heat is a concern, adequacy may encompass an obligation to provide sufficient service for widespread air conditioner use.[124] In the context of widespread end-use electrification, providing adequate service will require providing energy when and where it is needed on the grid in a timely manner, but the specific needs of these end uses and the emergence of new technologies should create new expectations on utilities to serve this load in ways that benefit all customers.

Much of the case law around the adequacy of service addresses utilities' obligations to minimize outages, and to notify customers when outages do occur.[125] In *Langley v. Pac. Gas & Elec. Co.*, for example, the plaintiff owned a fish hatchery and was at high risk of losing his stock of fish during a power outage.[126] He repeatedly asked his utility to notify him of outages, and a utility employee did so on multiple occasions ahead of planned outages.[127] But, no such notice came after an unplanned outage one night, and he returned to the hatchery the next morning to find almost all of his fish dead.[128] The utility argued that it was not liable for the loss, pointing to CPUC regulations that required it to "exercise 'reasonable diligence and care' to furnish a continuous and sufficient supply of electricity to its customers," and that it is not "liable for interruption or shortage or insufficiency of supply, or any loss or damage of any kind or character occasioned thereby . . . except that arising from its failure to exercise reasonable diligence."[129] The court rejected this argument, finding that even though the utility wasn't responsible for the outage itself, the CPUC regulations did not "abrogate defendant's general duty to exercise reasonable care in operating its system to avoid unreasonable risks of harm to the persons and property of its customers."[130] The utility is not expected to provide perfect, uninterrupted service, but instead must simply "act in a reasonable manner under the circumstances," which in this instance meant making a reasonable effort to give notice to customers of outages when those customers have informed the utility they require such notice "to prevent serious loss."[131]

123. *See, e.g.*, Standards for Operation, Reliability, and Safety During Emergencies and Disasters, General Order No. 166, at 7 (Cal. Pub. Utils. Comm'n May 20, 2021), https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M464/K730/464730514.pdf ("In general, the utility shall set priorities so that Critical Customers, Access and Functional Needs Populations, and Essential Customers are least impacted and service is restored for the majority of customers in the shortest amount of time.").

124. Rossi & Panfil, *supra* note 72, at 1149.

125. *See id*. at 1150-52.

126. 262 P.2d 846, 847-48 (Cal. 1953).

127. *Id*. at 848.

128. *Id*. at 848-49

129. *Id*. at 849 (citing Cal. Pub. Utils. Comm'n Gen. Ord. No. 166, at 7 (May 20, 2021), https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M464/K730/464730514.pdf.

130. *Langley*, 262 P.2d at 847-48 (referencing CAL. PUB. UTILS. CODE § 451).

131. *Id*. at 850. *See also* Natural Food Stores, Inc. v. Union Elec. Co., 494 S.W.2d 379, 381 (Mo. Ct. App. 1973) ("Generally speaking, an electric power company which undertakes to supply current, although not an insurer of service, has an obligation to provide a patron with adequate and continuous service...") (footnote omitted).

The application of "adequacy" to the duty to serve also generally encompasses the obligation of utilities to meet some minimum standard of service in the provision of service even in the absence of specific statutory obligations and to consider the impacts of its service on specifically situated customers where it is reasonable to do so.[132] In *Humphreys v. Central Kentucky Natural Gas Co.*, a utility was held liable for not providing enough gas at a high enough pressure to allow a florist to keep his greenhouse warm.[133] In *Kentucky Power Co. v. Kilbourn*, the court found the utility could be held liable for damages when its equipment failed to provide sufficient voltage to a customer's electric motors, causing them to overheat and start a fire.[134] And in *Lund v. Princeton*, the court found the utility liable when it replaced a transformer system that provided 240 volt service with one that provided 208 volts, which the plaintiff—a chicken hatchery owner—claimed reduced the heat produced by his incubators.[135] Although the decision to install the new transformer "was a reasonable one which defendant might determine was in the best interest of its consumers generally," the utility was at fault because it could have notified the hatchery owner of the change and give him the opportunity to take necessary steps to continue providing the necessary heat to his incubators without any harm to its remaining customers.[136] Today, PUCs often set performance standards utilities must abide by for service characteristics such as voltage,[137] but a general reasonableness standard may still apply for other service characteristics such as reliability.

Importantly, courts may distinguish between utilities' actions regarding investment and rate setting—where they are subject to the prudence standard—and their actions in the operations of their systems—where they are subject to a reasonableness standard that is less deferential to utilities.[138] In the context of end-use electrification as discussed in this article, the prudence standard may be more often applied given the focus on utility investments rather than maintenance of

132. *See* Rossi & Panfil, *supra* note 72, at 1152.

133. 229 S.W.117, 120 (Ky. 1920) ("We do not of course mean to say that a gas company is under an absolute duty to furnish each or any of its customers the precise quantity of gas or the exact pressure needed by them, because it might not be reasonable or practicable for it to do this without discrimination, but if it known the needs of a particular customer and the quantity and pressure of gas he requires in his business it should furnish this quantity and pressure if by reasonable and practicable diligence and care under all the existing circumstances and conditions it can do so without discrimination against other customers.")

134. 307 S.W.2d 9 (Ky. 1957).

135. 85 N.W.2d 197, 200-02 (Minn. 1957).

136. *Id*. at 203.

137. *See, e.g.*, 52 Pa. Code § 57.14 (2025) (defining the allowable voltage variation for electrical service for customers of regulated electric utilities in Pennsylvania); *Electric Rule No. 2*, PAC. GAS & ELEC. CO., at 4 (2023) (setting out the minimum and maximum allowable service voltage on electric distribution circuits).

138. Massachusetts Electric Co. v. Department of Pub. Utils., 15 N.E.3d 176, 183-84 (2014) ("a utility satisfies the prudence standard where it acts in conformance with fair and prevailing utility practice. Under the reasonableness standard, a practice followed by every utility may still be unreasonable where it fails adequately to restore service following a storm in a safe and reasonably prompt manner . . . The prudence standard is limited to rate setting…") (internal citation omitted).

existing assets, but the expectation that utilities adhere to prevailing standards remains.[139]

These cases illuminate a few principles that can together define the adequacy of utility service in the context of end-use electrification. First, a utility's actions—both in providing and failing to provide service—must be prudent and/or reasonable not just in their design and intent but also in their impact on customers. Second, providing adequate, nondiscriminatory service does not require—or perhaps even allow—utilities to treat all customers equally, as "adequacy" will mean different things to different customers. And third, as utilities invest in their systems over time, they must account for how available technologies and utility practices could serve the system as a whole as well as uniquely situated customers.

1. Timeliness of Service

Applying the requirement of "adequate" service to the context of end-use electrification supports the conclusion that utilities are obligated to provide service to new customers in a reasonably timely manner. As with all applications of a "reasonableness" standard, this timeline is not fixed but depends on the specifics of both the customer's request and the utility's system. And as seen in the *Lukrawka* case, the binary question of whether a utility must extend service to a customer may be more easily justiciable than the open-ended inquiry of what timeline for that service extension is reasonable. The application of an "adequate service" requirement, however, suggests that utilities face baseline obligations to customers even in the face of distribution constraints.

Case law is understandably sparse on the topic of timeliness of distribution service, particularly when compared to that regarding utilities' obligations to minimize and mitigate outages, as evinced in *Langley*. Two factors may explain this: (1) the likelihood of complaints regarding the timeliness of service to become moot before being resolved in court, and (2) the lack of clarity in the legal obligations utilities owe to prospective customers compared to those owed to current customers. If a prospective customer applies for utility service and receives a lengthy interconnection timeline from their utility, they may decide to simply wait it out if that interconnection is still important even if far off, they may reassess whether the utility service in question is necessary, or if they have geographic flexibility they may apply for service elsewhere within the service territory or another utility's territory to seek out a shorter timeline.[140]

For those customers inclined to directly challenge a utility's interconnection timeline, there may be administrative hurdles customers are expected or required to overcome before a complaint would end up in court. The CPUC, for example, provides an "Energization Delay Reporting Form" customers can file with the commission, but they can only do so after attempting to resolve the delay with their utility directly, or if their request exceeds the maximum interconnection timeline target set by the commission—which can be up to nine years where the utility

139. *See id*. *But see Lund*, 85 N.W.2d 197, 203 (discussing the breach of an implied contract between the utility and customer to provide "reasonably adequate and continuous electrical service.").

140. This appears to be the case with emerging data center load today. *See* NAT'L GRID & HITACHI ENERGY, *supra* note 103, and accompanying text.

determines the customer's application triggers a need for a new substation.[141] And for those complaints that do reach the litigation stage, judges may be deferential to utilities as the experts on the reasonableness of system upgrade timelines on their systems. Even though utilities have an obligation to reasonably anticipate future loads and prepare their systems accordingly,[142] a judge may feel they would be going too far out on a limb to direct a utility to speed the interconnection of a specific customer whose service requires a system upgrade. This dearth of case law on the subject underscores the need for more research and scholarship on the timeliness of service, both in general and for end-use electrification in particular. This includes greater tracking of interconnection timelines for varying types of customers requesting interconnection today, and a comparison to customers' requested timelines.[143]

Even in the absence of such data or case law, however, regulators can effectuate the "adequacy of service" principles outlined above in a number of ways. The first is ensuring that utilities' capital plans and interconnection processes are sufficient to serve the number and complexity of service requests forecasted in the territory. Because serving new load requests is a core component of a utility's duty to serve, regulators should require utilities to demonstrate how their capital investment plans are reasonably consistent with the anticipated scale and pace of service requests.[144] The factors driving much of this load growth—e.g., individual

141. *See* Decision Establishing Target Energization Time Periods and Procedure for Customers to Report Energization Delays, Rulemaking No. 24-01-018, at 47 (Cal. Pub. Utils. Comm'n Sep. 17, 2024), https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M540/K806/540806654.PDF. For customers whose application triggers a need for a new or upgraded circuit or substation, this maximum timeline ranges from 684 to 3242 calendar days, or 1.9-8.9 years. *Id*.

142. *See supra* Part IV.A.

143. Efforts by the California PUC and the state's utilities in response to the directives of Senate Bill 410 represent the clearest example in the U.S. of such tracking today. *See generally* Decision Establishing Target Energization Time Periods and Procedure for Customers to Report Energization Delays, Rulemaking No. 24-01-018, at (Cal. Pub. Utils. Comm'n Sep. 17, 2024), https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M540/K806/540806654.PDF.

144. The reasonableness of a utility's actions to serve new load are likely easier to outline than those related to more general, external factors such as climate change and extreme weather. A utility's liability for outages and other failures to provide service may be limited when caused by such factors. *See, e.g.*, Monolith Portland Midwest Co. v. Western Pub. Serv. Co., 142 F.2d 857, 859 (10th Cir. 1944) (describing a lightning strike that caused an outage as "clearly an act of God"); *see also* Rossi & Panfil, *supra* note 72, at 1151 ("Most states limit liability for service interruption to conduct that is, at the very minimum, negligent, though many states' regulations or approved tariffs provide some defense to customer recovery unless the utility was willfully or grossly negligent."). Some scholars have argued, however, that the overwhelming scientific evidence regarding the expected impacts of climate change are so clearly foreseeable as to overcome this hurdle. *See* Payne, *supra* note 28, at 624 ("At this point, scientists have told us far more about climate change than what utilities are taking action based upon. Utilities should be tasked with that knowledge."); Rossi & Panfil, *supra* note 72, at 1178-79 ("Just as the duty to serve requires a utility to constantly update technical standards in light of the environment in which it operates, the duty to adapt should similarly compel updates in light of what climate science makes available.").

customer electrification plans,[145] economic factors driving customer behavior,[146] and customers' regulatory obligations[147]—are not only knowable, but are the types of information that have historically been central to utilities' forecasting and planning efforts.[148] Preparing for end-use electrification, therefore, is not asking utilities to reinvent their operations; it is reasonably expecting them to adapt their operations in response to the best available information to adequately serve their customers.

Regulators should also recognize utilities' capacity to enable customers' compliance with policy requirements and goals as a threshold requirement for "timely" service. If a certain pace of interconnections of EV chargers or electrified buildings for example is needed to meet a government policy related to those sectors, the obligation to serve should include meeting that pace of need. In New York City, Local Law 154 banned fossil fuel heating in new buildings,[149] and Local Law 97 set declining limits on greenhouse gas emissions from large buildings in New York City;[150] Con Edison has reported that service requests for electric heating more than doubled from 2022 to 2023, and applications for its Clean Heat incentives from buildings covered by those regulations more than tripled in that same period.[151] In California, some fleets argued that the maximum interconnection timelines proposed by the Commission were too long because they would not allow the fleets to electrify in time to meet regulations.[152] At minimum, reasonable

145. *See, e.g.*, *Zeero- Zero Emissions, Energy Resilient Operations*, PORT OF LONG BEACH (last visited Sep. 17, 2025), https://polb.com/environment/zeero/#zero-emissions-projects ("The 2017 Clean Air Action Plan Update set the Port of Long Beach on the path to zero-emission goods movement, with a goal of transitioning terminal equipment to zero emissions by 2030 and on-road trucks by 2035."); *Everything You Need to Know About Amazon's Electric Delivery Vans from Rivian*, AMAZON (last updated June 19, 2025), https://www.aboutamazon.com/news/transportation/everything-you-need-to-know-about-amazons-electric-delivery-vans-from-rivian ("With its commitment to have at least 100,000 electric delivery vehicles on the road by 2030, Amazon will eliminate millions of metric tons of carbon per year.").

146. *See* Hussein Basma et al., *White Paper: Total Cost of Ownership of Alternative Powertrain Technologies for Class 8 Long-Haul Trucks in the United States*, INT'L COUNCIL ON CLEAN TRANSP., at ii (Apr. 2023), https://theicct.org/wp-content/uploads/2023/04/tco-alt-powertrain-long-haul-trucks-us-apr23.pdf (forecasting that battery electric trucks will be the cheapest option for long-haul operations by 2030 in all seven of the states studied)

147. *See*, *e.g.*, N.Y EDUC. LAW §3638 (McKinney 2023) (requiring all new school bus purchases in New York State to be zero-emission after July 1, 2027, and all school buses operating in the state to be zero-emission by July 1, 2035).

148. EPRI, *supra* note 87, at 3-1 (listing common inputs for utility load forecasts including customers' "utilization of new technologies, and . . . information about likely future developments, for example, opening of new factory or shopping mall, etc.").

149. N. Y. C. ADMIN. CODE, §§ 24-177.1, 24-178, 28-506 (2025)

150. *Id*. §§ 28-320, -321.

151. Consolidated Edison Company of New York, Inc. Urgent Projects Proposal, No. 24-E-2364, at 101-102 (N.Y. Pub. Serv. Comm'n Nov. 13, 2024), https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={50672793-0000-C09B-BFAB-3705801008E7} ("From 2022 to 2023 the number of electric heating load letters received increased by 103%. . . . The Company observed a more than three-fold increase in the number of Local Law 97 covered buildings applying for incentives through its Clean Heat program, from 14 in 2022 to 51 in 2023.").

152. Opening Comments of Powering America's Commercial Transportation on the Proposed Decision Establishing Target Energization Time Periods and Procedure for Customers to Report Energization Delays,

interconnection timelines should be those that ensure utilities do not prevent customers from complying with requirements and goals such as these. Taking too long to interconnect a group of customers facing a regulatory compliance deadline because it was their load requests that triggered the need for grid upgrades may be unreasonable even if the utility's timeline to design and build the grid upgrades in question was reasonable. Like those customers in *Humphreys*, *Kentucky Power Co.*, and *Lund*, these are customers making service requests that may differ from those of the average customers but are still reasonable requests. They may be able to persuasively argue that utilities have access to data sources and modeling techniques that make this end-use electrification reasonably foreseeable, particularly when driven by public policy and regulations, and allow utilities to proactively begin work to serve the anticipated load rather than waiting for specific requests to begin necessary system upgrades.[153] Failure by a utility to make reasonable efforts to account for this data and prepare their systems to serve these customers may rise to the level of violating the duty to serve.

Some regulators may also be under more direct requirements to account for their state's policy goals in utility regulatory decisions. Connecticut, Washington D.C., and New York are examples of states that explicitly codify an obligation of their PUCs to consider their state climate and energy policies in their decision-making.[154] In these jurisdictions, the duty to serve manifests both "top-down" (i.e.,

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Rulemaking No. 24-01-018, at 10 (Cal. Pub. Utils. Comm'n Aug. 29, 2024), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M539/K203/539203682.PDF (proposing alternative, shorter timelines that "are reasonable timelines because they are what is required to enable TE entities to meet their obligations under ACT, ACF and other state, local and federal regulations, as required by SB410.")

153. *See* Humphreys v. Central Ky. Nat. Gas Co., 229 S.W. 117, 120 (Ky. 1920) ("We do not of course mean to say that a gas company is under an absolute duty to furnish each or any of its customers the precise quantity of gas or the exact pressure needed by them, because it might not be reasonable or practicable for it to do this without discrimination, but if it known the needs of a particular customer and the quantity and pressure of gas he requires in his business it should furnish this quantity and pressure if by reasonable and practicable diligence and care under all the existing circumstances and conditions it can do so without discrimination against other customers."); Kentucky Power Co. v. Kilbourn, 307 S.W.2d 9, 13 (Ky. 1957); Lund v. Princeton, 85 N.W.2d 197, 200-03 (Minn. 1957); 52 PA. CODE § 57.14 (2025); *Electric Rule No. 2*, *supra* note 137.

154. CONN. GEN. STAT §16-2(m) (2025) ("Notwithstanding any provision of the general statutes, the decisions of the Public Utilities Regulatory Authority, including, but not limited to, decisions relating to rate amendments arising from the Comprehensive Energy Strategy, the Integrated Resources Plan, the Conservation and Load Management Plan and policies established by the Department of Energy and Environmental Protection, shall be guided by said strategy and plans and such policies"); D.C. CODE §34-808.02 (2025) ("In supervising and regulating utility or energy companies, the Commission shall consider the public safety, the economy of the District, the conservation of natural resources, and the preservation of environmental quality, including effects on global climate change and the District's public climate commitments."); 2019 N.Y. Laws 106 § 7(2) ("In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, all state agencies, offices, authorities, and divisions shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law."); Order Approving Joint Proposal, As Modified, and Imposing Additional Requirements, No. 19-G-0309, 19-G-0310, & 18-M-0270, at 69-70 (N.Y. Pub. Serv. Comm'n Aug. 12, 2021), https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={CC550437-3EC4-4F79-8F83-CFA85C572020} (concluding "Sections 7(2) and 7(3) are applicable to the [New York Public Service] Commission's actions here," observing "the Legislature's intent that Section 7(2) of the CLCPA be broadly construed," and explaining that "Commission orders in rate cases fall within the ambit of Section 7(2)'s [and 7(3)'s] application to 'other administrative approvals' notwithstanding the absence of a direct correlation to any item provided in the list of examples").

from the regulator's obligation to align its decision-making with state law) and "bottom-up" (i.e., from the customer's regulatory compliance requirement to the utility's service obligation).

2. Quality of Service

Alongside the timeliness of service, "adequacy" also implicates the characteristics of the service customers require. These include the customer's maximum allowable load, the voltage at which they take service, and the reliability of that service, each of which can vary widely between customers. For example, hospitals and water supply facilities today are often connected to the grid by multiple feeders through "spot networks" because of the greater risk of harm from an outage than that for an average customer.[155] Utilities may owe specific duties to particularly situated customers, when the utility is aware of and can reasonably effectuate those duties.[156]

For end-use electrification customers, this includes appropriately sizing grid infrastructure in anticipation of forecasted future loads. Installing new and upgraded infrastructure that has sufficient available capacity to serve not just immediate customer needs but also reasonably likely future loads is generally considered a prudent investment;[157] in fact, utilities have an obligation to prepare for those future public needs.[158] As discussed in Part IV.A, utilities have a wide range of new data sources and analytical resources available to them to improve the temporal and geographic accuracy of their load forecasts, and an obligation to employ these tools to improve their investment decision-making.[159] Using these tools, utilities will find that additional distribution grid capacity will be needed on certain parts of their systems to serve all of the anticipated load. But they cannot simply stop at these forecasting or planning stages, content with knowing how they would serve the expected load but not actually doing so; fulfilling their duty to serve requires them to put that knowledge into practice to provide the necessary grid capacity.

In providing this capacity, utilities will need to determine where it is more cost-effective to sequentially increase capacity—upgrading assets and transferring load in response to individual or small groups of interconnection requests—and when it makes more sense to proactively complete upgrades—planning upgrades to enter service additional available headroom to serve anticipated load over a longer timeframe.[160] But as discussed above, utilities' duty to serve implicates the

155. *See* Edvard Csanyi, *Primary and Secondary Power Distribution Systems (Layouts Explained)*, ELEC. ENG. PORTAL (last updated Jan. 18, 2025), https://electrical-engineering-portal.com/primary-secondary-distribution-systems.

156. *See* Kentucky Power Co. v. Kilbourn, 307 S.W.2d 9 (Ky. 1957); *see also* Lund v. Princeton, 85 N.W.2d 197 (Minn. 1957).

157. *See supra* Part II.B.

158. Northern Light & Power Co. v. Stacher, 109 P. 896, 903 (Cal. Dist. Ct. App. 1910) (stating that it is the "duty [of public utilities] to anticipate future needs of the public.").

159. *See supra* Part IV.A.

160. *See Proactive Grid Investment Assessment*, *supra* note 97, at 7 ("The costs and benefits related to adopting a proactive planning approach over a sequential one is largely dependent of the level of oversizing

timeliness of service, and utilities and their regulators must consider how the balance between sequential and proactive grid upgrades impacts the interconnection timeline. This includes not just the average timeline for customers as a whole, but the timelines for particularly situated customers, such as those facing regulatory compliance deadlines. Utilities do not need to meet every request of particular customers at the expense of service to the rest of their customer base—e.g. devoting more resources to accelerate the construction of a substation needed to serve a particular customer service request when that reallocation of resources will unreasonably displace or delay other necessary work. But, when utilities are on notice of their customer's service needs—including where such needs arise from an identifiable technological trend, rather than a direct request from a customer—the utility must account for those customers' needs without simply defaulting to their standard grid planning and customer interconnection processes.[161] They must take reasonable actions, and make prudent investments, to effectuate those customers' requests.

When implementing more proactive planning and construction efforts, utilities and regulators must also consider the types of service end-use electrifying customers will prefer to avoid overinvesting in the wrong types of grid assets. Some customers may have a preference for taking service at primary, rather than secondary, distribution voltages in order to operate equipment designed for higher voltages or to lower their electricity costs.[162] Similarly, utility planners will need to consider the modularity of many end-use electrification loads and the potential of these loads to grow from requiring distribution service to being better suited to taking service directly from the transmission system.[163] National Grid found in a study of anticipated electricity demand from highway EV charging between Boston, MA and Buffalo, NY that a majority of the seventy-one sites studied would eventually have peak loads above its standard limit for service at distribution voltages, with over a quarter of these sites exceeding that five megawatt limit as soon as 2030.[164] Where forecasting in accordance with best practices suggests transmission-level voltages will be needed within the forecast horizon, a utility that relies instead upon a distribution-level solution may be failing to exercise prudence.

Some electrifying customers, including public safety agencies like fire departments, police, and ambulance services electrifying their vehicle fleets, may

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employed with a proactive approach and the associated costs, which varies by planning specifications and jurisdiction.").

161. The clarity of a customer's request is also relevant, as a request with a specific site, capacity request, and timeline may more clearly obligate a utility to act than one which is more vague in its nature.

162. When customers receive high-tension service, they are generally responsible for installing and maintaining the equipment to convert their electricity from primary distribution voltages to their required service voltage; for low-tension service, in contrast, the utility is responsible for this equipment and customers pay for the additional cost through higher rates. *See* Comments of Read and Laniado, LLP on Proceeding on Motion of the Commission to Address Barriers to Medium- and Heavy-Duty Electric Vehicle Charging Infrastructure, No. 23-E-0070, at 2, 5-6 (N.Y. Pub. Serv. Comm'n June 5, 2023), https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={70AB8D88-0000-CA1D-8F43-9FF784C4A29F} (explaining the Authority's preference for high-tension service for electrifying their bus depots).

163. *See* Katsh et al., *supra* note 50.

164. *Id*.

also require the same higher levels of reliability as hospitals and other critical services today, and utilities should account for this in their system planning efforts. For example, this could include additional spot networks for these agencies that have electrified their fleets to maintain emergency response services, or for heating and cooling in buildings that serve as emergency shelters during natural disasters.[165] Again, utilities cannot be expected to provide 100% reliable service to these customers, as the investment needed to approach that level of reliability is almost certainly imprudent. But, where the grid architecture can accommodate it and the customers in question are willing to pay the increased costs attributable to their service requests, utilities' duty to serve includes making prudent investments, and taking reasonable steps to forecast and serve this load, in a way that meets the specific needs of these customers.

Considerations of the "adequacy" of service must also account for emerging technologies and operational capabilities that allow the utility to provide partial service to customers when delays to providing full service is unavoidable. Flexible interconnection programs are one example of this, where utilities provide partial service to customers who traditionally would need a long-timeline grid upgrade before interconnecting.[166] For example, the utility may restrict the customer's peak load below their theoretical maximum load, or require the customer to reduce their load specifically during high-demand periods.[167] Some utilities including Pacific Gas & Electric, Southern California Edison, and Con Edison are already piloting such programs,[168] while other utilities are actively considering how to deploy them,[169] and the CPUC is exploring how to expand such pilots into

165. It should be noted that electrifying heating does not create additional safety concerns in the event of outages, as furnaces that burn natural gas or home heating oil still rely on electricity and do not work during power outages. *See* Charlotte Shuff, *Gas Myth: All Gas Appliances Work in Power Outages*, OREGON CITIZENS' UTIL. BD. (Feb. 15, 2022), https://oregoncub.org/news/blog/gas-myth-all-gas-appliances-work-in-power-outages/2489/nr-aside-main.

166. Casey Horan et al., *Let's Get Flexible: Considerations for Unlocking Grid Capacity Using Flexible Interconnection*, ENV'T DEF. FUND 6 (Feb. 2025), https://library.edf.org/AssetLink/q812pd5afr3hboi61cm503fprla5ge0p.pdf

167. *Id*. at 8-9.

168. Bridging Solutions Strategies Compliance Report Filed by Pacific Gas and Electric Company (U 39 E), Rulemaking No. 21-06-017, at Attachment A, at 3 (Cal. Pub. Utils. Comm'n Dec. 16, 2024), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M549/K805/549805932.PDF (discussing PG&E's Flex Connect program) [hereinafter PG&E Bridging Solutions]; Southern California Edison Company's (U 338-E) Plan and Compliance Report on Bridging Strategies and Solutions, Rulemaking No. 24-01-018, at 6-7 (Cal. Pub. Utils. Comm'n Dec. 16, 2024), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M550/K147/550147940.PDF (discussing SCE's Load Control Management System pilot) [hereinafter SCE Bridging Solutions]; *Department of Public Service Staff Modified Proposal for Streamlined V1G Queue Management in Electric Vehicle Make-Ready Program and Other Programs Amendment 1*, No. 18-E-0138, N.Y. PUB. SERV. COMM'N 8-9 (Dec. 17, 2024), https://dps.ny.gov/system/files/documents/2025/01/modified-proposal-for-streamlined-v1g-queue-managment.pdf (discussing Con Edison's practice of phasing interconnection of EV chargers where grid upgrade needs would delay full interconnection).

169. *See, e.g.*, Order on Refiling, Docket No. 24-0181, at 42-44 (Ill. Com. Comm'n Dec. 19, 2024), https://www.icc.illinois.gov/docket/P2023-0055/documents/359318/files/629460.pdf (acknowledging Commonwealth Edison Company's commitment to implementing flexible interconnections); *see also* Order on Refiling, Docket No. 24-0238, at 218 (Ill. Com. Comm'n Dec. 19, 2024), https://www.icc.illinois.gov/docket/P2023-0082/documents/359319/files/629463.pdf (acknowledging Ameren Illinois Company's commitment to implementing flexible interconnections).

full-scale programs in California.[170] These solutions can be used indefinitely to avoid an otherwise-necessary grid upgrade, or as part of a phased interconnection approach that increases a customer's allowable load over time as the utility completes the needed upgrades.

When used as a phased solution, flexible interconnection programs represent another tool in the toolbox for utilities to provide timely service to customers otherwise faced with lengthy grid upgrade needs, alongside temporary infrastructure solutions like mobile substations and mobile battery storage systems.[171] Some utilities facing lengthy interconnection queues are already implementing these "bridging" solutions,[172] and this need is likely to expand as end-use electrification continues to grow. For other utility territories where customers are facing these long service timelines, or are likely to see such delays given expected trends in end-use electrification, these bridging solutions may already represent the prudent option that defines the adequacy of service utilities must provide. The fact that they are not already in widespread use is not dispositive for defining reasonableness in this context, as an industry's current practice is only one piece of evidence in the prudency inquiry.[173] This inquiry must take a broader view, not just at what is generally done today, but also what can and should reasonably be done given the circumstances.[174] Not all bridging solutions will be prudent for all utilities in all instances,[175] but given the scale of the expected grid upgrade needs associated

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170. Administrative Law Judge's Ruling Clarifying Next Steps for Flexible Service Connections, Modifying Phase 2 Schedule, and Requesting Party Comments, Rulemaking No. 24-01-018, at 4 (Cal. Pub. Utils. Comm'n Feb. 2, 2025), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M556/K603/556603068.PDF ("[flexible interconnections] are currently being offered to some energization customers on a case-by-case basis through form-based processes and in other cases through IOU pilots…this effort will focus on how to standardize [flexible interconnections] in simple terms that can be implemented in the very near term to avoid energization delays triggered by upstream capacity needs on the distribution system.").

171. *See, e.g.*, *Mobile Substations: A Complete Range of Flexible Solutions*, GE GRID SOLUTIONS 4, https://www.gevernova.com/grid-solutions/hvmv_equipment/files/grid-acs-l2-mobile_substations-0311-2016_03-en.pdf (detailing use cases for mobile substations, including for temporary power supply during grid upgrades and maintenance); Alex Smith, *Clean Power Unplugged: The Rise of Mobile Energy Storage*, ENERGY STORAGE NEWS (Jan. 2, 2024), https://www.energy-storage.news/clean-power-unplugged-the-rise-of-mobile-energy-storage/ (listing EV fleet charging as a use case for temporary mobile battery storage).

172. *See* PG&E Bridging Solutions, *supra* note 168; SCE Bridging Solutions, *supra* note 168.

173. *See* The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (holding that "in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.").

174. Texas & Pac. Ry. Co. v. Behymer, 189 U.S. 468, 470 (1903) ("What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."); *see also* Rossi & Panfil, *supra* note 72, at 1179-80 ("To the extent some existing industry custom (such as a custom of looking to historical averages in planning) fails to recognize adaptation risks in energy grid planning, this does not excuse a utility's inaction or failure to take proactive operational or planning measures.").

175. Kayla Guo, *ERCOT Approves $54 Million Plan to Move CenterPoint's Mobile Generators to San Antonio*, TEX. TRIB. (Feb. 25, 2025), https://www.texastribune.org/2025/02/25/texas-power-grid-ercot-mobile-generators-centerpoint-energy-san-antoni/ (describing "mobile" generators leased by CenterPoint, which the utility did not use during major outages caused by Hurricane Beryl in 2024, leading to calls from lawmakers that the leases be found imprudent and barred from cost recovery).

with end-use electrification, providing adequate service to these electrifying customers will likely require greater consideration of these solutions than they generally receive today.

3. Glimpse of the Future: Anticipatory System Planning at FERC

The above discussion explains how distribution utilities' core legal duties include the obligations to anticipate, prepare for, and adapt to changing customer needs; and identifies ways in which these obligations manifest in the face of electric load growth. Recent history at the Federal Energy Regulatory Commission (FERC) illustrates how these obligations are implemented with respect to transmission planning.

As of this writing, regional transmission operators' generation interconnection queues are suffering from long backlogs. Data from Lawrence Berkeley National Lab found that generator interconnection requests increased every year between 2014 and 2023, and interconnection timelines for these projects have continued to grow during this same period, reaching almost five years from request to entering service in 2023.[176] These backlogs grew in response to a proliferation of interconnection requests from prospective new storage and renewable generation projects, which have grown increasingly commercially attractive as their costs have fallen. Several factors drove these backlogs, but they can be boiled down to two general categories: (1) a dearth of transmission capacity in areas rich in renewable resources; and (2) structural mismatches between RTOs' traditional interconnection processes (which were developed around large generator projects with long development timelines) and a market increasingly characterized by smaller projects reliant on fast speed-to-market.[177]

FERC has recently addressed these issues through a series of orders, including Order 1920 (and successor clarifying Orders 1920-A and 1920-B) on electric transmission planning and cost allocation.[178] These Orders demonstrate that anticipatory planning and system deployment has become an integral part of transmission utilities' existing obligations.

For example, among other things, Order 1920 examines how transmission providers conduct long-term planning for regional transmission facilities. The Order grounds this inquiry in part in FERC's obligation to ensure just, reasonable, and nondiscriminatory rates, reflecting FERC's conclusion that how utilities' costs

176. Joseph Rand et al., *Queued Up: 2024 Edition*, LAWRENCE BERKELEY NAT'L LAB., at 10, 41 (Apr. 2024), https://emp.lbl.gov/sites/default/files/2024-04/Queued%20Up%202024%20Edition_1.pdf.

177. *See* Order No. 2023, *Improvements to Generator Interconnection Procedures and Agreements*, 184 FERC ¶ 61,054 P 27 (2023) (to be codified at 18 C.F.R. pt. 35) [hereinafter Order No. 2023]; *see also* Notice of Proposed Rulemaking, *Improvements to Generator Interconnection Procedures & Agreements,* 87 Fed. Reg. 39934, 33938-39 (July 5, 2022).

178. *See* Order No. 1920-A, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation*, 189 FERC ¶ 61,126, 89 Fed. Reg. 97,186 (2024) (to be codified at 18 C.F.R. pt. 35) [hereinafter Order No. 1920-A]; *see also* Order No. 2023, *supra* note 177.

are recovered through rates is inextricably bound up in how they plan for and construct infrastructure.[179]

FERC also explicitly tied transmission system planning to utilities' obligation to serve.[180] FERC found that transmission utilities' foundational duties include forward-looking infrastructure planning:

> Specifically, in this final rule, we find that there is substantial evidence to support the conclusion that the existing regional transmission planning and cost allocation processes are unjust, unreasonable, and unduly discriminatory or preferential because the Commission's existing transmission planning and cost allocation requirements do not require transmission providers to: (**1) perform a sufficiently long-term assessment of transmission needs that identifies Long-Term Transmission Needs; (2) adequately account on a forward-looking basis for known determinants of Long-Term Transmission Needs;** and (3) consider the broader set of benefits of regional transmission facilities planned to meet those Long-Term Transmission Needs.[181]

The Order goes on to articulate several ways in which utilities should discharge this aspect of their service obligation. It directs transmission providers to develop long-term scenarios, with a twenty-year forward-looking horizon, to inform infrastructure planning.[182] It further directed utilities to use "best available data inputs," including seven "factor categories," to develop these scenarios.[183] These factor categories include federal, Tribal, state, and local laws related to resource mix, demand, electrification, and decarbonization, even where the laws do not directly regulate utilities themselves;[184] as well as technological trends "including shifts toward electrification of buildings and transportation."[185]

To be clear, Order 1920 does not dictate *distribution* utilities' load forecasting obligations. It does not apply to state-jurisdictional utility distribution systems, and its connections between forward-looking planning and utilities' service obligation are derived in part from language in the Federal Power Act,[186] which does not regulate state-jurisdictional utility operations. But it is a useful corollary.

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179. *See* Order No. 1920-A, *supra* note 178, at P 61 (sustaining the "finding that the identified deficiencies in transmission planning and cost allocation processes render existing Commission-jurisdictional rates unjust and unreasonable"); *see also* South Carolina Pub. Serv. Auth. v. FERC*,* 762 F.3d 41, 55-59 (D.C. Cir. 2014) (holding that the Federal Power Act authorizes FERC to regulate utility "practices" that affect FERC-jurisdictional rates, and transmission planning constitutes one such practice).

180. *See* Order No. 1920, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation*, 187 FERC ¶ 61,068 at P 447 n.996 (2024) (quoting 16 U.S.C. 824q(b)(4) [hereinafter Order No. 1920] ('The Commission shall exercise the authority of the Commission under this chapter in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities, and enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.").

181. *Id.* at P 1 (emphasis added).

182. *Id.* at P 302.

183. *Id.* at PP 422, 636.

184. Order No. 1920, *supra* note 180, at PP 432, 440, 447

185. *Id.* at PP 442, 450. In its follow-up order on rehearing Order 1920-A, responding to various requests for reconsideration of Order 1920, FERC removed corporate commitments from the factor categories, but otherwise left them intact. Order No. 1920-A, *supra* note 178, at P 14.

186. *See* 16 U.S.C. § 824q(b)(4) (2018).

First, Order 1920 illustrates how load forecasting is reasonably deemed a core constituent of utilities' service obligation. Second, by prescribing specific categories of load forecasting inputs to a relatively high degree of detail, the Order suggests that this conception of utilities' service obligation is not nascent. Regulators can establish (and in FERC's case, did establish) factual records robust enough to allow this obligation to be defined and applied. Third, the Order demonstrates that incorporating anticipated policy and technology impacts into forward-looking load forecasts is a best practice. Utilities will be hard-pressed to argue that they can ignore these factors for distribution planning purposes, where they are required to consider them for transmission planning purposes. By virtue of Order 1920's broad applicability, its planning requirements will constitute (if they do not already) "good utility practice"[187] that regulators and customers can reasonably expect utilities to accomplish.

V. CONCLUSION

Adapting utility practices to serve end-use electrification is a clear case of evolution, not revolution. Most of the customers responsible for this new load will already be customers of their electricity utility looking to upsize their grid connection rather than begin it anew. But simply continuing current practices may not be sufficient for utilities to fulfill their duty to serve these customers. These loads will look different than those which utilities currently see on their systems in their timing and location, may drive new peaks or increase system utilization rates, and can be more flexible in their electricity consumption. These characteristics may make these emerging loads a significant benefit to ratepayers by supporting more efficient use of the grid as a whole, but these positives can only be realized if utilities can connect these loads to the grid efficiently and effectively.

New data collection and forecasting methods are available that can allow utilities to target the specific portions of their systems in greatest need of proactive upgrades. Data sources like vehicle telematics can give utilities invaluable insights into customers' behavior and corresponding electricity needs, but only if utilities learn how to leverage this information. Targeted bottom-up forecasting can account for how emerging loads will not show up evenly across a utility's system. And a recognition of forecasting's self-fulling nature for end-use electrification will be key for shifting utilities from a reactive to a proactive planning mindset.

187. "Good utility practice" is a widely used term of art that generally refers to industry-accepted methods, procedures, and standards by which utility companies operate. *See, e.g., Amended and Restated Operating Agreement of PJM Interconnection*, FERC Docket No. ER24-2398-000 (Dec. 1, 2024), https://www.pjm.com/pjm-files/directory/merged-tariffs/oa.pdf ("'Good Utility Practice' shall mean any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather is intended to include acceptable practices, methods, or acts generally accepted in the region; including those practices required by Federal Power Act Section 215(a)(4).").

Beyond simply forecasting these new loads, meeting the duty to serve will also require utilities to actually serve this load in a timely manner, and account for the particular needs of these customers to ensure their service is of adequate quality. This includes accounting for the long construction timelines for some distribution system assets such as substations to avoid significant delays for customers seeking service. It presses utilities to adapt how they design their systems to consider the particular needs of these customers. And it suggests that they should be doing more to account for emerging practices and technologies that can take advantage of these emerging loads' particular flexibility to shorten interconnection timelines and more cost-effectively meet their electrification needs.

The coming years will be a time of significant expectations for utilities and their regulators. High energy cost burdens on customers, state policies and regulation requiring changing utility practices and investments, and the reemergence (and uncertainty) of rapid load growth are all putting pressure on utilities to do more with less. Underlying all of this is the duty to serve that fundamental obligation of utilities to provide service to customers safely, reliably, and fairly. Meeting this duty for end-use electrification loads will not be trivial, but the resources exist to do so. Actually, achieving this, however, will require regulators to hold utilities accountable to continually adapt and improve their efforts with the needs of customers in mind.

RATE CASE EXPENSE: A UNIQUELY ANTI-CONSUMER FORM OF LITIGATION FEE SHIFTING

William G. Bolgiano[*]

Synopsis: In nearly every jurisdiction in America, including at the federal level, energy consumers are responsible for paying—as part of their service rates—the legal bills associated with utilities litigating in front of various public commissions and courts against consumers. This is called "rate case expense," and, although there has been a recent uptick in interest in it in several states, this is the first academic article to focus on the topic. This article puts forward several insights to advance these discussions. First, rate case expense should be understood as a form of fee shifting. Second, understanding rate case expense recovery this way reveals it to be unique. Reasons for this uniqueness include that rate case expense recovery (i) is not explicitly authorized by statute, (ii) can typically be recovered regardless of whether the utility prevails in the litigation, (iii) is rarely scrutinized or reduced by adjudicators. Third, rate case expense recovery is difficult to justify as a form of fee shifting and in fact operates against fee shifting's traditional justifications. For instance, rate case expense recovery shifts costs from the party with more resources to parties with fewer, and it subsidizes resistance to a regulatory regime, whereas fee shifting is traditionally seen as a way to overcome economic imbalances and subsidize enforcement of regulatory regimes. Fourth, because rate case expense is a form of fee shifting, it should have guardrails and limits comparable to those for conventional fee shifting. Fifth, many of the approaches that state regulators have applied to limit rate case expense recovery are consistent with both (1) established policy and scholarship on fee shifting and (2) the ratemaking principles that justify recovery of these expenses by utilities. This article puts forward several such approaches.

* Mr. Bolgiano is an associate in Venable LLP's Energy Group. He owes each member of that group, especially Steven Adducci, a great debt for their encouragement in this work and for the valuable experience and training that supported and informed the research. The views expressed are the author's alone and should not be taken as legal advice.

I. INTRODUCTION

In cost-of-service ratemaking litigation, adversaries operate under a fee shifting regime that makes a utility's ratepayers responsible for the costs the utilities just incurred litigating against their interests. This appears to be the first article that focuses on this practice or that categorizes it as a form of fee shifting. For at least a century, regulators adjudicating cost-of-service disputes have allowed utilities to recover from their ratepayers the costs of litigating (against those same ratepayers) in the instant disputes.[1] This essentially forces utility ratepayers to indemnify regulated utilities for (typically) all costs incurred *against*

1. *See, e.g.*, Columbus Gas & Fuel Co. v. City of Columbus, 17 F.2d 630, 640 (S.D. Ohio 1927) ("Legal expenses in connection with rate cases have been given the stamp of approval by courts, when these expenses have been incurred in rate litigation before commissions and before courts.") (citing Monroe Gaslight & Fuel Co. v. Michigan Pub. Utils. Comm'n, 11 F.2d 319, 325 (E.D. Mich. 1926); Winona v. Wisconsin-Minnesota Light & Power Co., 276 F. 996, 998 (D. Minn. 1921)).

the interest of those same ratepayers. The obvious moral hazard this creates has long been known. Writing in 1928, one commenter explained the dynamic thus:

> The common course in a rate case is for the company to spare no efforts as to lawyers, engineers, accountants and other experts to present the facts fully from its own standpoint. The cost is then included in operating expense and charged to the consumers. On the public side, however, there is usually parsimonious regard for its several expenses; only the minimum effort is made in preparing the facts and analysis. The commission usually does little or nothing except to hear both sides. Consumers therefore pay for the elaborate and costly preparation of the company, also the skimpy preparation of their own side, and finally pay the high rates sought by the company.[2]

While that commenter was optimistic that regulators were "taking a turn toward the better representation of the public interest,"[3] precious little was achieved on this front in the intervening years, especially at the federal level.[4] Several states, however, have adopted a more complete and nuanced understanding of this issue and have meaningful scrutiny, limits, and other measures to counteract this imbalance.[5] More recently, there has been renewed interest in this topic at the state level.[6]

This article seeks to build on that commonsense impulse expressed nearly a century ago and pursued by generations of administrative litigators since, that consumers should not always be financially responsible for the legal arguments a utility makes against their statutorily protected interests. The article first comprehensively addresses the origins of the practice of rate case fee recovery and assesses its theoretical justification against established ratemaking principles. State regulators provide helpful "laboratories of democracy" with their diverse, and significantly more thoughtful, approaches to this topic. The article therefore includes a survey of fifty-two jurisdictions (all states plus the District of Columbia and Puerto Rico) as the Appendix hereto.

This article proposes that recovery of rate case expenses fundamentally operates as a form of fee shifting because one party to the dispute is made responsible for the legal fees of its adversary in that dispute. It next assesses rate case expense recovery against established scholarship on fee shifting. This provides guidance as to how the practice of rate case expense recovery can (and cannot) be justified, as well as cautions about the pitfalls of unconstrained application. It concludes that because one of the key differences between rate case expense recovery and other forms of fee shifting is that rate case expense is generally awarded to a utility regardless of the merits of its case, it likely operates to encourage utilities' lawyers to pursue low merit substantive and procedural

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2. *Public Utilities*, 17 NAT'L MUN. L. REV. 348, 351 (1928) (describing recent efforts of Indiana regulators to rein in such costs). *See* the Appendix to this article at 17-18 for a description of how Indiana regulators currently handle rate case expenses.

3. *Public Utilities*, 17 NAT'L MUN. L. REV. 348, 351 (1928).

4. *See infra* Part II.B.1

5. *Id.*

6. *See, e.g.*, Jason Plautz, *States Challenge Utility Costs Backed by 'Fleet of Lawyers'*, ENERGY WIRE (Apr. 6, 2023), https://www.eenews.net/articles/states-challenge-utility-costs-backed-by-fleet-of-lawyers/; Appendix at 6-8 (Colorado), 8-10 (Connecticut), 16 n.127 (noting proposed legislation in Illinois) 35-36 (New Hampshire).

arguments. This imposes costs on consumers, regulators, and other participants in the proceeding. Many state regulators have recognized this problem. As Chairman Sievers of the Kansas Corporation Commission articulated, utilities are essentially "spending someone else's money" when conducting their rate cases and therefore have "no incentive to minimize that spending or direct insight into the benefits of such spending."[7]

Guided by the scholarship on fee shifting, this article identifies policy proposals to limit or scrutinize rate case expense recovery that are consistent with, and further, the ratemaking principles underlying its recovery while, at least partially, correcting for the perverse incentives created when recovery of legal fees is not tied to the legal merits. These proposals track with those employed by those few state regulators who have seriously confronted these issues.

II. RECOVERY OF RATE CASE LITIGATION EXPENSES IN COST-OF-SERVICE RATES

Rate case expense recovery represents a unique intersection of procedure and substance. Because utilities[8] are substantively permitted a reasonable opportunity to recover their prudently-incurred costs of providing service, regulators also permit them to recover the costs of presenting their case to that agency, i.e., their rate case expenses. State regulators exercise varying degrees of scrutiny as to what level of rate case expenses is appropriate for utilities to recover, with the Federal Energy Regulatory Commission (FERC) exercising perhaps the least.[9] Importantly, FERC and most state regulators do not consider the merits of a utility's case when evaluating requests to recover rate case expenses.[10] Utilities are typically allowed to recover most, or all, expenses incurred employing one of three methods: a normalized level of historic experience, an amortization of present costs over several years, or a guaranteed dollar-for-dollar surcharge.[11]

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7. Kansas City Power & Light Co., Docket No. 10-KCPE-415-RTS, 2012 Kan. PUC LEXIS 89, at *166 (Jan. 18, 2012) (discussing the framework established by Milton Friedman in MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 115-119 (1990)).

8. This article uses "utilities" as shorthand to refer generally to businesses regulated on a cost-of-service basis, which may also include "carriers." To use examples from the federal level, entities regulated under the Federal Power Act are "utilities," (16 U.S.C. § 796 (22), (23)); entities regulated under the Interstate Commerce Act are "common carriers" (49 App. U.S.C. § 3(a) (1988)); and entities regulated under the Natural Gas Act are "companies" (15 U.S.C. § 717(a)). However, despite the differences in term and scope of regulations, the substantive cost of service regulation is the same and precedent presumably applies across statutes. *See* Flint Hills Res. Alaska, LLC v. FERC, 627 F.3d 881, 887 (D.C. Cir. 2010); Tennessee Gas Pipeline Co. v. FERC, 860 F.2d 446, 454 (D.C. Cir. 1988). Utility is also the preferred term as it is more prevalent at the state level where more of the cited discussions have taken place.

9. *See infra* Part II.B.1.

10. *See infra* Part II.B.1.c; Pennsylvania Pub. Util. Comm'n v. West Pa. Water Co., No. C-871582, 1988 Pa. PUC LEXIS 422, at *30 (July 1, 1998) ("The fact that the claim in support of which this study was offered was not a successful claim does not mean that the cost of this study is not a proper ratemaking expense. As stated by the ALJ, the test is not the success or failure of the issue, but one of the reasonableness and good faith with which the study was undertaken.").

11. *See infra* Part II.B.1.

A. Foundation and Purpose of Rate Case Expense Recoverability

The issue of rate case expense arises when utility rates are set on a cost-of-service basis under the "just and reasonable" standard.[12] The ultimate purpose of this form of regulation is to protect ratepayers from excessively high prices.[13] At the same time, rates set must afford the utility an opportunity to recover their operating costs plus a reasonable return on their investment.[14] At the extreme end, when a regulator sets rates too low, this may constitute a "taking" of property under the Fifth and Fourteenth Amendments.[15] Rates falling between these two extremes are understood to fall within a statutorily permissible "zone of reasonableness," which reviewing courts are loathe to upset.[16] This principle is typically implemented using some version of the following formula, which should already be familiar to many energy professionals:

$$R = O + D + T + (RB)r$$

Where R is the revenue requirement, O is operating expenses, D is depreciation expense, T is taxes, RB is rate base (i.e., the gross value of investments less accrued depreciation), and r is the authorized rate of return.[17]

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12. Using the example of FERC's three ratemaking regimes. Interstate Commerce Act, 49 App. U.S.C § 1(5) (1988) (ICA) (oil); Natural Gas Act, 15 U.S.C. § 717(c)(a) (NGA) (natural gas); Federal Power Act, 16 U.S.C. § 824d (FPA) (electric transmission).

13. Chicago v. FPC, 458 F.2d 731, 751 (D.C. Cir. 1971) (". . . the primary purpose of the Natural Gas Act is to protect consumers. Thus, when the inquiry is whether a given rate is just and reasonable to the consumer, the underlying concern is whether it is low enough so that exploitation by the producer is prevented."); Municipal Light Bs. v. FPC, 450 F.2d 1341, 1348 (D.C. Cir. 1971) (the "primary aim [of the FPA] is the protection of consumers from excessive rates and charges.") (citing Atlantic Refin. Co. v. Public Serv. Comm'n, 360 U.S. 378, 388-89 (1959); FPC v. Hope Nat. Gas Co., 320 U.S. 591, 610-12 (1944))); Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486, 1507 (D.C. Cir. 1984) ("Whether the purpose of oil pipeline rate regulation is 'consumer protection' or 'producer protection,' the statute requires meaningful rate regulation.") (internal footnotes omitted). *See also* RICHARD A. POSNER, NATURAL MONOPOLY AND ITS REGULATION 5-33 (Cato Inst. 1999) (questioning rationales); CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES: THEORY AND PRACTICE 152-60, (Pub. Utils. Reps. 1984).

14. *See* FPC v. Hope Nat. Gas Co., 320 U.S. 591, 603 (1944); Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n of W. Va., 262 U.S. 679, 692 (1923).

15. Duquesne Light Co. v. Barasch, 488 U.S. 299, 307-08 (1989) ("[T]he Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory." (citing Covington & Lexington Tpk. Road Co. v. Sandford, 164 U.S. 578, 597 (1896); FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 585 (1942); FPC v. Texaco Inc., 417 U.S. 380, 391-92 (1974)).

16. *See* Maine v. FERC, 854 F.3d 9, 24 (D.C. Cir. 2017) (describing that falling within the zone of reasonableness is a necessary but not sufficient condition for a regulator to approve a rate); Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968); *see also, e.g.*, Coalition for Clean Affordable Energy v. New Mexico Pub. Regul. Comm'n, 2024-NMSC-016, ¶ 6,549 P.3d 500, 505 (2024); Columbus Tel. Co. v. Kansas Corp. Comm'n, 31 Kan. App. 2d 828, 835 (2003); Equal Access Corp. v. Utilities Bd., Utils. Div., Iowa Dep't of Com., 510 N.W.2d 147, 151 (1993).

17. *See, e.g.*, Alabama Power Co. v. FERC, 160 F.3d 7, 8 n.1 (D.C. Cir. 1998) (citing CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES 177 (3d ed. 1993)).

Rates are then set by dividing the revenue requirement by the anticipated rate of assessed transactions or units, allocated among ratepayers.[18]

This article focuses on the operating expenses part of the equation, where rate case expenses are claimed.[19] In determining a reasonable level of operating expenses, FERC and many state regulators employ a "test period" or "test year" approach wherein costs are set based on a historic period adjusted for known and measurable changes and to remove the impact of extraordinary and non-recurring events.[20]

Importantly, such rates are never meant to *guarantee* recovery of costs. As articulated by FERC, "while regulated companies must have a reasonable opportunity to recover their costs, they enjoy no guarantee that they will necessarily do so."[21] In fact, rate regulation does not even guarantee continued viability. As the Supreme Court has articulated, "regulation does not insure that the business shall produce net revenues,"[22] and the due process clause "cannot be applied to insure values or to restore values that have been lost by the operation of economic forces."[23] There are limits on what types of expenses may be recovered. Notably, because utilities are only permitted to recover their *operating* expenses in rates, they cannot recover "nonoperating" expenses,[24] such as transaction costs[25] or lobbying.[26] Imprudent expenses are also not recoverable from ratepayers.[27] In

18. There are different methods for allocating costs among rate payers. For instance, the "postage stamp" formula is one where all transactions are assessed the same rate regardless of distance. *See, e.g.*, *Northwest Pipeline Corp*., 82 FERC ¶ 61,158, 61,576 (1998).

19. Although utilities occasionally seek to have their rate case expenses treated as an investment that should earn return, these requests are rarely granted. *See* Appendix.

20. Opinion No. 586, *Epsilon Trading, LLC v. Colonial Pipeline Co*., 185 FERC ¶ 61,126 at P 306 (2023) ("The Commission uses a test-period methodology to determine representative costs."); *id.* at P 258; Opinion No. 885, *Panhandle E. Pipe Line Co., LP*, 181 FERC ¶ 61,211 at P 246 (2022), *order on reh'g*, 184 FERC ¶ 61,181 (2023), *order on reh'g*, 186 FERC ¶ 61,015 (2024) ("test period ratemaking methodology recognizes that, as time passes, costs, revenues, contract demand, and other factors change so that it is best to take a 'picture' of the company's operations at a single, consistent point in time . . . to avoid a moving target record.") (quoting *Iroquois Gas Transmission Sys., L.P*., 86 FERC ¶ 61,261, 61,956-57 (1999)); *Nebraska Pub. Power Dist. v. Tri-State Generation and Transmission Ass'n, Inc*., 177 FERC ¶ 61,194 at P 49 (2021). *See also, e.g.*, Los Angeles v. Public Utils. Comm'n, 7 Cal. 3d 331, 347 (1972) (unless "extraordinary or that the anticipated increase in revenue will not be sufficient to offset all anticipated increases in expenses and investment, there is no basis for adjusting the test year figures."); Central Power & Light Co. v. Public Util. Comm'n of Tex., 36 S.W.3d 547 (Tex. Ct. App. 2000).

21. *ISO New England Inc*., 172 FERC ¶ 61,251 at P 23 (2020).

22. FPC v. Natural Gas Pipeline Co. of Am., 315 U.S. 575, 590 (1942).

23. Market St. Ry. Co. v. Railroad Comm'n of Cal., 324 U.S. 548, 567 (1945).

24. Notice of Inquiry, *Rate Recovery, Reporting, & Accounting Treatment of Industry Association Dues & Certain Civic, Political, & Related Expenses*, 177 FERC ¶ 61,180 at P 6 (2021) ("The Commission presumes that expenses recorded in below the line, nonoperating accounts may not be recovered in rates, without a further showing justifying such recovery for ratemaking purposes.").

25. *See, e.g.*, *Southwest Pub. Serv. Co*., 188 FERC ¶ 61,102 at P 43 (2024).

26. *See, e.g.*, Opinion No. 554, *Potomac-Appalachian Transmission Highline, LLC*, 158 FERC ¶ 61,050 at P 56 (2017).

27. Opinion No. 544, *BP Pipelines (Alaska) Inc*., 153 FERC ¶ 61,233 at P 13 (2015) ("The regulated entity has the burden of proof to establish prudence. However, in order to ensure that rate cases are manageable, a presumption of prudence applies until the challenging party creates a serious doubt as to the prudence of an expenditure . . . Serious doubt must be more than a bare allegation of imprudence, but this threshold may not be

addition, the "rule against retroactive ratemaking" prohibits FERC and state regulators from adjusting current rates to recover expenses from prior periods.[28]

Setting rates at this "just and reasonable" level typically involves an administrative proceeding with a trial-type hearing called a "rate case." These proceedings are often involved, expensive, and time-consuming for all parties involved.[29] Rate cases are initiated by a utility filing an application to change its rates, or by a rate-paying entity filing a complaint challenging the existing rates.[30] There are essentially two sides to a rate case: the utility seeking higher rates and ratepayer interests seeking lower ones. Sometimes there is also a neutral participant in these adjudications, such as the Office of Administrative Litigation (i.e., Trial Staff) at FERC, that is tasked with "representing the public interest."[31] Such official advocates are particularly important because ratepayers face barriers to participation, including their diffusion of interests relative to the high costs of participating.[32] Some states have also addressed this problem through intervenor compensation regimes.[33] Nevertheless, regulators frequently rely on the participation of intervenors representing the interests of affected ratepayers.[34] While these proceedings are often costly and time-consuming, they do not have to be. Rate cases are often successfully resolved through settlement, which is strongly favored by FERC policy.[35]

Utilities have successfully characterized this expense of litigating against ratepayers as a proper cost of operating their businesses, which means they should recover it from their ratepayers through rates. As seen in the Appendix below, essentially every state regulator and a good number of state courts agree with them. FERC has also agreed that such costs are recoverable in each of its ratemaking regimes.[36] FERC has noted that "[t]raditionally, public utilities are permitted to

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so demanding that it effectively reverses the statutory burden of proof. Once such serious doubt has been raised, the pipeline has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.") (internal citations and quotations omitted).

28. SFPP, L.P. v. FERC, 967 F.3d 788, 801 (D.C. Cir. 2020). *See also, e.g.*, Spire Mo., Inc. v. Public Serv. Comm'n, 618 S.W.3d 225, 232–33 (Mo. 2021); People *ex rel.* Madigan v. Illinois Com. Comm'n, 25 N.E.3d 587, 600 (Ill. 2015).

29. *See* Stephen C. Pearson, *Innovations in FERC Hearing Procedures*, 41 ENERGY L. J. 23, 25-27 (2020).

30. *See, e.g.*, Scott Hempling, *Litigation Adversaries and Public Interest Partners: Practice Principles for New Regulatory Lawyers*, 36 ENERGY L. J. 1, 6 (2015). This article focuses on the former example, although the discussion should apply equally to complaint proceedings.

31. *Statement of Admin. Pol'y on Separations of Functions*, 101 FERC ¶ 61,340 at P 17 (2002); 18 C.F.R. § 385.102(b)(2); *see also High Land Off-Shore Sys., LLC*, 110 FERC ¶ 61,043 at P 30 (2005).

32. *See* Darryl G. Stein, *Perilous Proxies: Issues of Scale for Consumer Representation in Agency Proceedings*, 67 N.Y.U. ANN. SURV. AM. L. 513, 533-46 (2012).

33. *See, e.g.*, CAL. PUB. UTILS. CODE § 1801.3.

34. *See, e.g.*, Order No. 561, *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, [Reg. Preambles 1991-1996] FERC STATS. & REGS. ¶ 39,985, at 30,967, 58 Fed. Reg. 58,753 (1993) (to be codified at 18 C.F.R. pts. 341-47, 360-61, 375, *order on reh'g*, FERC STATS. & REGS. ¶ 31,000 (1994), *aff'd* Association of Oil Pipe Lines v. FERC, 83 F.3d 1424 (D.C. Cir. 1996) (noting the agency "rel[ies] primarily on the affected parties to bring challenges to rates" under the ICA).

35. *See, e.g.*, *Florida Power & Light Co*., 175 FERC ¶ 61,024 at P 6 (2021); *see also* 18 C.F.R. §385.602 (2025).

36. *See* Opinion No. 534, *Midwest Indep. Transmission Sys. Operator, Inc*., 148 FERC ¶ 61,206 at P 221 (2014) (citing Opinion No. 133, *Public Serv. Co. of N.M*., 17 FERC ¶ 61,123, 61,251 (1981), and *City of Coll.*

seek recovery of reasonable regulatory expenses from their customers when the expenses are attributable to the service provided to those customers."[37] Therefore FERC's "longstanding precedent is that regulated utilities 'are entitled to recover their reasonably incurred rate litigation costs' incurred in Commission rate making proceedings as ordinary and usual business expenses."[38]

Where there is remarkably little federal judicial precedent on the issue, especially recently, early cases supported utilities' ability to recover rate case expenses. In one Supreme Court decision from 1935, the Court concluded that rate case expenses "must be included among the costs of operation in the computation of a fair return."[39] In that matter, the company prevailed in showing the rates to be confiscatory, with the Supreme Court finding the merits of the utility's argument before the regulator to be important, noting it might be a "different case . . . if the company's complaint had been unfounded, or if the cost of the proceeding had been swollen by untenable objections."[40] In another case from 1939, the Supreme Court was again faced with an order denying the regulated entity the ability to recover its rate case expenses—this time incurred defending unreasonably high rates.[41] There, in upholding the exclusion of these costs by the state commission, the Supreme Court opined in dictum "that the utility should be allowed its fair and proper expenses for presenting its side to the commission," even "where the rates in effect are excessive."[42] Nevertheless, the Court allowed the rates to stand because it was "satisfied the reduction required" by excluding those costs in this case was "not shown to be confiscatory."[43]

The only recent federal judicial decision on the topic upheld FERC's limits on rate case expense recovery. The D.C. Circuit, reviewing a FERC oil pipeline order under the ICA, upheld FERC's policy of requiring that rate case expense in a complaint proceeding (recovered through a surcharge) first be offset by the "unpaid" refunds attributable to noncomplaining shippers that the pipeline retained.[44] The Court concluded that FERC

> could reasonably conclude that because [the pipeline] had reaped a windfall by charging rates in excess of those ultimately deemed just and reasonable . . . it

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Station, Tex., 86 FERC ¶ 61,165, 61,582 (1999) (citing *Alabama-Tennessee Nat. Gas Co.*, 11 F.P.C. 75, 82-83 (1952), and Opinion No. 730, *Sierra Pac. Power Co*., 53 F.P.C. 1795, 1805 (1975)); Opinion No. 528, *El Paso Nat. Gas Co*., 145 FERC ¶ 61,040 at P 73 (2013); Opinion No. 511-A, *SFPP, L.P.*, 137 FERC ¶ 61,220 at P 39 (2011); Opinion No. 435-A, *SFPP, L.P., Mobil Oil Corp. v. SFPP, L.P.*, 91 FERC ¶ 61,135, 61,512 (2000).

37. 86 FERC ¶ 61,165, 61,582 (1999) (cited in 148 FERC ¶ 61,206 at P 221 (2014)).

38. 158 FERC ¶ 61,050 at P 135 (2017) (quoting 137 FERC ¶ 61,220 at P 39); *see also* 91 FERC ¶ 61,135, at 61,512.

39. West Ohio Gas Co. v. Public Utils. Comm'n of Ohio, 294 U.S. 63, 73 (1935).

40. *Id.*

41. Driscoll v. Edison Light & Power Co., 307 U.S. 104, 114 (1939). *See also* Robert W. Harbeson, *The Supreme Court and Temporary Rate Orders*, 15 J. LAND & PUB. UTIL. ECON. 287, 291-92 (August 1939) (providing contemporary analysis of *Driscoll*, 307 U.S. 104 (1939)).

42. *See Driscoll*, 307 U.S. at 120-21.

43. *Id.* at 121-22, 121 n.27 (calculating a hypothetical cost of service that "produces an estimated return very close to the reasonable rate, even with the addition to the operating expenses of the other items").

44. BP W. Coast Prods., LLC v. FERC, 374 F.3d 1263, 1293-94 (D.C. Cir. 2004).

> should be required to first fund its litigation expenses out of that pool before it could begin charging those costs to its customers anew.[45]

B. How Regulators Allow Utilities to Recover Rate Case Expenses

Under this paradigm where rate case expenses are recoverable, there are two questions to address: first, what specific expenses or level of expenses can be recovered; and second, how should they be recovered. On the first question, many states have seriously considered the issue and taken diverse approaches, while FERC has hardly scratched the surface. On the second question, there are three general approaches for recovering rate case expenses employed by different states, with FERC applying a different method in each of its three ratemaking regimes (the ICA, the FPA, and the NGA). The merits of these different approaches are discussed below in Part IV, regarding recommendations.

1. Which Rate Case Expenses Are Recoverable

FERC and nearly all states articulate the same standard for recoverability of rate case expenses: the costs should be "prudent" and "reasonable."[46] Of course, like the term "just and reasonable," these terms lack precise definition and can be manifested in many ways.[47] They also reflect different policy goals and perspectives. Compare, for example, the approaches of FERC (which does not appear to have recently disallowed recovery of any rate case expenses) and Connecticut (which disallows any recovery).[48] Most states fall somewhere in between by allowing recovery while attempting to keep these costs in check. The different goals of the regulator can influence its determination of which rate case expenses may be recovered.

Without getting bogged down in semantics, "prudent" and "reasonable" may reflect different scrutiny from subjective or objective perspectives. Whether these terms are lumped together or treated separately by a particular regulator, they could be seen to reflect the subjective and objective views of rate case expenses. That is, a regulator might scrutinize whether the regulated business exercised the proper *subjective* care that its rate case expenses were prudently obtained, overseen, and employed. Or a regulator might scrutinize whether the total level of expenses was permissible relative to an *objective* benchmark such as an industry average or another formula. For instance, the Pennsylvania Commonwealth Court, articulated that the Pennsylvania Public Utility Commission can disallow

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45. *Id.* at 1294.

46. 137 FERC ¶ 61,220 at P 39; 86 FERC ¶ 61,165, at 61,582; *see also, e.g.*, Diamond Bar Ests. Water Co., No. DIA-W-07-01, 2007 Ida. PUC LEXIS 198, at *10 (Oct. 19, 2007) (the Idaho PUC has "consistently found that prudent and reasonable costs for a [regulated utility] to file and litigate a rate case before us are an expense properly recoverable in rates.").

47. Morgan Stanley Cap. Grp. Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 532 (2008). *See also* Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486, 1501 (D.C. Cir. 1984) ("The 'just and reasonable' statutory standard is, of course, not very precise, and does not unduly confine FERC's ratemaking authority. As this court once explained, the necessity for an anchor to hold the terms 'just and reasonable' to some recognizable meaning is plain, for the words themselves have no intrinsic meaning applicable alike to all situations.") (cleaned up) (quoting City of Chicago v. FPC, 458 F.2d 731, 750 (D.C. Cir. 1971)).

48. *See* Appendix at 8-10.

recovery of rate case expense when the record shows the expenses to be "unreasonable, imprudently incurred *or* excessive in amount."[49] The Washington Utilities and Transportation Committee also distinguishes between rate case expenses that are "exorbitant and imprudent" and those that are "extraordinary and excessive, although not imprudent."[50] FERC does not appear to differentiate between the two terms on this issue.[51]

For operating expenses, including rate case expenses, FERC applies a presumption of prudence for all expenses actually incurred, even when the requesting party bears the overall burden of proof, which thus far has been dispositive on this issue.[52] Some states apply this presumption as well,[53] though many do not.[54] Many states apply a heavy, if unstated, deference to utility requests to recovery rate case expenses.[55] While FERC has not recently employed any measure of reasonableness or prudence to find that a utility's incurred rate case expense could not be recovered, state regulators have. These measures are described more fully in the appended survey and are only briefly summarized below. This article groups these measures into two broader categories: (1) *itemized* reasonableness measures and (2) *overall* reasonableness measures. Itemized approaches involve the regulator scrutinizing individual components of the expenses, such as attorney hourly rates, witness fees, and invoices, against different objective or subjective measures of reasonableness or prudence. In contrast, scrutiny of the overall expense level seeks to determine a reasonable level of recoverable costs relative to objective statistical standards or subjective facts of the case.

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49. Butler Twp. Water Co. v. Pennsylvania Pub. Util. Comm'n, 473 A.2d 219, 221 (Pa. Commw. Ct. 1984) (emphasis added).

50. Washington Utils. & Transp. Comm'n v. Waste Control, Inc., Order No. 13, 2015 Wash. UTC LEXIS 672, at *49 n. 79 (Aug. 6, 2015).

51. *See, e.g.*, 137 FERC ¶ 61,220 at PP 39-42 (referring to "reasonably incurred," "prudently incurred," and a "reasonable level of" rate case expenses without distinction).

52. *See, e.g.*, 158 FERC ¶ 61,050 at PP 113-14 (outside legal expenses levels are presumed prudent notwithstanding recordkeeping shortfalls), *on reh'g*, 170 FERC ¶ 61,050 (2020), *on reh'g*, 172 FERC ¶ 61,048, *rev'd on other grounds sub nom.*, Newman v. FERC, 27 F.4th 690 (D.C. Cir. 2022); *Louisianna Pub. Serv. Comm'n v. System Energy Res., Inc.*, 183 FERC ¶ 63,020 at P 631 (2023) ("I find that the prudence of SERI's legal and expert witness fees is presumed and that LPSC has failed to demonstrate serious doubt about SERI's prudence to overcome that presumption.") (initial decision), *dispute partially resolved through settlement via* 186 FERC ¶ 61,194 (2024), 188 FERC ¶ 61,124, 189 FERC ¶ 61,143.

53. *See, e.g.*, United Water Del., Inc. v. PSC, 1998 Del. Super. LEXIS 122, at *6 (1998); *In re* Wilmington Suburban Water Corp., 367 A.2d 1338, 1347 (Del. Super. Ct. 1976) (reversing Delaware Public Service Commission on disallowance of rate case expenses).

54. *See, e.g.*, Aqua Utils. Fla., Inc., Order No. PSC-09-0385-FOF-WS, 2009 Fla. PUC LEXIS 415, at *247 (May 29, 2009); Kentucky Power Co., No. 2020-00174, 2021 Ky. PUC LEXIS 21, at *26 (Jan. 13, 2021). *See also* N.M. Stat. Ann. § 62-13-3(A) (2025) (applies a heightened burden to recover rate case expense in New Mexico); El Paso Elec. Co., No. 20-00104-UT, 2021 N.M. PUC LEXIS 39 (Apr. 6, 2021) (quoting PNM Gas Servs. v. New Mexico Pub. Util. Comm'n, 2000-NMSC-012, ¶ 94, 129 N.M. 1); Magnolia Water Util. Operating Co., Order No. U-35822, 2021 La. PUC LEXIS 319, at *15 (Oct. 20, 2021).

55. *See, e.g.*, Chattanooga Gas Co., Docket No. 18-00017, 2019 Tenn. PUC LEXIS 5, at *53-54 (Jan. 15, 2019) (allowing all rate case expenses to be recovered when record was insufficient to determine apportion costs to ratepayers). *See also* Appendix at 11 (District of Columbia), 11-13 (Florida) and n.96 (discussing Florida Pub. Utils. Co., Order No. PSC-2023-0103-FOF-GU, 2023 Fla. PUC LEXIS 53, at *199 (Mar. 15, 2023)), 22 (Louisiana), 26-28 (Massachusetts), 28 (Michigan), 28-30 (Minnesota), 47-48 (Tennessee), 34-35 (Nebraska).

a. Itemized Scrutiny of Rate Case Expense

Lodestar Method (Kansas Approach)

The lodestar is likely the approach most familiar to attorneys outside the energy area. This method has long been "the guiding light of [the courts'] fee-shifting jurisprudence."[56] The lodestar sets a fee award by multiplying the hours reasonably expended times a reasonable hourly rate in that community.[57] This rate should be "sufficient to induce a capable attorney to undertake the representation of a meritorious" case.[58] The level of reasonable hours spent is reduced to exclude hours that were excessive, redundant, unnecessary, or related to unsuccessful claims.[59] Only one regulator, the Kansas Corporation Commission, has explicitly endorsed the use of the lodestar to calculate recoverable rate case expenses,[60] with the Kansas Court of Appeals finding "no error" in this approach.[61] While not endorsed by name, several state regulators have similarly approached the issue of recoverable rate case expense with an eye toward reasonable hourly rates and time expended.[62] The Colorado Public Utilities Commission has rejected the use of a lodestar during its legislatively mandated re-examination of this issue, saying it involved a "different inquiry."[63] And FERC has affirmed an ALJ's rejection of the use of a lodestar to set recoverable outside legal expenses (in that case originating with a certificate proceeding, not a rate case).[64]

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56. City of Burlington v. Dague, 505 U.S. 557, 562 (1992).

57. ROBERT L. ROSSI, ATTORNEYS' FEES § 10:4 (3d ed. 2025).

58. Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 552 (2010).

59. ROSSI, *supra* note 57, § 10:4 n. 13-14.

60. Kansas City Power & Light Co., 2012 Kan. PUC LEXIS 89, at *57 ("Because so much of the rate case expense here is attributable to attorney fees, the Commission will consider the lodestar calculation in determining an appropriate amount to award for this proceeding. For guidance, the Commission has reviewed how district courts use the lodestar calculation. Consistently, those courts required each lawyer for whom fees were sought to provide meticulous, contemporaneous time records documenting the time allotted to specific tasks.").

61. Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n, 47 Kan. App. 2d 1112, 1127 (2012) ("After all, it is the method approved by our Supreme Court for use by lower courts when making such a determination.") (citations omitted).

62. *See e.g.*, 83 ILL. ADMIN. CODE 288.110(b) (2023) (discussed in Appendix at 16 & n.130); *see also* Appendix at 49-50 & nn.404-06, as well as the following "use to regulator" discussion.

63. Atmos Energy Corp., Decision No. C23-0293, 2023 Colo. PUC LEXIS 289, at *24-25 (Apr. 21, 2023) ("Determining whether those costs were prudently incurred (which is our charge in a rate case) is a different inquiry than determining whether the winning party in a court case incurred a reasonable amount of attorney fees (that the losing side must pay). Therefore, we decline to apply the 'lodestar test' to determine whether the legal and consulting fees—one of the utility's operating expenses—were prudently incurred so as to be recoverable in utility rates."). *See also* Appendix at 6-8; Potomac Edison Co., No. 9490, 2019 Md. PSC LEXIS 18, at *40 (Mar. 22, 2019) (rejecting a cap on outside counsel hourly fees).

64. *Potomac-Appalachian Transmission Highline, LLC*, 152 FERC ¶ 63,025 at P 80 (2015) ("This model rule is known as the Lodestar method and prohibits excessive legal fees and overhead charges by attorneys. In contrast and as discussed above, the presumption of prudence standard requires a determination as to whether a reasonable utility manager would have paid the bills, in good faith, under the same circumstances, and at the relevant point in time."), *aff'd*, 158 FERC ¶ 61,050, at PP 113-14 (2017), *on reh'g*, 170 FERC ¶ 61,050 (2020), *on reh'g*, 172 FERC ¶ 61,048, *rev'd on other grounds sub nom.*, Newman v. FERC, 27 F.4th 690 (D.C. Cir. 2022).

Scrutinizing Whether Rate Case Expenses Were Useful to the Regulator

There is another line of scrutiny employed by state regulators that focuses on the value of the attorneys' or experts' work to the ratemaking body. Some of the factors considered in this approach, such as necessity and redundancy, overlap with the lodestar method. However, the purpose of this scrutiny is different. Looking to whether legal expenses aided the regulator is aligned with the ratemaking principle that a utility should only recover the cost of providing service at just and reasonable rates. If litigation costs were unnecessary or irrelevant to the regulator, they do not further the provision of that service. Some regulators frame this inquiry in terms of "necessity," looking to whether rate case expenses were needed for the utility's case.[65] One manifestation of this inquiry is disallowing recovery of redundant or duplicative expenses.[66] Texas and Illinois also articulate a "relevance" requirement in their regulations on rate case expenses, which appears closely related to a necessary standard some jurisdictions implicitly apply.[67] Going one step further, some jurisdictions have found the recoverability of rate case expenses to turn on the merits of the specific issue those legal fees were directed toward.[68] Regulators have also found other specific categories of rate case expenses unrecoverable, such as meals and snacks,[69] or the legal expenses of resisting discovery.[70] Somewhat similarly, the Rhode Island PUC found the

65. *See, e.g.*, Public Serv. Co. of Okla., Order No. 672864, 2018 Okla. PUC LEXIS 41, at *73 (Jan. 31, 2018) ("the Commission directs that witness fees and expenses of witness Quackenbush, an unnecessary witness that contributed nothing of substance to these proceedings, not be paid by customers but by shareholders."); Washington Utils. Transp. Comm'n v. Puget Sound Pilots, Order No 09, 2020 Wash. UTC LEXIS 627, at *141 (Nov. 25, 2020) (Commission "may limit recovery of excessive legal or expert witness fees when the evidence establishes that certain expenses are unreasonable or unnecessary."); Indiana Mich. Power. Co., No. U-21-461, 2024 MICH. PSC LEXIS 117, at *170 (July 2, 2024) (denying recovery of witness training expenses not shown to be needed).

66. *See, e.g.*, Appendix at 1 (Alabama), 2-3 (Arizona), 16-17 (Illinois), 19-21 (Kansas), 41-42 (Oklahoma), 46-47 (South Carolina), 48-53 (Texas).

67. ILL. ADMIN. CODE tit. 83, §288.110(b)(4) (2023) (requiring assessment of "the relevance of the work products to the justness and reasonableness of the proposed utility rates."); 16 TEX. ADMIN. CODE § 7.5530(b) (2025) (requiring assessment of "whether the work was relevant and reasonably necessary to the proceeding"). *See also* Puerto Rico Elec. Power Auth. Rate Rev., No. CEPR-AP-2015-0001, at ¶ 121 (Jan. 10, 2017) (Final Resolution and Order), *aff'd* Final Resolution (Mar. 8, 2017).

68. Interstate Power & Light Co., Docket No. RPU-2019-0002, 2021 Iowa PUC LEXIS 266, at *14 (Aug. 10, 2021) ("customers should not be required to bear the resulting costs" from novel legal issues created by utility filing); Sunshine Utils. of Cent. Fla., Inc., Docket No.900386-WU, 1994 Fla. PUC LEXIS 613, at *32 (June 15, 1994) ("It is our belief that we are justified in depending upon the court's determination of success in making its determination of reasonableness or prudence. In other words, if a utility succeeds in an appeal, the Commission can fairly conclude it was prudent. On the other hand, if a utility fails in its appeal, the Commission can fairly assume it was not a prudent appeal. Because it is the ratepayers that bear the burden of appellate rate case expense, the Commission is justified in denying appellate rate case expense for appeals in which utilities are unsuccessful. Because we find that this Commission may depend on success at the appellate level as a basis for determining the reasonableness of an appeal, we also conclude that reasonable appellate rate case expense can only mean expense related to issues on which the utility prevails.").

69. Kentucky Power Co., No. 2020-00174, 2021 Ky. PUC LEXIS 21, at *26-27 (Jan. 13, 2021).

70. TXU Gas Distrib., Docket Nos. 9145-9148, 2000 Railroad Commn Tex. LEXIS 436, at *46 (Oct. 10, 2000) (disallowing expenses related to resisting discovery) (hearing officer's decision).

fact that a utility's initial proposal was not "in line with its final position" showed that the utility "contributed to the excessive costs of the rate case" and could not recover all such costs from ratepayers.[71]

Scrutinizing the Procurement, Management, and Recordkeeping of Rate Case Expenses

Several regulators also scrutinize a utility's procurement and management of attorneys and witnesses in determining what rate case expenses are recoverable. For instance, in Massachusetts and New Hampshire, utilities "must engage in a competitive bidding process"[72] to recover their rate case expenses.[73] Most states do not require or scrutinize the procurement of rate case legal service providers,[74] and at least one FERC ALJ has rejected the idea as well.[75] However, more states will scrutinize the management of rate case expenses once retained, though more often nominally than substantively.[76] Somewhat related to management is the issue of documentation required to meet the burden of proof. One of the more common reasons regulators disallow rate case expenses is failure to substantiate the past expenses or estimated future expenses.[77] Some states have regulations requiring specific documentation to support a request for rate case expenses.[78]

b. Scrutiny of the Overall Level of Rate Case Expense

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71. City of Newport, Utils. Dept., Water Div., Docket No. 2985, 2000 R.I. PUC LEXIS 12, at *37-38 (June 19, 2000) (utility reduced its request from 27% to 11.8% over the course of the proceeding).

72. East Northfield Water Co., Docket No. 19-57, 2020 Mass. PUC LEXIS 99, at *48-49 (Mar. 31, 2020) (citing various decisions) (noting an exception for small water utilities); Massachusetts Elec. Co., Docket No. 18-150, 2019 Mass. PUC LEXIS 264, at *292 (Sep. 30, 2019); NSTAR Elec. Co., Docket No. 17-05, 2017 Mass. PUC LEXIS 371, at *289-90 (Nov. 30, 2017). *See also* Appendix at 26 (noting that the work need not go to lowest bidder when adequate justification is provided).

73. N.H. CODE ADMIN R. ANN. PUC 1905.01-.04 (2013). *See also* N.H. CODE ADMIN. R. ANN. PUC 1905.04(c) (2013) (requiring utilities that choose a service provider other than the lowest bidder to justify that choice by "clear and convincing justification.").

74. *See* Community Nat. Gas Co., 2017 Ind. PUC LEXIS 71, at *66 (Mar. 22, 2017) (declining to adopt such a requirement).

75. 183 FERC ¶ 63,020 at P 643.

76. Public Serv. Co. of Colo., Decision No. C22-0642, 2022 Colo. PUC LEXIS 511, at *70 (Oct. 19, 2022) (encouraging better management); Northern Ill. Gas Co., 2023 Ill. PUC LEXIS 747, at *189 (Nov. 16, 2023) (utilities' "rate case expense of $5,363,900 is uncontested and therefore adopted by the Commission. While the two-time entries amounting to $562.50 are nominal, the Commission strongly encourages Nicor Gas to continue to scrutinize its legal bills for accuracy.").

77. *See, e.g.*, Louisville Gas & Elec. Co., No. 2003-00433, 2004 Ky. PUC LEXIS 525, at *63-64 (June 30, 2004) (disallowing $18,929 in expenses because "when a utility seeks to recover an expenditure in its rates, the Commission is obligated to review the nature of that expenditure to verify that it is just and reasonable. In this instance, we are unable to determine from the evidence of record the nature of certain legal services performed and whether those services were related to this rate case."); Potomac Elec. Power Co., No. 9336, 2014 Md. PSC LEXIS 22, at *78-80 (July 2, 2014).

78. *See, e.g.*, ILL. ADMIN. CODE tit. 83, § 288.100 (2023); 65 ME. CODE R. § 407-850-2(A) (2022); N.H. CODE ADMIN. R. PUC 1905.03 (Documentation of Expenses Required).

Normalization

One established method of setting recoverable rate case expense levels is by creating a "normalized" average of historic experiences. This is a standard ratemaking method for determining the level of recurring costs that fluctuate over time. It is described in greater detail below, in the section addressing how rate case expenses are recovered.

Caps or Benchmarks

One possible method of setting an overall level of recoverable rate case expense is for the regulator to determine an objective reasonable level that can be recovered regardless of the expenses actually incurred in a particular case. For instance, in the context of water utilities, New York determines a reasonable level of rate case expense by averaging the historic experience of comparable utilities.[79] As described in the Appendix, Colorado recently explored the use of caps for rate case expenses (as well as other measures) in response to a rulemaking spurred by legislation.[80] In a decision by the Kansas Corporation Commission dealing with rate case expense, its chairman penned a concurrence that proposed an alternative approach of presuming rate case expenses to be reasonable where they fell within a "zone of reasonableness" pegged at the relative share of the entire value of the case and to be presumed unreasonable otherwise.[81] The opinion was detailed and grounded in economic discussion of incentives.[82] Both FERC and the California Public Utilities Commission have found that, when utility rates are subject to a cap or index (rather than cost of service) ratemaking, rate case expenses are subsumed within that ratemaking methodology and cannot be separately recovered.[83]

50-50 "Split" (New Jersey Approach)

Another approach to limiting rate case expense is to require these costs be "shared" evenly between ratepayers and shareholders. Because shareholders are understood to bear the cost of expenses not recovered from ratepayers, this "sharing" is achieved by reducing the recoverable level of rate case expenses by 50%. The rationale for this approach is not tied to the reasonableness or prudence

79. *See* Appendix at 38-39.

80. *See* Appendix at 6-8 (discussing proposed Amendments to The Comm'n's Rules Regulating Elec. Utils., Decision No. C24-0285, 2024 Colo. PUC LEXIS 258, at *49 (Mar. 27, 2024); S.B. 23-291 § 2, 75th Gen. Assemb., Reg. Sess. (Colo. 2023) (codified at COLO. REV. STAT. § 40-3-102.5 (2023)). In fact, Colorado has articulated one recent disallowance as the implementation of a cap. Atmos Energy Corp., Decision No. C23-0293, 2023 Colo. PUC LEXIS 289, at *26 (Apr. 21, 2023).

81. Kansas Power & Light Co., Docket No. 10-KCPE-415-RTS, 2012 Kan. PUC LEXIS 89, at *144-77 (Jan. 18, 2012).

82. Notably the opinion also challenged the distinction between rate case expenses and attorneys' fees as "an historical artifact of regulation." *Id*. at *147-53.

83. Opinion No. 527, *SFPP, L.P.*, 143 FERC ¶ 61,213 at P 105 (2013) (holding that rate litigation surcharge revenue is not excluded when determining oil pipelines entitlement to index-based rate increase); *see also* Appendix at 5-6 (California).

of the expenses but rather is premised on a belief that rate case expenses are different from other operating expenses because they only partly serve ratepayers and also serve shareholders.[84] Perhaps because of its simplicity, this approach is frequently advocated by parties representing consumer interests. However, it is usually rejected by regulators.[85] Some states, however, articulate that these expenses are "shared" by the utility not earning a return on them, and therefore bearing the "carrying costs" associated with the time-value of money.[86] Currently, the 50-50 split is only employed in New Jersey, which has maintained this policy for a while.[87] Both Tennessee and Pennsylvania also briefly employed the 50-50 split, with both orders struck down.[88] Recently, the Colorado Public Utilities Commission has employed this approach on an itemized basis reducing the allowable expense for two specific witnesses by 50%.[89] Likewise, the Missouri Public Service Commission has evenly split costs between ratepayers and utilities on one occasion based on the specific facts of that case.[90]

Sliding Scale Based on Merit (Missouri-Texas Approach)

The most interesting approach to scrutinizing rate case expense levels, ultimately recommended here, is a statistical sliding scale where the level of rate case expenses recoverable corresponds to the merits of the positions taken by the utility. This rule can be expressed as the following formula, where recoverable rate case expenses are equal to:

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84. *See, e.g.*, Suez Water Arlington Hills, Inc., Docket No. WR16060510, 2017 N.J. PUC LEXIS 253, at *95-96 (Nov. 13, 2017) ("some portion of that expense is a cost of maintaining the stockholders investment.") (quoting South Jersey Gas Co., Docket No. 818-754 (Order dated November 24, 1982)); Gordon's Corner Water Co., Docket No. WR00050304, 2001 N.J. PUC LEXIS 125, at *35 (July 13, 2001) ("The Board recognizes that a rate case benefits both ratepayers and shareholders and, absent any special circumstances, sharing of these expenses is appropriate and consistent with prior Board Orders . . . .").

85. See Appendix at 11-13 (Florida), 14 (Hawaii), 15-16 (Idaho), 17-18 (Indiana), 28 (Michigan), 28-30 (Minnesota), 40-41 (Ohio), 54-55 (Washinton).

86. *See e.g.*, Appendix at 45-46 (Rhode Island) ("ratepayers to pay the actual, prudently incurred rate case expenses over a period of time, while stockholders pay the carrying costs on the unamortized balance.") (quoting Providence Gas Co. v. Malachowski, 656 A.2d 949, 953 (R.I. 1995)). Interestingly, Florida articulated this as consistent with a "long-standing policy that the cost of the rate case should be shared." *See* Tampa Elec. Co., Docket No. 080317-EI, 2009 Fla. PUC LEXIS 251, at *79 (Apr. 30, 2009); Aqua Utils. Fla., Inc., Docket No. 100330-WS, 2012 Fla. PUC LEXIS 216, at *335 (Mar. 5, 2012) (rejecting the 50-50 "sharing" of costs.); El Paso Elec. Co., No. 20-00104-UT, 2021 N.M. PUC LEXIS 39 (Apr. 6, 2021) ("excluding the unamortized balance of rate case expenses from rate base accomplishes some sharing of rate case expenses between shareholders and ratepayers.").

87. *See* Appendix at 36-37 (New Jersey).

88. *See* Appendix at 47-48 (Tennessee) and 42-44 (Pennsylvania).

89. Public Serv. Co. of Colo., Decision No. C24-0778, at P 215 (Oct. 25, 2024) ("[H]ence we find it appropriate for shareholders to carry an equal proportion of the cost of those consultants' services for which they too receive a benefit").

90. Laclede Gas Co., Amended Report and Order, Dockets No. GR-2017-0215-0216 (Mo. Pub. Serv. Comm'n Ma. 7, 2018), https://efis.psc.mo.gov/Document/Display/134183, *aff'd sub nom.* Spire Mo., Inc. v. Public Serv. Comm'n, 618 S.W.3d 225, 234 (Mo. 2021)); *id.* slip op. at 53-54; *see also* Appendix at 31-33.

$$Incurred\ rate\ case\ expense \times \frac{Increase\ Granted}{Increase\ Requested}$$

For instance, if a utility requested a 30% rate increase, but was granted only a 10% rate increase, then they could recover only one-third of the rate case expenses incurred. This practice has been applied by the Missouri Public Service Commission (and affirmed by that state's high court)[91] and is embodied in the regulations of the Texas Public Utilities Commission.[92] When it applied this rule, the Missouri Public Service Commission did not reduce any expense related to a depreciation study that was required to be conducted by the Commission's rules.[93] Texas applies a similar test—among others—but requires a triggering event first. In Texas, this practice—referred to as the "results oriented method"[94]—applies where it is first shown that "rate-case expenses as a whole were disproportionate, excessive, or unwarranted in relation to the nature and scope of the rate case."[95] The Texas PUC intended this method to be applied in limited circumstances when other, more granular disallowances did not apply.[96]

The logic behind this approach is that rate case expenses are unique. As the Missouri PSC cogently explained, this expense item is "different from most other types of utility operational expenses" in several ways, including that it creates an "inequitable financial advantage over other case participants" and provides no incentive to discipline costs.[97] The PSC illustrated this point clearly as follows:

> While [the utility] is able to recoup the costs of its legal counsel and expenses through utility service rates, [the Office of People's Counsel, the entity representing ratepayers] operates within a tight annual budget, and interveners pay their own legal expenses. . . Awarding a utility all of its incurred rate case expenses could provide that utility with a significant financial advantage over other participants in the rate case process, who may be constrained by budgetary and other financial restrictions. Such a practice does not encourage reasonable levels of cost containment in the utility's rate case expense decisions.[98]

While the Missouri PSC understood the harm caused by unchecked recovery of this unique expense, it also understood that because "customers benefit from having just and reasonable rates, it is appropriate for customers to bear some portion of the utility's cost of prosecuting a rate case."[99] The PSC reasoned that its' chosen approach "directly tie[s] a utility's recovery of rate case expense to

91. *See* Appendix at 31-32 (discussing Kansas City Power & Light Co., 2015 Mo. PSC LEXIS 789 (Sep. 2, 2015), and Kansas City Power & Light Co.'s v. Missouri Pub. Serv. Comm'n, 509 S.W.3d 757, 777 (Mo. Ct. App. 2016)).

92. 16 TEX. ADMIN. CODE § 25.245 (2014). *See also* Appendix at 50-51.

93. Kansas City Power & Light Co., 2015 Mo. PSC LEXIS 789, at *139 (Sep. 2, 2015) (but amortizing this expense level of over 5 years, which how frequently those studies were conducted, while other rate case expenses were amortized over a three-year amortization period).

94. 16 TEX. ADMIN. CODE § 25.245 (2014).

95. 16 TEX. ADMIN. CODE § 25.245(c)(5) (2014).

96. 16 TEX. ADMIN. CODE § 25.245 (2014); *see also* Appendix at 49-50 (describing the other justifications for rate case expense disallowances).

97. Kansas City Power & Light Co., 2015 Mo. PSC LEXIS 789, *133-34.

98. *Id*. at *126-27.

99. *Id*. at *133.

both the reasonableness of its issue positions and the dollar value sought from customers in a rate case."[100] In other words, it provides an incentive for the utility not to spend money pursuing unreasonable arguments or to request or defend unreasonable rates. The Texas PUC similarly articulated that scrutiny of this expense incentivizes utilities "to act more like self-funded litigants, while still providing for recovery of reasonable rate-case expenses."[101]

There are other manifestations of this sliding scale approach based on merit. For instance, the Texas PUC previously implemented a "51% Rule," under which a water utility was not permitted to recover any rate-case expenses if the rate increase granted by the commission is less than 51% of the increase proposed by the utility.[102] That is, the utility has to prevail in most of its case. The Rhode Island PUC's precedent, described above, that measured the reasonableness of overall rate case expense levels by comparing the utility's starting position against the increase ultimately supported by the record,[103] is based on a comparable rationale. In that case, however, the Rhode Island PUC did not implement a formulaic reduction based on the merits but rather cut recoverable rate case expenses by one-third.[104] Unlike the even 50-50 split, a sliding-scale approach does not appear to have been broadly raised as an alternative to guaranteed recovery.[105]

Holistic Evaluation of Case

Many regulators also measure the reasonableness of a utility's requested overall level of rate case expense based on the specific facts of the case. Factors that regulators consider range broadly and include subjective judgments, such as the complexity, scope, or adversarial rigor, as well as the more objective measure of the overall cost levels relative to comparable cases or the monetary value of the case. For example, as mentioned above, the Texas Public Utilities Commission

100. *Id*. at *128.

101. Recovery of Expenses for Ratemaking Procs., 39 Tex. Reg. 6434, 6435 (Aug. 22, 2014) ("the commission concludes that adopting clear evidentiary standards and specific criteria for the review and determination of the reasonableness of rate-case expenses will incentivize utilities and municipalities to act more like self-funded litigants, while still providing for recovery of reasonable rate-case expenses. The commission emphasizes that it retains broad discretion and flexibility when reviewing requests for recovery of or reimbursement for rate-case expenses. The commission further anticipates that in evaluating specific rate-case expense requests, the presiding officer will apply the specific criteria established in the adopted rule in light of the overall 'reasonableness' standard for rate-case expense recovery.").

102. Order Adopting Amendments to 16 TAC 24.44 for Consideration at The October 11, 2019 Open Meeting, Rulemaking to Amend 24.44 Rate-Case Expenses Pursuant to Tex. Water Code §13.187 & §13.1871, Project No. 48526, slip op. at 6 (Tex. Pub. Util. Comm'n Oct. 14, 2019), https://interchange.puc.texas.gov/Documents/48937_25_1037611.PDF.

103. City of Newport, Docket No. 2985, 2000 R.I. PUC LEXIS 12, at *37-38 (June 19, 2000); *see also* Appendix at 45-46.

104. *Id*. at *38.

105. *But see, e.g.*, Southwestern Bell Tel. Co., Docket No. U-2916, ,1979 Ark. PUC LEXIS 7, at *85-86 (Jan. 15, 1979) (rejecting similar proposal noting that some expenses do not impact ultimate revenue level but are "nonetheless very beneficial to the commission."); Potomac Elec. Power Co., No. 1139, 2017 D.C. PUC LEXIS 187, at *177-178 (July 25, 2017).

applies its sliding-scale approach only after a finding that "rate-case expenses as a whole were disproportionate, excessive, or unwarranted in relation to the nature and scope of the rate case."[106] The New Hampshire and Illinois regulations likewise require agencies to consider the novelty and complexity presented.[107] Similarly, the Indiana Utility Regulatory Commission has articulated that rate case expenses "must be prudent and reasonable given the complexity of the issues presented."[108] On the other hand, the Iowa Utilities Board has rejected arguments that a more complex case warranted recovery of more rate case expenses when it found that the complexity and novelty originated with the utility.[109] The California PUC has also looked to "the intensity with which [intervenors] chose to pursue their challenges" to a rate increase as "persuasive" justification for rate case expense levels.[110]

One particularly interesting factor is the total rate case expense incurred relative to the value of the case. This is more often considered among the "soft" factors in understanding the case as a whole rather than employing a hard benchmark. The Ohio PUC, for instance, understands that it "must consider the size of the company and a comparison of the rate case expense relative to the required revenue increase."[111] Maine regulations include "the amount of money at issue" among the factors to be considered,[112] and Texas PUC regulations include "the amount of money or value of property or interest at stake" to be a part of the "scope" the Commission must measure the incurred costs against.[113] The Massachusetts Department of Public Utilities has also articulated that it may disallow recovery of rate case expenses "where such expenses are disproportionate to the relief being sought."[114] In at least one instance, the Illinois Commerce Commission found that "it [was] unreasonable for rate case expense to represent 18.7%" of a utility's overall revenue request.[115] The New York PSC has also raised concerns as to the quantum of the rate case expense relative to the overall

106. 16 TEX. ADMIN. CODE § 25.245(c)(5) (2014).

107. N.H. CODE ADMIN. R. PUC 1904.01(b)(1) (2024) (Agency must consider "[w]hether the issues presented are novel or complex"). Related to the merit-based approach above, the New Hampshire regulations also require its PUC to consider whether the request itself was just and reasonable. N.H. CODE ADMIN. R. Puc 1904.01(b)(7) (2024). ILL. ADMIN. CODE tit. 83, § 288.110(b)(3) (2023) (factors include "[n]ovelty, complexity, or difficulty of the issues.").

108. Switzerland Cnty. Nat. Gas. Co., 2019 Ind. PUC LEXIS 90, at * 56 (Apr. 17, 2019).

109. Interstate Power & Light Co., Docket No. RPU-2019-0002, 2021 Iowa PUC LEXIS 266, at *13-14 (Aug. 10, 2021).

110. Crimson Cal. Pipeline L.P., Decision No. 20-11-026, 2020 Cal. PUC LEXIS 966, at *14 (Nov. 23, 2020); *see also* Global Water – Picacho Cove Water Co., Decision No. 78644, at 148 (Ariz. Corp. Comm'n July 27, 2022), https://docket.images.azcc.gov/0000207261.pdf?i=1759334104604 ("The Applicants' concerns that Staffs pursuit of the Section 1033 tax issue increased the difficulty of its rate case presentation is not entirely without merit.").

111. Water & Sewer LLC, No. 11-4509-ST-AIR, 2012 Ohio PUC LEXIS 749, at *52 (Aug. 15, 2012).

112. 65-407-850 ME. CODE R. § 3.B (2022).

113. 16 TEX. ADMIN. CODE § 25.245(b)(5)(B) (2014).

114. East Northfield Water Co., Docket No. 19-57, 2020 Mass. PUC LEXIS 99, at *47-48 (Mar. 31, 2020) (citing various decisions); Massachusetts Elec. Co., Docket No. 18-150, 2019 Mass. PUC LEXIS 264, at *290-291 (Sep. 30, 2019); NSTAR Elec. Co., Docket No. 17-05, 2017 Mass. PUC LEXIS 371, at *386-87 (Nov. 30, 2017).

115. North Shore Gas. Co., 2023 Ill. PUC LEXIS 786, at *302 (Nov. 16, 2023).

revenue requirement.[116] Finally, as described above, Chairman Sievers of the Kansas Corporation Commission proposed an alternative benchmark comprising ranges of percentages of rate case expense relative to the "awarded revenue requirement from past Commission decisions."[117]

c. Minimal Scrutiny (FERC Approach)

FERC employs a narrower scrutiny than most states, limiting its review to the prudence of a utility's legal expenses in a rate case.[118] It has not recently, if ever, applied this standard to reduce a utility's recoverable rate case expenses.[119] Most recently, a FERC administrative law judge articulated that the Commission "assesses prudence objectively by reference to what a reasonable utility management would pay for outside lawyers in similar regulatory litigation."[120] There the ALJ rejected evidence comparing the fees of other firms or parties in the case and expense levels from prior rate cases, as well evidence as to the lack of competitive solicitation or requests for discounts.[121] As a practical matter, in at least one oil pipeline dispute, FERC has entirely divorced the level of recoverable rate case expense from the merits of the case or the total value. Specifically, in Docket IS09-437, FERC approved a surcharge to recover $6 million in expenses for a rate case where—after nearly a decade of litigation—FERC set the pipelines' rates (exclusive of the surcharge) *below* those in place prior to the pipeline's application.[122]

2. How Rate Case Expenses Are Recovered

There are three principal methods by which regulators allow utilities to recover rate case expenses: (1) *amortizing* actual or expected expense levels over a period of years, (2) *normalizing* historic expense levels to determine an average yearly level, and (3) applying a temporary *surcharge* to recover all expenses incurred. The regulator's goals in setting a reasonable level of rate case expense can influence its choice among these three. Two competing goals that stand out are whether the regulator should set a rate case expense level to allow the regulated business (1) the *opportunity* to recover a representative level of such reasonable

116. Bristol Water-Works Corp., No. 17-W-0010, 2018 N.Y. PUC LEXIS 353, at *69-74 (July 16, 2018) (noting that the company's rate case expense exceeded its revenues and represented the majority of the requested rate increase).

117. Kansas City Power & Light Co., Docket No. 10-KCPE-415-RTS, 2012 Kan. PUC LEXIS 89, at *169 (Jan. 18, 2012).

118. *See, e.g.*, 137 FERC ¶ 61,220 at P 41.

119. *See, e.g.*, 183 FERC ¶ 63,020 at P 631.

120. *Id*. at P 637.

121. *Id.* at P 638-43.

122. *See* Opinion No. 522-B, *SFPP, L.P.*, 162 FERC ¶ 61,229 (2018); *compare Compliance Filing Implementing Opinion No. 522-B*, FERC Accession No. 20180514-6203, at Schedule 23(A)(1) (May 14, 2018) (calculating lawful rates for the earliest time period exclusive of the surcharge), *with SFPP Tariff No. 177*, FERC Accession No. 20090602-0177 (May 28, 2009) (the pipeline's rates immediately preceding the application). The surcharge awarded also represented approximately 10% of the initial rate increase sought. *Compare Compliance Filing Implementing Opinion No. 522-B*, FERC Accession No. 20180514-6203, at Schedule 23(B), *with SFPP Tariff No. 177*, FERC Accession No. 20090602-0177. *See SFPP Tariff No. 182*, FERC Accession No. 20090803-0061 (July 31, 2009) (tariff containing the requested rates).

costs the entity is likely to experience when the rates are in effect, or (2) to receive *indemnification* of all actual rate litigation costs incurred. State regulators have different goals that typically align with their chosen method, and FERC—which uses a different method for each of its three ratemaking regimes (gas, power, and oil)—appears to have different goals in each context.

a. Amortization

Amortization rate case expenses is the approach most widely used by state regulators and is used by FERC when regulating electric utilities under the Federal Power Act (FPA)[123] and, in rare circumstances, under the Natural Gas Act (NGA).[124] This approach has been identified as "customary" by the Federal Power Commission as far back as 1942.[125] Under this approach "regulatory expenses should be amortized over the period of time during which the rates at issue are expected to be in effect."[126] FERC and most state regulators set this amortization period to match the expected interval between rate cases.[127] FERC and most regulators do not require rates be reduced after the conclusion of the amortization period, as would be expected with a surcharge.[128] While rate case expenses are being amortized, FERC and most states prohibit utilities from including the unamortized portion in their rate base or otherwise earning a return.[129]

b. Normalization

Rate case expense levels can also be established via normalization. This is the approach used in a minority of states[130] and by FERC when setting rates under

123. *See* Michael E. Small, *A FERC Electric Rate Primer*, 5 ENERGY L. J. 107, 114-15 (1984) ("In determining whether regulatory expenses are reasonable three questions arise: (1) whether the amortization period is appropriate; (2) whether prior rate case expenses can be recovered; and (3) whether the total amount of expense is reasonable."). Since the publication of that article, FERC has resolved the second question in the negative in the context of a gas case, reasoning from "standard Commission policy to amortize gas pipeline and electric utility rate case expense" which FERC reasoned did not include giving "rate base effect to the unamortized balance." *Kuparuk Transp. Co*., 45 FERC ¶ 63,006, 65091 (1988) ("such special treatment is denied.").

124. *Enbridge Pipelines (KPC)*, 100 FERC ¶ 61,260 at PP 359-63 (2002).

125. Colorado v. Public Serv. Comm'n of Colo., 3 F.P.C. 32, 55 (1942).

126. 148 FERC ¶ 61,206 at P 221 (citing 17 FERC ¶ 61,123, 61,251 (1981) (citing *Alabama-Tennessee Nat. Gas Co*., 11 F.P.C. 75, 82-83 (1952), and Opinion No. 730, *Sierra Pac. Power Co.*, 53 F.P.C. 1795, 1805 (1975) and 86 FERC ¶ 61,165, at 61,582 (1999)).

127. *Id*. at PP 221-22. *See also, e.g.*, Appendix at 11 (District of Columbia), 13-14 (Georgia), 14 (Hawaii), 16-17 (Illinois).

128. 148 FERC ¶ 61,206 at P 223 ("A one-year amortization period would guarantee [utility] over-collection of its regulatory expenses as the rates have been in effect for longer than one year and will remain in effect indefinitely until such time that a superseding rate case is filed."); *see, e.g.*, Appendix at 11-13 (Florida); *but see id.* at 54-55 (Washington).

129. Appendix at 16-17 (Illinois), 46-47 (South Carolina); 37-38 (New Mexico), 48-52 (Texas). *But see id.* at 38-39 (New York). While FERC does not appear to have recently addressed this issue under the FPA, it has rejected rate base treatment when implementing an amortization approach under the NGA. Opinion No. 486, *Kern River Gas Transmission Co*., 117 FERC ¶ 61,077 at P 278 (2006).

130. Appendix at 10-11 (Delaware), 22-24 (Maine), 54 (Virginia), 55-56 (West Virginia); *see also id.* at 56-57 (Wisconsin).

the NGA.[131] Under this approach, the regulator takes the average annual cost experience over a sufficiently long historic period in order to establish a future level.[132] This approach is not limited to rate case expenses, but is employed generally in setting reasonable levels for recoverable expenses that fluctuate widely from year to year.[133] The Delaware Public Service Commission has articulated that "normalization [of rate case expense] is more consistent with the essential concept that rates are set to allow the [utility] to recover normal recurring expenses during the period the rates are to be in effect, and not to guarantee a dollar-for-dollar recovery of past expenses."[134] FERC has long employed this approach for rate case expense under the NGA, and by the Federal Power Commission before it.[135] Although its preference under the NGA is to use normalization, FERC has articulated that it may employ another method "[i]n the absence of sufficient historical data, or where the record indicates that the historical data are not reflective of potential future expense levels."[136] FERC does not appear to have seriously considered this approach when addressing electric utility rate case expenses or explained its different treatment across industries.[137]

c. Surcharges

The last approach employed for rate case expense recovery is a surcharge. This method is used by a handful of states, sometimes in exceptional circumstances, as well as by FERC under the Interstate Commerce Act (ICA).[138] In that context, FERC has articulated that "[w]here significant litigation costs have been incurred and it is uncertain whether those litigation costs will continue into future years, a surcharge based upon actual litigation costs provides an appropriate means to avoid both over-recovery and under-recovery," whereas "there is little assurance that base period data, test period data, or any other normalization would provide sufficiently representative estimates of future expense levels."[139] Like amortization, a surcharge is designed to allow recovery over a set period of time. Unlike amortization, however, it does not "permanently embed a litigation recovery" in the entity's rates.[140] FERC sets the target recovery period for rate

131. *See, e.g.*, 145 FERC ¶ 61,040 at PP 73-74.

132. *Id*.

133. *See, e.g.*, 185 FERC ¶ 61,126 at PP 262, 266 (ICA); 18 C.F.R. §154.303(a)(4); 181 FERC ¶ 61,211 at PP 22-27 (NGA).

134. Diamond State Tel. Co., Docket No. 92-47, 1993 Del. PSC LEXIS 22, at *6 (Nov. 30, 1993).

135. *Colorado Interstate Gas Co*., 35 FERC ¶ 63,043, 65,132 (1986), *aff'd* 41 FERC ¶ 61,179 (1987); Opinion No. 600-A, *El Paso Nat. Gas Co.*, 47 F.P.C. 1157 (1972).

136. 145 FERC ¶ 61,040 at P 73. *See also* 117 FERC ¶ 61,077 at P 278 ("The Commission's general approach to Regulatory Commission expenses is to look at a historical three or five-year period in order to establish a representative level of a pipeline's future expense level during the period the rates are effective. However, here, Kern River did not provide historical data and both staff and Kern River concur that historical amounts are not reflective of potential future expense levels.").

137. While FERC's disparate treatment of rate case expense recovery has not been challenged on judicial review, disparate ratemaking treatment across statutes has been found to be arbitrary and capricious. See, e.g., Environmental Action, Inc. v. FERC, 939 F.2d 1057, 1063 (D. C Cir. 1991).

138. *See, e.g.*, Opinion No. 511, *SFPP, L.P.*, 134 FERC ¶ 61,121 at P 35 (2011).

139. *Id*.

140. *Id*. at P 37.

case expense surcharges to align with "the length of the litigation at issue."[141] This differs from amortization, which is usually intended to align with the frequency of rate cases. State regulators that have articulated a policy on surcharge period timing have focused on ratepayer impact rather than rate case intervals or the term of litigation.[142] In the context of rate complaints under the ICA—where reparations are available only to complaining shippers—FERC has a policy of "credit[ing] the amount of unpaid reparations to noncomplaining shippers against the total" rate case expense that can be recovered through a surcharge.[143]

III. ANALYZING RATE CASE EXPENSE RECOVERY AS A FORM OF FEE SHIFTING SHOWS IT TO BE UNJUSTIFIED AND FRAUGHT WITH PERVERSE INCENTIVES

Rate case expense recovery is fundamentally a form of fee shifting because one side (the ratepayers) of the legal dispute (the rate case) is responsible for the other side's (the utility's) litigation expenses stemming from that dispute. In contrast to the dearth of scholarship that addresses rate case expense recovery,[144] there is a breadth and depth of scholarship examining fee shifting from several perspectives. A full survey of this fee shifting scholarship is beyond the scope of this article, which focuses on the generally established legal foundations, purposes, and likely effects of fee shifting to inform policy on rate case expense recovery. Comparing rate case expense recovery to other forms of fee shifting shows that awarding recovery without meaningful limits is unsound policy and anathema to legal norms.

The legal foundation of rate case expense recovery is academically unique compared to other forms of fee shifting because it is implied rather than expressly authorized. This lack of legislative oversight may explain in part its policy failures. The established justifications for fee shifting also provide a stark contrast to rate case expense recovery. In fact, besides the premise that fee shifting can help fully compensate a party vindicating their legal rights, nearly every basis used to justify fee shifting is inapplicable or cautions against the practice of rate case expense recovery. Specifically, such recovery (1) makes the intended beneficiaries of regulation (ratepayers) pay for the targets of regulation (utilities) to resist its enforcement; (2) disincentivizes the public good of participating in regulatory proceedings; and (3) exacerbates barriers to participating in proceedings for those with fewer resources and small-value claims (individual ratepayers) while subsidizing the better-resourced parties with higher-value claims (utilities). The litigation incentives created by allowing rate case expense recovery

141. 153 FERC ¶ 61,233 at P 136 (citing 134 FERC ¶ 61,121 at PP 35-37).

142. *See* Appendix at 48-52 (Texas), 18-19 (Iowa); *see also* Global Water-Palo Verde Utils. Co., Decision No. 78644, at 148-49 (Ariz. Corp. Comm'n July 27, 2022), https://docket.images.azcc.gov/0000207261.pdf?i=1759334104604 (setting recovery period "to moderate the impact" of the last phase of the rate increase).

143. 185 FERC ¶ 61,126 at PP 273-76 (*see* Opinion No. 571, *Chevron Prods. Co. v. SFPP, L.P.*, 172 FERC ¶ 61,207 at PP 59, 65-66, 70-71 (2020); *Mobil Oil Corp. v. SFPP, L.P.*, 100 FERC ¶ 61,353 at P 12 (2002); BP W. Coast Prods., LLC v. FERC, 374 F.3d 1293, 1294 (D.C. Cir. 2004)).

144. *See* PHILLIPS, *supra* note 13, at 237-38; Michael E. Small, *A FERC Electric Rate Primer*, 5 ENERGY L. J. 107, 114-15 (1984); 78 Ohio Jur. 3d Public Utilities § 155 (2025); 73B C.J.S. Public Utilities § 93 (2025); 64 Am. Jur. 2d Public Utilities § 114 (2025).

regardless of their level or the merits of a case, as discussed in the following section, also strongly validate the need for their reform.

A. Rate Case Expense Recovery Is a Form of Fee Shifting

Rate case expense recovery operates as a form of fee shifting because it makes one side to a dispute (i.e., ratepayers) responsible for paying the attorneys' fees and related costs of their adversary to that dispute (the utility). Definitions of fee shifting tend to assume that fees are only ever shifted to (i.e., ultimately paid by) the losing party. For instance, Black's Law Dictionary defines "fee-shifting" as "[t]he transfer of responsibility for paying fees, esp. attorney's fees, from the prevailing party to the losing party."[145] The limit in Black's definition, however, is understandable, given that virtually every other fee shifting regime—for glaringly obvious policy reasons—makes recovery of legal fees contingent on success.[146] This article uses a broader definition of fee shifting that includes awarding fees to non-prevailing parties. This definition is consistent with recent Supreme Court precedent on the topic.[147] Fee shifting can thus be defined as:

> The transfer of responsibility from one party to a dispute to another party to that dispute, of paying the latter's attorney's fees and related fees incurred in said dispute.

Rate case expense recovery fits this definition perfectly in intent and effect because one set of parties (the ratepayers) of the legal dispute (the rate case) are responsible for the other side's (the utility's) attorney and related expenses. As described above, rate case litigation pits utilities against ratepayers. When a utility can recover its attorney's fees from that dispute as rate case expense, it is ratepayers who ultimately bear that financial burden. FERC's stated goal is to allow the regulated entity to recover all expenses associated with a dispute, whether in the form of a tracking and surcharge mechanism[148] or an estimate.[149] When FERC employs a normalized level of recoverable expense, that level is still meant to set "a representative level of a [business's] future [rate case expenses] level during the period the rates are effective" that ratepayers must bear.[150] As described above and in the Appendix hereto, state regulators share a similar understanding, especially those who exercise oversight of this cost item comparable to FERC's.

While fee shifting is unique in many ways, these differences do not change the reality for participants litigating before regulators and courts. Rate case expense recovery undeniably introduces fee shifting to the arena of regulatory

145. *Fee-shifting*, Black's LAW DICTIONARY (12th Ed. 2024).

146. Ruckelshaus v. Sierra Club, 463 U.S. 680, 684 (1983).

147. *See* Peter v. Nantkwest, Inc., 589 U.S. 23, 29 (2019) ("contrary to the Government's suggestion, Congress has indeed enacted fee-shifting statutes that apply to nonprevailing parties.").

148. 134 FERC ¶ 61,121 at P 37.

149. 148 FERC ¶ 61,206 at PP 221-24 (describing a reasonable estimate and noting it reflects "the full amount of [the entity'] regulatory expenses").

150. 145 FERC ¶ 61,040 at P 73.

litigation. Many state regulators understand this.[151] It is therefore reasonable to lean on the established scholarship and precedent on fee shifting to assess the merits and consequences of rate case expense recovery. This body of analysis can inform whether rate case expense recovery can be justified, what its pitfalls are, and what reforms can or should be adopted.

B. Legal Foundation of American Fee Shifting in Conventional Disputes Is Antithetical to Rate Case Expense Recovery

In the American legal system parties to disputes normally must bear their own costs "unless a statute or contract provides otherwise."[152] This is known as the "American Rule," to contrast it to the "English Rule," where the loser is normally required to pay the winner's reasonable legal fees.[153] Limited exceptions to the American Rule arise in class action cases, where attorneys may be paid through the common fund,[154] or in cases of misconduct.[155] Other exceptions, such as the "private attorney general" theory, have been put forward but rejected at the

151. Community Utils. Of Ind., Inc. 2023 Ind. PUC LEXIS 102, at *5 (May 3, 2023) (endorsing statement that "rate cases are considered the exception to the general American Rule"); Appendix at 19-21 (Kansas) (quoting Kansas City Power & Light Co., Docket No. 10-KCPE-415-RTS, 2012 Kan. PUC LEXIS 89, at *40 (Jan. 18, 2012) ("If the American Rule were applied here, [the utility] would be responsible for paying its own expenses and costs, [and] would not recover any rate case expense from ratepayers . . . But historically Kansas utilities have been allowed recovery of prudently incurred rate case expense that is just and reasonable as one of the many components making up revenue requirement."); Sunshine Utils. Of Cent. Fla. Inc., Docket No. 900386-WU, 1994 Fla. PUC LEXIS 613, at *17 (June 15, 1994) (borrowing insight from fee shifting cases for rate case expense recovery); North Shore Gas Co., 2014 Ill. PUC LEXIS 827, at *106 (Nov. 7, 2014) (same); Mid-Kansas Am. Pipeline Co., Docket No. 12-MDAP-068-RTS, 2012 Kan. PUC LEXIS 40, at *8 (Jan. 11, 2012) (setting for briefing whether rate case expenses should be recovered "or the American rule" should apply); *see also* Appendix at 31-33 (Missouri) (quoting Kansas City Power & Light Co., 2015 Mo. PSC LEXIS 789, at *133-34 (Sep. 2, 2015) (recognizing that rate case expenses were unique in part because rate cases were adversarial and "requiring all rate case expense to be paid by ratepayers provides the utility with an inequitable financial advantage over other case participants."). *But see* Atmos Energy Co., Decision No. C23-0293, 2023 COLO. PUC LEXIS 289, at *24-25 (Apr. 21, 2023) (differentiating rate case expense inquiry from lodestar inquiry in attorneys' fee disputes).

152. Baker Botts L.L.P. v. ASARCO LLC, 576 U.S. 121, 121 (2015) (quoting Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 252–53); Lackey v. Stinnie, 604 U.S. 192, 199 (2025) ("Federal courts may depart from [the American] rule only when 'there is express statutory authorization' to do so.") (quoting Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

153. Susan M. Olson, *How Much Access to Justice from State Equal Access to Justice Acts*, 71 CHI.-KENT L. REV. 547, 549-50 (1995). While referred to in the Unites States as the English Rule, it is followed in some form by nearly every jurisdiction outside of the United States. *See* David P. Riesenberg, *Fee Shifting in Investor-State Arbitration: Doctrine and Policy Justifying Application of the English Rule*, 60 DUKE L.J. 977, 1000 (2011). Within the United States, the state of Alaska is unique in generally following the English Rule of awarding prevailing party fees as a matter of course. *See generally* Virginia Cella Antipolo, *The Impact of Economic Incentives on the Award of Attorney's Fees in Public Interest Litigation*, 1 ALASKA L. REV. 189 (1984).

154. *See* Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) ("The common-fund doctrine reflects the traditional practice in courts of equity, . . . and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees,") (citing Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, at 257–258 (1975)).; Maureen Carroll, *Fee-Shifting Statutes and Compensation for Risk*, 95 IND. L.J. 1021 (2020).

155. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975).

federal level.[156] Even when provided for by statute, such authorization is construed narrowly against the presumption against fee shifting, with courts demanding "express statutory authorization."[157]

Ironically, FERC appears to believe that it also adheres strictly to the American Rule, claiming it is "well-established" that the agency cannot award attorneys' fees without statutory authorization.[158] State energy regulators typically, but not universally, reach similar conclusions.[159] This paradigm is reversed, however, when the utility seeks to recover its litigation expenses. As described above, recovery of rate case expense is not authorized by any statute, but rather by an implicit authority in setting cost-of-service rates. In fact, as shown in the Appendix, where states have specific statutes governing the practice, they serve primarily to limit recovery, not to authorize it. A default rule in favor of fee shifting implied rather than expressly authorized would be inconceivable in every other American legal setting.

C. The Policy Justifications for Fee Shifting Are Mostly Incompatible with Rate Case Expense Recovery

It is difficult to justify rate case expense using the rationales that lawyers and economists have put forward to justify other forms of fee shifting. Many federal and state statutes provide for fee shifting.[160] In each case, the legislature has

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156. *Id*. at 270 (the American Rule "is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals.").

157. *Lackey*, 604 U.S. 192, 199 (2025) (quoting Hensley v. Eckerhart, 461 U.S. 424, 429 (1983)); *see also* Peter v. Nantkwest, Inc., 589 U.S. 23, 28 (2019) (citing Sebelius v. Cloer, 569 U.S. 369 (2013)); *id.* 31-32 ("the term "expenses" alone does not authorize recovery of attorney's fees"); *see also* Baker Botts L.L.P., 576 U.S. 121, 133-34 (2015).

158. *Newmont Nevada Energy Inv. LLC v. Sierra Specific Power Co*., 147 FERC ¶ 61,030 at P 42 (2014) ("The Commission has stated that '[a]lthough the federal courts are empowered to award attorneys' fees where a party has litigated in bad faith, as a limited exception to the general 'American Rule' that parties to litigation pay their own attorneys' fees regardless of a lawsuit's outcome, no statute confers such authority on the Commission, and the Commission has never claimed such authority.'") (quoting *State of Cal.,* ex rel. *Lockyer v. British Columbia Power Exch. Corp.*, 139 FERC ¶ 61,213 at P 24 (2012)).

159. *Compare* Southwestern Elec. Power Co., Order No. 38, 2015 Ark. PUC LEXIS 203, at *16 (May 20, 2015) ("Without specific statutory authority, the Commission cannot make an award of attorneys' fees."); Pastrick v. Southwestern Bell Tel. Co., No. TC-2002-301, 2003 Mo. PSC LEXIS 1055, at *7 (Aug. 21, 2003); Oak Hill Garbage Disposal, Inc. v. Lusk Disposal Serv., Inc., No. 03-0950-SWF-C, 2003 W. Va. PUC LEXIS 3398, at *10 (July 25, 2004); Tampa Elec. Co., Docket No. 120192-EI, 2013 Fla. PUC LEXIS 43, at *8 (Feb. 7, 2013), *with* Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 783 (1994); Barenberg v. Louviers Mut. Serv. Co., Docket No. 07F-036W, 2008 Colo. PUC LEXIS 942, at *5 (Sep. 23, 2008) ("The Commission has considerable discretion and broadly based authority in awarding attorneys fees and costs to complainants in utility disputes.") (citing Mountain States Tel. & Tel. Co. v. Public Utils. Comm'n of Colo., 576 P.2d 544, 547 (1978)). *See also* Consumers Lobby Against Monopolies v. Public Utils. Com., 25 Cal. 3d 891 (1979), disapproved of on other grounds by *Kowis v. Howard*, 3 Cal. 4th 888, 838 P.2d 250 (1992) (California PUC has authority to award attorney's fees in reparations complaints but not in rate cases); Linda M. Ross, *Consumers Lobby Against Monopolies v. Public Utilities Commission: The PUC's Power to Award Attorney Fees*, 69 CALIF. L. REV. 969 (1981).

160. *See* Ruckelshaus v. Sierra Club, 463 U.S. 680, 684 (1983) (stating there were more than 150 federal statutory fee-shifting provisions); *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule*, 47 LAW & CONTEMP. PROBS. 321 (1984) (survey identifying 1,974 state fee-shifting statutes); Olson, *supra*

affirmatively selected fee shifting as a means of achieving one or more policy goals. This article measures rate case expense recovery against these policy justifications for fee shifting. In doing so, it borrows the influential list of six rationales identified by Prof. Thomas Rowe, Jr.[161] These are fairness considerations, full compensation, punishment and deterrence, public benefits, imbalanced resources of the parties, and creating efficient litigation incentives generally.[162] Though composed several decades ago, the list put forward by Rowe still appears to encompass the full debate,[163] and the broader umbrella categories provide a ready point against which to measure rate case expense recovery.

This comparison shows another way that rate case expense recovery is unique: not only does it not serve to advance any of the traditional rationales, in most cases it operates against them. Indeed, the only policy goal (sometimes) furthered by rate case expense recovery is that of full compensation for legal vindication. The punitive rationale is not applicable. The goals of public benefit, overcoming imbalanced resources of the parties, and litigation incentives are all actively undermined by it, as is the fuzzier goal of "fairness," at least according to American legal norms.

1. Fairness

The first rationale identified by Professor Rowe is that of "fairness."[164] While abstract ideas of fairness are mostly beyond the scope of this article, the recovery of rate case expenses can certainly be said to cut against American legal norms, which disfavor fee shifting. Most assessments of the normative fairness of fee shifting focus on the concrete outcomes, i.e., rationales two through six below.[165] As Professor Rowe discusses, views of the "fairness" of fee shifting in the abstract are very dependent on culture. While the English Rule is the majority practice globally (perhaps because it is perceived as discouraging litigation), "American attitudes, however," are more opposed to fee shifting because we "tend to regard litigation as everyone's right and to emphasize the importance of not excessively hindering access to justice."[166]

Though fairness is not the focus of this article, we should not completely ignore important societal norms. State regulators and legislatures that restrict, or prohibit, rate case expense recovery certainly appear concerned with its perceived unfairness.[167] Without the benefit of a survey, the author still submits it is likely

note 153, at 552 (describing state fee shifting statutes); HENRY COHEN, CONG. RSCH. SERV., R94-970, AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES 64-114 (2009) (listing federal statutes).

161. Thomas D. Rowe Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651 (1982).

162. *Id.* at 653-66.

163. *See, e.g.*, Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2045-75 (1993) (identifying rationales for one-way fee shifting that fit within these larger umbrellas).

164. Rowe, *supra* note 161, at 653-57.

165. *See, e.g.*, Issachar Rosen-Zui, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717 (2010).

166. Rowe, *supra* note 161, at 656 (citing Philip Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, 2 Litig. 27 (1976)).

167. *See* Appendix at 30-31 (Mississippi); Suez Water Arlington Hills Inc., Docket No. WR16060510, 2017 N.J. PUC LEXIS 253, at *30 (Nov. 13, 2017) ("Rate Counsel noted that the Board's long standing 50/50 rate

that the typical American ratepayer (who would normally have to pay their own legal bills) would not find it "fair" that the rates they pay for water, electric, gas, and other regulated services must all be increased to pay for lawyers in regulatory proceedings to argue against the lawyers that represent the ratepayers' interests. Common notions of fairness also cut against the idea that rate case expenses can be recovered regardless of the merits of the utility's case. As the Supreme Court has articulated, acceptance of the "established rule [that] a successful party need not pay its unsuccessful adversary's fees. . . reflects, at least in part, intuitive notions of fairness to litigants."[168]

2. Full Compensation

The full compensation (or "make whole") rationale is the one justification of fee shifting that *does* (partially) apply to the logic of rate case expense recovery. This argument is that, because attorneys must be paid to vindicate legal rights, fee shifting is required for a legally harmed party to truly be made whole.[169] This rationale has, however, been consistently rejected by federal courts as a basis to infer fee shifting.[170] As described above, the rationale for rate case expense recovery is that utilities should be compensated for their operating costs, which include the costs of prosecuting rate cases. To the extent the full compensation rationale is invoked to justify rate case expense recovery, an important distinction is that recovery of rate case expenses is typically divorced from the merits of the underlying case.

Rate case expenses are typically recovered by utilities in their rates regardless of how successful they are in their rate case.[171] As the Supreme Court opined in dictum, a "utility should be allowed its fair and proper expenses for presenting its side to the commission" even "where the rates in effect are excessive."[172] The full compensation rationale, to the extent it applies to rate case expense recovery, does so only to the extent the utility prevails. In fact, Rowe and other scholars of fee shifting have expressed that this rationale does not apply unless the liable party has affirmatively committed some wrongful act.[173] Any concern with ratepayer culpability is obviously inapplicable to a cost-of-service ratemaking. The bare minimum that a case be meritorious does, however, apply. Legal fees spent

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case sharing policy is rooted in fundamental fairness, as both shareholders and ratepayers benefit from a rate case proceeding.") (discussed in Appendix at 36-37); Plautz, *supra* note 6.

168. Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983). Note however that there are rare exceptions where the government pays an unsuccessful parties' legal fees, such as the National Childhood Vaccine Injury Act of 1986. *See* Sebelius v. Cloer, 569 U.S. 369 (2013).

169. Rowe, *supra* note 161, at 657.

170. *See, e.g.*, Summit Valley Indus. Inc. v. Local 112, United Bhd. of Carpenters & Joiners of Am., 456 U.S. 717, 725 (1982).

171. *See* discussion *supra* Part II.B.1.c.

172. Driscoll v. Edison Light & Power Co., 307 U.S. 104, 120-21 (1939).

173. Rowe, *supra* note 161, at 658 ("The make-whole rationale as defined here, by contrast, requires fee shifting only if the loser was somehow at fault--either in his primary conduct or in the course of litigation-in forcing the winner to spend money on legal services."); Krent, *supra* note 163, at 2070-71.

pursuing unsuccessful (even if viable) arguments cannot have been required to secure the relief ultimately awarded.[174]

While an imperfect fit, the full compensation rationale does provide some justification for rate case expense recovery as a form of fee shifting, insofar as it overlaps with the traditional ratemaking justification. The comparison is somewhat limited, and indeed raises more points of scrutiny than assurances. However, the concern that utility rates compensate for their costs should be considered in recommending reforms to the general practices around rate case expenses.

3. Punishment and Deterrence

Another justification for fee shifting is that it can punish and deter misconduct that occurs both outside and within litigation.[175] This rationale does not apply to rate case expense recovery. Rate case expenses are recovered by utilities from their ratepayers. There is no reason to believe that the recoverability of rate case expenses influences the conduct of either utilities or ratepayers outside of the litigation. Automatic indemnification would of course influence behavior within litigation, as described below. For instance, ratepayer advocates might be discouraged from challenging even very unsound legal positions of a utility, if they believe any positive results might be offset by an increase in the utility's recoverable litigation costs.[176] It is also possible, as FERC and other regulators have found, that ratepayer conduct in a proceeding can influence the level of litigation costs.[177] However, participating in a rate case is not considered to be a wrong to be deterred. To the contrary, it is the public policy of FERC to encourage public participation in its rate cases.[178] Therefore, rate case expense recovery cannot be justified as a means of punishment or deterrence. If anything, it has the potential to deter public participation that is generally considered positive.

4. Public Benefits and Regulatory Enforcement

Fee shifting is also sometimes justified because it can support litigation in the public interest or enforce a regulatory regime.[179] This consideration does not justify the recoverability of rate case expenses; in fact, it cuts strongly against it. This is one of the most common rationales invoked to justify fee shifting in

174. And as described in the recommendation section, legal fees spent on unavailing arguments are not truly related to or required for the provision of regulated services.

175. Rowe, *supra* note 161, at 660-61.

176. For instance, even if ratepayers believe they have a strong chance (60 to 80%) of prevailing on a specific issue worth $500,000 net present value, but they would need to expend $50,000 additional legal fees to pursue that claim and the utility would be expected to spend $350,000 in responding to their arguments, then raising that issue has a net negative value (minus $100,000 to $0).

177. *See, e.g.*, 137 FERC ¶ 61,220 at P 41 ("Although SFPP made the decision to file the rate increase, it does not control the degree to which shippers have litigated the issues raised in this proceeding."); *see also* Crimson Cal. Pipeline L.P., Decision No. 20-11-026, 2020 Cal. PUC LEXIS 966, at *14 (Nov. 23, 2020).

178. *See Office of Public Participation*, FERC, https://www.ferc.gov/OPP, (last visited Oct. 2, 2025).

179. Rowe, *supra* note 161, at 662-63. Professor Rowe calls this the "'private attorney general' theory." However, this article will not use that term to keep it distinct from the now largely rejected common law exception to the American rule.

America. As the Supreme Court articulated, "under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation."[180] The theory goes that in many cases "potential plaintiffs may well refrain from bringing socially beneficial suits because the gains would not sufficiently further their private interests."[181] Robert Percival and Geoffrey Miller explain that this arises when "the benefits of such litigation are widely scattered."[182] These disincentives are difficult to overcome with voluntary contributions because of transaction costs and "free riders."[183] Relatedly, Professor Krent has similarly articulated that "fee shifting serves as a means of encouraging private parties to help enforce federal regulatory requirements, particularly where government enforcement might prove inefficient."[184]

The goal of funding public interest litigation is uniquely disserved by shifting rate case expenses to ratepayers. Rate cases are tried under regulatory regimes whose primary purpose is to protect consumers from unreasonably high rates charged by utilities.[185] Lower rates (so long as they are not confiscatory) are themselves a public benefit.[186] In these disputes, the utilities' lawyers are arguing for *higher* rates. Rate case expense recovery therefore uniquely shifts fees *against* public benefits and regulatory enforcement. Furthermore, it is the ratepayers that constitute the (often extremely) dispersed set of interests. It is their attorneys (often funded with donations, government expenditures, or through an established "intervenor compensation" mechanism) that are enforcing the regulatory regime by seeking lower rates for the broader public. Rate case expense recovery therefore cannot be justified as supporting regulatory enforcement; in fact, it subsidizes *resistance* to enforcement of laws primarily aimed at protecting ratepayers from unjustified rate increases.

5. Overcoming Economic Barriers

Another frequently invoked justification for fee shifting is that it can place litigants on a more even footing when they face imbalanced resources that prevent access to the legal process.[187] As with the "full compensation" rationale, the costs of litigating relative to the value of the claim can be prohibitive for many individuals absent fee shifting.[188] One such example would be the federal and state "Equal Access to Justice" Acts, which award fees against government

180. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975).

181. Rowe, *supra* note 161, at 662.

182. Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 237-38 (1984).

183. *Id.* at 238-39.

184. Krent, *supra* note 163, at 2057.

185. *See* discussion *supra* p. 5; *see also supra* note 13.

186. *See, e.g.*, *Northern Border Pipeline Co*., 53 FERC ¶ 61,051 (1990); *Colorado Interstate Gas Co*., 97 FERC ¶ 61,385 (2001); *Great Basin Gas Transmission Co*., 189 FERC ¶63,010 (2024).

187. Rowe, *supra* note 161, at 663-65.

188. Carroll, *supra* note 154, at 1034-36 (describing such situations as "gaps in the market for legal services").

defendants in suits by individuals.[189] This rationale applies only to one-way fee shifting.[190] Two-way "English Rule" fee shifting tends to deter litigation against wealthier defendants by poorer or more risk-averse plaintiffs, who must risk paying the wealthier party's defense bills in order to bring a legal action.[191]

As with other considerations, this rationale for fee shifting does not support recovery and rate case expense, but rather cautions strongly against it. In a typical rate case, no serious argument can be made that the regulated utility faces an imbalance of resources relative to the ratepayers. Utilities tend to be large, well-resourced businesses, and their rate cases are very high value propositions for them. To the contrary, as state regulators have identified, it is intervenors representing ratepayer interests that face financial barriers to participate in rate cases.[192] Even if a ratepaying entity has relatively greater resources, they still have a much lower stake in the proceeding relative to the utility (unless they are the only ratepayer). Notably, many states have established "intervenor compensation" regimes designed to encourage participation in rate cases by interested parties that cannot otherwise afford to.[193] Even FERC has the theoretical authority to award fees to intervenors whose participation presents financial hardship.[194] There are no similar financial barriers to participation on the part of utilities. Rate case recovery cannot therefore be justified as necessary to overcome cost barriers faced by utilities.

Interestingly under this rationale, fee shifting is most justified when the costs are high relative to the value of the case.[195] As described above and in the Appendix, however, utility regulators that consider high legal costs relative to a utility's claims have found this indicates that rate case expense in a specific case might be unreasonably high.

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189. Rowe, *supra* note 161, at 664-65 (discussing 28 U.S.C. § 2412 (d)(1)(A)); Olson, *supra* note 153, at 547.

190. Krent, *supra* note 163, at 2050 n.48. One-way shifting, which is the form typical in America, limits recovery to one party, e.g. the plaintiff in a particular case. By contrast "two-way" fee shifting allows recovery to either party as captured in the "English" Rule that is dominant globally.

191. *See, e.g.*, Rosen-Zui, *supra* note 165, at 740; Keith N. Hylton, *Fee Shifting and Predictability of Law*, 71 CHI.-KENT L. REV. 427, 445-46 (1995).

192. Kansas City Power & Light Co., 2015 Mo. PSC LEXIS 789, at *126-128 (Sep. 2, 2015) ("While [the utility] is able to recoup the costs of its legal counsel and expenses through utility service rates, [the Office of People's Counsel], the entity representing ratepayers, operates within a tight annual budget, and interveners pay their own legal expenses.").

193. *See, e.g.*, CAL. PUB. UTIL. CODE § 1801.3 ("The provisions of this article shall be administered in a manner that encourages the effective and efficient participation of all groups that have a stake in the public utility regulation process."), Southern Cal. Edison Co. v. Public Utilities Com., 117 Cal. App. 4th 1039, 1049-51 (2004); 220 ILL. COMP. STAT. ANN. 5/9-229(b) (2025); Second Notice Order, Docket No. 22-0238, at 14 (Ill. Corp. Comm'n Jan. 19, 2023), https://icc.illinois.gov/docket/P2022-0238/documents/332886/files/579610.pdf ("the purpose of the legislation is to assist eligible entities that may not otherwise be able to participate in Commission proceedings due to financial constraints. One of the main goals of the legislation is to encourage participation for new stakeholders and remove economic barriers associated with undue financial risk.").

194. 16 U.S.C. § 825q-1(b)(2). This authority has been cut short by Congress's later limitation in appropriation bills. *See* HENRY COHEN, CONG. RSCH. SERV., R94-970, AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES 60 (2009) (discussing P.L. 102-377 (1992), § 502).

195. Carroll, *supra* note 154, at 1034-36 (illustrating with hypotheticals); Krent, *supra* note 163, at 2051-52.

6. Economic Incentives Generally

Finally, fee shifting is justified as creating better overall economic incentives, primarily by discouraging low merit claims (and encouraging meritorious but small claims described above).[196] This rationale, however, is premised on two elements that are absent regarding rate case expenses: two-way shifting and connection to the merits.[197] Therefore, this rationale for fee shifting does not support rate case expense recovery. In fact, because rate case expenses are virtually guaranteed to be recovered, their recovery creates uniquely problematic litigation incentives, which are discussed in the following section.

D. Experience with Fee Shifting Shows That Rate Case Expense Recovery Requires Limits and Scrutiny

The availability of fee shifting changes the dynamics of litigation; indeed, it is usually why jurisdictions implement it. An established body of empirical and theoretical scholarship analyzes the effects and effectiveness of fee shifting. Because rate case expense recovery is a form of fee shifting, this scholarship can provide important insight into the benefits and drawbacks of its current policy.[198] Generally, one-way fee shifting is understood to increase the number of claims and the level of legal expenditures, and to skew settlement positions. Because rate case expense is generally guaranteed regardless of the merits of a case, these impacts extend beyond those previously examined in other fee shifting contexts. Other fee shifting regimes also have important limitations tied to the level of costs and the merits of the case, which help to blunt the most perverse incentives. In most jurisdictions, comparable limits for rate case expense recovery are lacking and needed.

1. One-Way Fee Shifting Increases the Number of Disputes and Litigation Expenditures

The precise effect fee shifting has on disputes is a matter of debate, with ongoing theoretical and empirical efforts to quantify its impact.[199] This article does not aim to resolve this theoretical debate or conduct a new empirical

196. Rowe, *supra* note 161, at 665-66; Rosen-Zui, *supra* note 165, at 753 ("The English 'loser pays' rule, it is maintained. . . improves claim quality by reducing the likelihood of frivolous lawsuits while increasing the likelihood of strong low-value lawsuits.").

197. Rowe, *supra* note 161, at 665; Krent, *supra* note 163, at 2040 ("Less litigation should ensue under two-way fee shifting than under one-way fee shifting because potential litigants may be deterred from litigating by the prospect of paying their adversaries' fees."); Brandon Chad Bungard, *Fee - Fie - Foe - Fum: I Smell the Efficiency of the English Rule Finding the Right Approach to Tort Reform*, 31 SETON HALL LEGIS. J. 1, 44-45 (2006).

198. The converse is also true: utility experience with rate case expense can inform the study of fee shifting. The generally public nature of utility operating expenses and rate case proceedings especially could provide a broad and deep dataset to test established theories. Furthermore, while utility rate disputes can be resolved through settlement, they usually cannot be resolved through private ordering in the absence of a formal filing. This means the public data should reflect the outcome of all potential as well as litigated disputes. Valuable comparisons could include reported rate case expenses of comparable utilities across jurisdictions with different treatment, or in the same jurisdiction before and after policy changes.

199. *See, e.g.*, John Yukio Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 MICH. J. INT'L L. 1, 27 n.172 (Fall 1999) (and articles cited therein).

evaluation. However, three facts are generally agreed upon, described below. First, the availability to a party of fee shifting increases the likelihood that a party will initiate a proceeding or bring a particular claim. Second, after a proceeding has commenced, the availability of fee shifting tends to increase overall legal expenditures. And third, the availability of fee shifting impacts settlement bargaining strength and can discourage settlement overall.

Because rate case expense recovery operates only one way (from ratepayers to utilities), literature that focuses on comparing the incentives under the English Rule of two-way fee shifting and the American Rule of no fee shifting has limited value.[200] As professors Rowe and Shavell explain, it is important to distinguish between specific fee shifting regimes, particularly one-way versus two-way shifting.[201] As Rowe explains, "a one-way pro-prevailing-plaintiff rule. . . should uniformly encourage the pursuit of claims of all sorts in all situations" because that regime creates an "expect[ation of] greater net recoveries, without adding a counterbalancing threat of loss" that would exist under a two-way fee shifting regime.[202] However, some scholars have pushed back on this intuitive conclusion, arguing that it is not borne out by empirical evidence.[203]

The exact effect that one-way fee shifting has on settlement is more uncertain; however, it is generally understood to impact the bargaining strengths. Theoretically, a rational and risk-neutral party should only be expected to settle a dispute for an amount equal to or greater than their expected gain less the costs of litigating a matter.[204] Fee shifting generally lessens the likelihood of settlement on the theory that it "magnifies the effects of differences of opinion about the trial outcome" that prevented parties from settling in the first place.[205] Counterbalancing this concern is the principle that fee shifting also increases legal expenses, and that (merit-based) fee shifting increases the risks of losing, both of which make settlement more attractive for risk-averse parties.[206] Some authors have even argued that one-way fee shifting encourages settlement better than other

200. *See, e.g.*, John C. Hause, *Indemnity, Settlement, and Litigation, or I'll be Suing You*, 18 J. LEGAL STUD. 157 (1989); James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225 (1995); John J. Donohue, *The Effects of Fee Shifting on the Settlement Rate: Theoretical Observations on Costs, Conflicts, and Contingency Fees*, 54 L. & CONTEMP. PROBS. 195 (1991).

201. Thomas D. Rowe, *Predicting the Effects of Attorney Fee Shifting*, 47 L. & CONTEMP. PROBS. 139, 143-44 (1984); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUDS. 55 (1982).

202. Rowe, *supra* note 201, at 147. *See also id.* at 150 (opining that while one-way fee shifting "should not encourage nuisance suits much more than the American rule" any effect of a one-way rule "could only be in the direction of more encouragement for nuisance litigation.").

203. *See, e.g.*, Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 805-10 (2011) ("Although one-way fee shifts theoretically should increase the rate of litigation by reducing its cost, the data available on the consequences of fee shifting call into question its efficacy in that respect.").

204. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 401 (Harv. Univ. Press 2004); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 555-56 (Little Brown Co., 4th ed. 1992).

205. SHAVELL, *supra* note 204, at 430.

206. *Id*. at 431. *See also* POSNER, *supra* note 204, at 572-73.

arrangements.[207] However, most commenters hypothesize that fee shifting tends to discourage settlement, even if the effect is more pronounced in two-way than in one-way regimes.[208] In addition to the likelihood of settlements, fee-shifting can influence their substance as well.[209] As one commenter noted, when costs can "be forced on an adversary with little or no chance of recovery, [that] can distort the bargaining process and lead to settlements (or abandonment of claims) with little seeming basis in the substantive merits of a dispute."[210]

Most relevant for this article is the effect one-way fee shifting has on litigation spending once a proceeding commences.[211] In analyzing the impact of fee shifting on legal spending, scholarship in the field of law and economics seeks to model rational conduct, with the simplest modeling for risk-neutral parties. Under this basic framework a (risk-neutral) litigant can be expected to "spend[] up to the point where a dollar spent increases the expected value of the litigation" by a like amount.[212] For the same reason articulated above, fee shifting (especially when one-way) is generally understood to increase costs.[213] Where there is a chance that the party will not ultimately bear the associated costs, each decision to increase legal expenditures is more likely to be justified.

Importantly and regrettably, this increase cannot be attributed only to the more zealous pursuit of meritorious and substantive claims. Rather, unrelated procedural costs, including discovery and motions practice can play a large part. Parties have the incentive—and ability—to increase legal costs their opponent will have to bear.[214] One area ripe for strategic manipulation is discovery. When operating under one-way fee shifting, the indemnified party has an incentive to issue burdensome discovery requests to drive up their opponent's costs, while the party without the ability to recover those costs (typically the defendant) "has no incentive to reciprocate."[215] Even worse, when a party views fee recovery as likely, they actually "face an incentive to maximize [their] own costs" in order to drive up the costs their opponent will eventually bear.[216]

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207. See, e.g., Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069 (1993). *See also* Eric Talley, *Liability-Based Fee-Shifting Rules and Settlement Mechanisms Under Incomplete Information*, 71 CHI.-KENT L. REV. 461 (1995) (concluding that hypothetical "winner pays" fee shifting is most likely to encourage settlement).

208. Rowe, *supra* note 201, at 157, 157 n. 75.

209. Thomas D. Rowe, Jr. & David A. Anderson, *One-Way Fee Shifting Statutes and Offer of Judgment Rules: An Experiment*, 36 JURIMETRICS J. 255 (Spring 1996).

210. Thomas D. Rowe, Jr., *Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 38 DUKE L. J. 824, 877-78 (citing Richard Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L REV. 433, 456 (1986)).

211. This article does not assert that the ability to recover rate case expenses would be the deciding factor in a utility's filing of a rate case at all absent extraordinary circumstances.

212. POSNER, *supra* note 204, at 564.

213. Krent, *supra* note 163, at 2082; Braeutigam et. al., *An Economic Analysis of Alternative Fee Shifting Systems*, 47 L. & CONTEMP. PROBS. 173, 180 (Winter 1984).

214. Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 107 (2009).

215. William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887, 1998-99 (2003). *Id.* at 1906-08, 1910-12.

216. Stancil, *supra* note 214, at 106-07 ("especially if there are significant differences in the marginal value of money to the two parties").

2. Fee Shifting in Conventional Litigation Has Many Limits

Fee shifting in every other context has many limits. As described above in Part III.B, explicit legislative authorization or exceptional circumstances are required for fee shifting to be available at all. When it is available, there are further limits, two of which are key. First, recovery of fees is nearly always limited to parties prevailing on the merits in some form. Second, the amount of fees recovered is seriously scrutinized in terms of both hours and rates in a manner meant to mirror the competitive market for legal services. In addition, Rule 68 of the Federal Rules of Civil Procedure creates a procedural limitation if a claimant to fees is awarded less in damages than offered in settlement.

Limiting fee recovery to winning parties is a near universal rule.[217] Indeed, this requirement is strictly construed.[218] As the Supreme Court has explained,

> virtually every one of the more than 150 existing federal fee-shifting provisions predicates fee awards on some success by the claimant; while these statutes contain varying standards as to the precise degree of success necessary for an award of fees—such as whether the fee claimant was the 'prevailing party,' the 'substantially prevailing' party, or 'successful'—the consistent rule is that complete failure will not justify shifting fees from the losing party to the winning party.[219]

According to the Supreme Court this "reflects, at least in part, intuitive notions of fairness to litigants."[220]

The amount of fees that can be recovered is also carefully scrutinized with "the degree of success obtained" identified as "the most critical factor" by the Supreme Court.[221] The starting point for a recoverable fee level is the "lodestar," described above, which sets the fee award by multiplying the hours reasonably expended times a reasonable hourly rate in that community.[222] This amount can (rarely) be increased, but more often is reduced, including when "the relief, however significant, is limited in comparison to the scope of the litigation as a whole."[223] However, the Supreme Court has disapproved of a strict formulaic approach reducing fee awards by the ratio of successful to unsuccessful issues.[224]

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217. For academic interest, one commenter has hypothesized that hypothetical "winner pays" system would create the strongest incentives to settle disputes but does not advocate for that rule. *See* Talley, *supra* note 207.

218. *See, e.g.*, Lackey v. Stinnie, 604 U.S. 192, 203-04 (2025) (obtaining a preliminary injunction did make one a "prevailing party" for purposes of a fee shifting statute, even if voluntary compliance then resolved the dispute); Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Hum. Res., 532 U.S. 598, 600 (2001).

219. Ruckelshaus v. Sierra Club, 463 U.S. 680, 684 (1983). There are exceptions to this rule. *See* Peter v. Nantkwest, Inc., 589 U.S. 23, 29 (2019) (noting nonprevailing party can recover fees under specific statutes).

220. *Ruckelshaus*, 463 U.S. at 685. Note however that there are rare exceptions where the government pays an unsuccessful parties' legal fees, such as the National Childhood Vaccine Injury Act of 1986. *See* Sebelius v. Cloer, 569 U.S. 369 (2013)

221. Farrar v. Hobby, 506 U.S. 103, 114 (1992) (quoting Hensley v. Eckerhart, 461 U.S. 424, 436 (1983)).

222. ROBERT L. ROSSI, ATTORNEYS' FEES § 10:4 (3d ed. 2025).

223. *Hensley*, 461 U.S. at 430.

224. *See id*. at 435 n.11 (1983). The court has also rejected arguments that the level of fees themselves must be in proportion to the level of relief obtained. *See* City of Riverside v. Rivera, 477 U.S. 561, 574 (1986).

Lower courts have rejected similar reductions based on the ratio of the relief obtained and the relief requested.[225]

Another limitation to fee awards operates through Rule 68 of the Federal Rules of Civil Procedure.[226] Many states have their own cognate provisions.[227] This rule creates a mechanism for an offer of judgment and imposes the post-offer "costs" on the offeree if they rejected the offer and are ultimately awarded less after trial. "Costs" under Rule 68 does not include attorneys' fees, unless the relevant statute specifically provides for them.[228] This means an offeree may lose their right to recover their own attorneys' fees if they reject such an offer of settlement, even if they would not risk incurring their opponent's fees.[229] While the purpose of Rule 68 is to promote settlement,[230] its effectiveness has been heavily debated, with its critics hypothesizing that its main effect is wealth transfer.[231]

3. Current Scrutiny and Limits of Rate Case Expense Recovery Are Inadequate to Check Its Perverse Incentives

Because recovery of rate case expenses is a form of one-way fee shifting, it creates the same incentives described above to increase legal expenditures and claims and resist otherwise fair settlement offers.[232] In fact, because the rate case expense is usually awarded without regard to the merits of the case or the level of the expenses, utilities have only remote incentives to limit their litigation expenses, creating pronounced incentives to increase their spending on discovery, motions, and legal theories regardless of their merit. The typical outside restriction on recovering utility expenses—the prudency standard—is inadequate to restrict these incentives. Several state regulators appreciate this dynamic, but FERC has yet to.

In the existing fee shifting scholarship it does not appear that anyone has attempted to model the incentives created by *guaranteed* one-way fee shifting disconnected from the merits. While formal mathematical modeling is beyond the scope of this paper, any incentive to litigate more issues created by the *possible* recovery of legal expenses should apply more strongly when the recovery of legal expenses was a near certainty. To provide context for the unfamiliar: a typical rate case is not built on one or even a handful of claims. Rather, a typical rate case is built on numerous items comprising alleged costs and revenue. Each item is

225. *See, e.g.*, Yellow Pages Photos, Inc. v. Ziplocal, LP, 846 F.3d 1159, 1164 (11th Cir. 2017).

226. FED. R. CIV. P. 68.

227. *See* Philip Michael Thompson, *Sanctioning Hard Bargaining: A Critique of State Offer-of-Settlement Rules*, 44 GA. L. REV. 1133 (2010).

228. *See* Marek v. Chesny, 473 U.S. 1, 9 (1985).

229. *Id*. at 1.

230. *Id*. at 5.

231. *See, e.g.* Robert G. Bone, *"To Encourage Settlement": Rule 68, Offers of Judgement, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561, 1571-72 (2008); David A. Anderson, *Improving Settlement Devices: Rule 68 and Beyond*, 23 J. LEGAL STUDS. 225 (1994); Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUDS. 93, 118-21 (1986) (hypothesizing that Rule 68 only marginally promotes settlement in one-way fee shifting regimes); POSNER, *supra* note 204, at 575-76.

232. *See* discussion *supra* Part III.D.1.

separately supported factually and legally, with many items not disputed by other participants. Disposition of each item increases or decreases the overall rate, and it is rare for one item to constitute the bulk of the value of the case.[233]

With that context, take the hypothetical of a utility that will certainly file a rate case but is deciding whether to raise *Theory X* as part of this case. Theory X is not technically frivolous but is incompatible with current policy. The utility accurately estimates it has a 5% chance of prevailing, and prevailing would represent a net present value of $2,000,000 in associated increased rates. If the theory will cost an incremental $500,000 to support, the utility could not justify this expense because the discounted value of $100,000 is far exceeded by the costs. But with rate case expense recovery, the "costs" side of its decision is essentially wiped clean. The utility would be constrained only by remote or unquantifiable factors, such as the time value of money,[234] its credibility with decisionmakers, or the availability of preferred vendors. As Chairman Sievers of the Kansas Corporation Commission articulated, utilities are essentially "spending someone else's money" and therefore have "no incentive to minimize that spending or direct insight into the benefits of such spending."[235]

The incentive to increase costs during litigation is just as strong. After all, one-way shifting is understood to raise expenditures because of the *possibility* they will be paid by the other party[236] and in most jurisdictions, recovering the lion's share of rate case expenses is nearly certain for utilities.[237] In the hypothetical above, replace *Theory X* with *Motion X* or *Discovery X* and the dilemma remains. Because the subsidy is disconnected from the merits of the case, rate case expense recovery fuels low-merit litigation practice just as strongly as it does valuable advocacy. Because a risk-neutral litigant can be expected to spend up to the point where the costs exceed the value, utilities can justify nearly any litigation expenditure if there is even a small chance of improving the utility's position. The motion or discovery need not have *any* chance of success if it still presents litigation value by raising the utility opponent's costs. As one commenter put it, "a procedure that makes it tactically advantageous to increase the costs that one's

233. An exception to this might be an allegation that the rates at issue are not subject to regulation, such as through lack of authority by the regulator or lack of market power by the utility. Or perhaps a utility's cost of service has been set by an existing formula that eliminates the need to dispute most items.

234. This would only apply if rates reflecting the rate case expense were not allowed to go into effect on an interim basis.

235. Kansas City Power & Light Co., Docket No. 10-KCPE-415-RTS, 2012 Kan. PUC LEXIS 89, at *166 (Jan.18, 2012) (Sievers, Comm'r, concurring) (discussing the framework established by Milton Friedman in MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 115-19 (1990)). *Id*. at *167 ("In the regulatory environment, excessive legal or rate case expenses are not naturally controlled by the discipline of the market. Investors don't punish utility managers for spending too much on legal fees and rate cases so long as those expenses are automatically flowed through to rates -- they are gambling with someone else's money. Inflating prices with excessive legal and rate case expenses will not be punished in the market by more cost efficient new entrants offering lower-priced alternatives because government flatly prohibits competitive entry. The regulatory theory is that a single, regulated provider can and will provide service at lower costs than multiple, competing providers and that regulators can and will prevent imprudent expenditures.").

236. SHAVELL, *supra* note 204, at 431-32.

237. *See generally* Appendix.

opponent must incur in the effort to obtain justice seems unsound."[238] This incentive also usually applies to judicial appeals, representing an unjustified drain on judicial resources as well.[239]

Without empirical evidence, it is unclear if rate case expense recovery discourages settlement occurring or whether it simply gives greater bargaining strength to utilities in settlement discussions. The choice to settle is primarily a factor of a party's expectations of the outcome of the proceeding and their costs of litigating it.[240] If a utility expects that all its litigation costs will be borne by ratepayers, excluding other factors,[241] it has no incentive to settle for less than the full value it expects to achieve at hearing. On the other hand, ratepayers could be expected to settle the case for as little as their expected value of the case less *both* their litigation expenses and the utility's. That is because ratepayers and their advocates can justify contesting an application (or issue within an application) only if the expected value exceeds both sides' litigation costs (or incremental litigation costs) as well.[242] This could cause ratepayers and their advocates to abandon meritorious claims. It also can create the distorted bargaining commenters have identified, where parties settle or abandon claims on terms unrelated to the merits of the case.[243] As the Missouri PSC articulated, "[a]warding a utility all of its incurred rate case expenses could provide that utility with a significant financial advantage over other participants in the rate case process, who may be constrained by budgetary and other financial restrictions."[244]

At FERC and many state regulators, the only limit on rate case expense is the standard of imprudence. This standard varies across jurisdictions,[245] but generally follows FERC's articulation that a prudent decision is one that "reasonable utility management [] would have made, in good faith, under the same circumstances, and at the relevant point in time. . . based upon what the company knew or should

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238. Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1831 (1986).

239. *See, e.g.*, Don Charles Uthus & Diane McIntire, *Public Utility Rate Regulation and the Iowa Administrative Procedure Act - Extending Maximum Procedural Protection to Public Utilities at Public Expense*, 26 DRAKE L. REV. 483, 490 (1977) (arguing Iowa utilities were overly zealous in appeals in part because most litigation costs were "eventually paid by the customer").

240. SHAVELL, *supra* note 204, at 401-03.

241. One such factor, which could cut both ways, might be timing. For instance, a utility may have a separate incentive to settle if the requested rate increases are not implemented on an interim basis. In that position a settlement could be an avenue to implement rates sooner. On the other hand, if the rates requested are implemented on an interim basis, then the utility has an incentive not to resolve the proceeding quickly, because in such a situation the conclusion could not be more advantageous than the status quo. In complaint proceedings, this incentive could be delayed if, as in the Natural Gas Act, the regulator is only authorized to change rates prospectively of its final order without other refunds for complaining ratepayers as are available under the Federal Power and Interstate Commerce Acts.

242. For individual ratepayers, their share of rate case expenses, while not complete, still tracks their relative stake in the case as a whole, which is determined by their share of the regulated transactions and by extension, the utility's overall cost of service.

243. Rowe, *supra* note 210, at 877-78 (citing Richard Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L REV. 433, 456 (1986)).

244. Kansas City Power & Light Co., 2015 Mo. PSC LEXIS 789, at *127 (Sep. 2, 2015).

245. SCOTT HEMPLING, JUST-AND-REASONABLE PRICES IN NONCOMPETITIVE MARKETS: COST-BASED RATES SET BY THE REGULATOR 273-89 (Am. Bar Ass'n 2019).

have known at the time a decision was made."[246] FERC and many (but not all) jurisdictions employ a strong presumption of prudence for all expenditures made.[247] FERC has even articulated that this subjective standard is comparable to the reasonable person standard used to determine ordinary negligence.[248]

This prudence test, however, is inapposite to the problems presented by unrestrained rate case expense recovery. Shifted fees are limited to prevailing parties and restrained by the lodestar to reach a level that "is sufficient to induce a capable attorney to undertake the representation of a meritorious" case.[249] On the other hand, the prudence standard (especially as FERC applies it) requires the utility be affirmatively shown to be "imprudent" before ratepayers can be protected from paying any litigation costs. Prudent management, however, will not prevent a utility from initiating low-merit claims and procedural actions when they reasonably expect those costs to be recovered from ratepayers.[250] The prudency standard of review is therefore insufficient to protect regulatory and judicial resources—or ratepayers—from over-litigation on the part of utilities.

State regulators recognize that normal prudency reviews are inadequate to control these incentives to over-litigate. For instance, Missouri's PSC articulated that allowing complete recovery of rate case expense "does not encourage reasonable levels of cost containment in the utility's rate case expense decisions."[251] In promulgating its rules governing the issue, Maine's PSC articulated that "actual expenses" would "potentially reward[] overspending and inefficient use of outside counsel and consultants."[252] Similarly, Connecticut's Public Utilities Regulatory Authority identified that "there is no intrinsic motivation for the Company to curtail such expenses if the Company and its outside lawyers and consultants assume such costs will be fully recovered from ratepayers."[253] The Arizona Corporation Commission has also expressed a

246. 158 FERC ¶ 61,050 at P 99.

247. *Id*. at P 100 (noting that although the "regulated entity has the burden of proof to establish prudence. . . the Commission presumes that all expenditures are prudent."). *But see* Opinion No. 505, *Entergy Servs., Inc*., 130 FERC ¶ 61,023 at P 52 (2010) ("The utility does not have the burden of demonstrating that expenditures are prudent.").

248. Opinion No. 231, *New England Power Co*., 31 FERC ¶ 61,047, 61,084 (1985) ("What we glean from the cases which is most helpful is the so-called "reasonable man" test, and, as discussed below, we find it appropriate to follow a similar test here.").

249. Perdue v. Kenny A. *ex rel*. Winn, 559 U.S. 542, 552 (2010).

250. *See, e.g.*, 183 FERC ¶ 63,020 at P 631 ("For the reasons discussed below, I find that the prudence of SERI's legal and expert witness fees is presumed and that LPSC has failed to demonstrate serious doubt about SERI's prudence to overcome that presumption"); *see also supra* note 122 and accompanying text.

251. Kansas City Power & Light Co., 2015 Mo. PSC LEXIS 789, at *127-28 (Sep. 2, 2015) ("Prudency reviews, by their nature, are not a strong incentive to control costs.").

252. Amendments to Regul. Proc. Expenses (Chapter 850), Docket No. 2022-00072, 2022 Me. PUC LEXIS 121, at *5-6 (Aug. 3, 2022).

253. Aquarion Water Co., Docket No. 22-07-01RE01, 2024 WL 3723916, at *9 (July 31, 2024) ("In a typical attorney-client or consultant arrangement, the client is incentivized to monitor the attorney's or consultant's fees and work product to avoid inefficient or unnecessary costs. At the same time, the attorney or consultant is similarly incentivized to provide efficient services to avoid the risk that billed work will be rejected by the client. However, if full cost recovery is assumed, the incentive structure has no inherent cost containment measure. As such, the requirement that the Company produce evidence in support of the prudency of the requested rate case costs is essential to ensure just and reasonable rates.").

concern that "the expenditure of resources toward rate case presentation is largely within an applicant's control and uncritical acceptance of all expenditure levels can promote a cycle of escalating rate case expenses."[254] The Texas PUC articulated a goal that scrutiny of rate case expenses in general incentivizes utilities "to act more like self-funded litigants, while still providing for recovery of reasonable rate-case expenses."[255] FERC, however, has elected not to see this problem. According to FERC, concerns that recovery of rate case expense "will create perverse incentives" are fully addressed by the fact that recoverability is "limited to [] prudently incurred litigation costs."[256]

IV. RECOMMENDATIONS

Meaningful limits and scrutiny of recoverable rate case expenses are highly justified and can be fully consistent with ratemaking principles. As shown above, guaranteed recovery of all litigation expenses—regardless of amount or merit—creates unsound incentives to over-litigate that inflate ratepayer costs and strain government resources. Meaningful limits should be imposed, and these limits should be informed by fee shifting analyses to account for the perverse incentives, while remaining fundamentally consistent with ratemaking principles. The specific approach most strongly recommended here is the *Missouri-Texas Approach* of sliding scale recovery based on merit. Regulators should also consider a procedural offer of settlement limitation. Different approaches may, of course, be more compatible with the different, policies, procedures, industries, and settings. The most important feature of any reform is a realistic limit such that a utility must plan to internalize some or all of their unsuccessful litigation costs.

A. The Missouri-Texas Approach Is the Simplest Approach to Deriving a Reasonable Level of Rate Case Expense That Corresponds to the Merits of the Utility's Case

Jurisdictions that allow rate case expenses to be recovered should consider some version of the *Missouri-Texas Approach* to limiting that recovery. This approach employs a sliding scale of recovery based on the result achieved relative to the result sought. This approach is (1) simple to administer, (2) most consistent with ratemaking principles, and (3) most likely to create proper litigation incentives and correct for otherwise distorting effects. While other approaches have their merits, none has all these strengths to the same degree.

As described above, Missouri has employed a method where utilities can recover a fraction of their incurred rate case expenses where the numerator is the change in rates requested and the denominator is the change in rates granted.[257] Under this framework a utility that is granted their full requested increase will recover all their rate case expenses, a utility whose request is denied entirely would

254. Global Water-Palo Verde Utils. Co., Decision No. 78644, at 147 (Ariz. Corp. Comm'n, Jul. 27, 2022), https://docket.images.azcc.gov/0000207261.pdf?i=1759431571361.

255. Recovery of Expenses for Ratemaking Procs., 39 Tex. Reg. 6434, 6435 (Aug. 22, 2014).

256. 137 FERC ¶ 61,220 at P 41.

257. *See* discussion *supra* Part II.B.1.b. The Texas PUC employs a similar method (among other approaches) but may only do so after a separate finding that litigation costs were excessive.

recover no costs, and a utility whose request is partially granted would recover costs in proportion to its victory. One major advantage of this approach is its simplicity; it does not require individual examination of legal invoices to determine which were too high or related to unreasonable claims.

This allocation is consistent with ratemaking principles traditionally used to justify rate case expense recovery. One such rationale is that a utility is entitled to recover its *reasonable* expenses.[258] As the Missouri PSC articulated, this approach "directly tie[s] a utility's recovery of rate case expense to both the *reasonableness* of its issue positions and the dollar value sought from customers in a rate case."[259] The approach is also grounded in a realistic understanding of the incentives at issue,[260] as well as the difficulty in scrutinizing individual legal invoices for reasonableness.[261] Rate case expense recovery is also justified on the grounds that ratepayers benefit from financially healthy utilities and rate cases are "necessary to establish reasonable rates."[262] Under a sliding scale approach to rate case expense recovery, the level of recoverable expenses tracks the proportion actually spent "to establish reasonable" (rather than excessive) rates. Expenses spent pursuing unreasonably high rates do not advance these goals.

There are some weaknesses to this approach. With its simplicity, it is less precise than other approaches aim to be. It also does not account for litigation of issues unrelated to the total revenue requirement, such as rate design.[263] However, as implemented by Missouri, the approach separately allows full recovery of rate case expenditures that are legally required, such as mandated studies.[264] The distinction between required and discretionary litigation expenses could allow a utility to recover the full costs of litigating its meritorious positions while forgoing (or internalizing the cost of) low-value claims aimed at increasing their rate levels. The Texas variation of this rule also has a triggering mechanism such that it applies only after rate case expenses are shown to be unreasonably high.[265]

Importantly, this approach also cabins the otherwise unchecked incentive created by the majority approach to rate case expense recovery. As described above, the recovery of legal expenses regardless of the merits creates uniquely perverse incentives to drive up costs, including the imposition of costs on a

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258. *See, e.g.*, PHILLIPS, *supra* note 13, at 237-38.

259. Kansas City Power & Light Co., 2015 Mo. PSC LEXIS 789, at *128 (Sep. 2, 2015) (emphasis added).

260. *Id*. at *126-28.

261. *In re* Kansas City Power & Light Co. v. Missouri Pub. Serv. Comm'n, 509 S.W.3d 757, 778 (Mo. Ct. App. 2016) ("The majority of costs, for example, those related to infrastructure and transmission costs, are transparent and verifiable by the PSC. Rate case expenses are opaque, shielded from effective oversight by privilege and confidentiality. It would be an abdication of the PSC's responsibility to set just and reasonable rates to allow a utility to benefit from imprudently incurred litigation expenses.").

262. *See, e.g.*, Crimson Cal. Pipeline L.P., Decision No 24-05-007, 2024 Cal. PUC LEXIS 268, at *16 (May 9, 2024); *see also In re Kansas City Power & Light Co*., 509 S.W.3d at 778 ("[T]he PSC recognized that rate cases are both beneficial to shareholders of a utility and also utility customers, but in different ways. Shareholders benefit from the rate case expenses as the costs are incurred to increase the utility's revenues and profitability. Customers benefit by having a healthy utility."); Pennsylvania Pub. Util. Comm'n v. National Fuel Gas Distrib. Corp., 1982 Pa. PUC LEXIS 132, at *42 (Mar. 26, 1982).

263. Southwestern Bell Tel. Co., Docket No. U-2916, 1979 Ark. PUC LEXIS 7, at *85-86 (Jan. 15, 1979).

264. Kansas City Power & Light Co., 2015 Mo. PSC LEXIS 789, at *139 (Sep. 2, 2015).

265. 16 TEX. ADMIN. CODE § 25.245(c)(5) (2014).

utility's opponent. The *Missouri-Texas Approach* would also likely promote settlement and narrow disputes by promoting more realistic litigation positions. In fact, the approach bears a striking resemblance to the fee shifting rule known as the "Welamson doctrine" applied in several European countries.[266] This rule shifts fees between parties in proportion to their relative success, measured as a percentage of their monetary reward received relative to the award sought.[267] While not widely adopted, some scholars assert that the rule "compensate[s] parties for legal costs expended to the extent that their claims were found to be justified by the tribunal" and "deter[s] parties from asserting unrealistic claims, facilitate[s] settlements, and ultimately lead[s] to a more efficient dispute resolution system."[268] Others have studied the concept of awarding fees based on the margin of victory and hypothesize that such rules could create better incentives than the American or English Rules.[269]

The main criticism of the Welamson doctrine is that it works "well in simple cases containing a single claim for damages" but not as well in "cases dealing with multiple claims and counterclaims, as well as cases involving both claims for damages and equitable relief."[270] Rate cases essentially are disputes "where the main issue is quantum,"[271] i.e., the rate increase to be authorized. Another criticism is that creating proper litigation incentives through fee shifting requires a party to have sufficient *ex ante* knowledge of the case.[272] Utilities initiating rate cases, which concern their own costs and revenues, should have more than sufficient *ex ante* information. Thus, the Welamson doctrine and similar margin of victory concepts provide theoretical support to the *Missouri-Texas Approach*.

Part II.B., above, and the Appendix describe a variety of approaches to limiting and scrutinizing rate case expense that each have their own advantages. They all have other limitations that make the *Missouri-Texas Approach* stronger. The New Jersey approach of "sharing" rate case expense with half borne by utility shareholders and half by ratepayers is sound from a ratemaking principle, since these costs are understood to benefit both parties.[273] It is somewhat limited in terms of the incentives it creates. While it does blunt the incentives created by guaranteed full recovery, there is no connection to the merits of the case. A utility would recover the same expenses spent on a rejected case as one fully granted. A "lodestar"-type approach has the advantage of being potentially more precise, and lawyers are already familiar with it. This would require more effort, however, and raise satellite issues to the dispute without more assurance that it accurately

266. Gotanda, *supra* note 199, at 39-42 (1999); Mika Savola, *Awarding Costs in International Commercial Arbitration*, 63 SCANDINAVIAN STUDS. L. 275, 310-12 (2017); J. Gillis Wetter & Chart Priem, *Costs and Their Allocation in International Commercial Arbitrations*, 2 AM. REV. INT'L ARB. 249 (1991).

267. Gotanda, *supra* note 199, at 39-40 *nn.181-82.

268. *Id*. at 42.

269. Lucian Arye Bebchuk & Howard F. Chang, *An Analysis of Fee Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11*, 25 J. LEGAL STUDS. 371 (1996).

270. Gotanda, *supra* note 199, at 41; Savola, *supra* note 267, at 312-13.

271. Savola, *supra* note 267, at 312.

272. Avery W. Katz, *Fee Shifting in Litigation: Survey and Assessment* 24 (Univ. Pa. L. Sch. Inst. L. & Econ. Rsch., Working Paper No. 10-30, 2010).

273. *See* discussion *supra* pp. 14-15.

quantifies the expenses required for a reasonable rate case presentation. Other subjective approaches may also be beneficial if employed meaningfully. If not, they would provide less benefit than the rarely used prudence standard.

B. Settlement Offer Rule

Regulators should also seriously consider an offer of settlement rule like Federal Rule 68 that would limit a utility's recovery of rate case expense if it rejects a settlement offer but then does not obtain a higher rate after a hearing. Notably, the Texas PUC previously had just such a rule for water utilities, although it was withdrawn in 2019 with little explanation.[274] While some have doubted the rule's efficacy, such a rule would create real incentives for utilities to accept reasonable settlements, and for ratepayer interests to put forward reasonable offers.[275] It would also align with ratemaking principles because in such a situation the excluded expenses could have been easily avoided and were thus not reasonably incurred and unnecessary to providing regulated service at reasonable rates.

V. CONCLUSION

Utility recovery of case expenses recovery presents an anomalous proposition in the American legal landscape that has not received enough attention. It is a unique form of guaranteed fee shifting that operates against consumers and in favor of efforts to resist regulation. It has also received insufficient scrutiny from regulators. The appended survey and analysis are intended to aid advocates and regulators interested in seriously examining current practice and its consequences. Even if no policy changes are adapted, it is hoped that ALJs, regulators, their staff, and other decision-makers can benefit from understanding the incentives at play when a utility expects full indemnification of its legal expenses. ALJs and hearing-level decisionmakers especially may find this framework helpful to understanding utilities' practice before them. The simple explanation might be that the utility's actions do not seem cost-justified because they are not cost-justified. Identifying this dynamic could be the first step in curbing the drain of unnecessary litigation.

274. Order Adopting Amendments to 16 TAC 24.44 for Consideration at The October 11, 2019 Open Meeting, Rulemaking to Amend 24.44 Rate-Case Expenses Pursuant to Tex. Water Code §13.187 & §13.1871, Project No. 48526, slip op. at 6 (Tex. Pub. Util. Comm'n Oct. 14, 2019), https://interchange.puc.texas.gov/Documents/48937_25_1037611.PDF.

275. *See* discussion *supra* pp. 35.

APPENDIX: SURVEY OF HOW REGULATORS IN THE 50 STATES, THE DISTRICT OF COLUMBIA, AND PUERTO RICO TREAT RECOVERY OF UTILITY RATE CASE EXPENSES

The following survey describes the treatment of utility rate case expense by utility regulators and courts in the fifty states, the District of Columbia, and Puerto Rico.

ALABAMA

Utilities regulated by the Alabama Public Service Commission (PSC) may recover reasonable rate case expenses from ratepayers, although the need to do so may have been largely eliminated through procedural streamlining. This practice is not governed by a specific statutory or regulatory provision but is rather implied by general cost-of-service ratemaking. The level of recoverable expense must be "reasonable."[1] Alabama's PSC has not explicitly stated how this reasonable level should be determined but appears to accept the "actual" test period expenditures submitted as "updates" to previously submitted estimates.[2] Portions of this allowed rate case expense have been excluded from rate recovery by the Alabama PSC when they were included expenses related to a Commission audit.[3] The manner of recovery has historically been via amortization over a period of several years.[4]

However, the imposition of rate case expenses upon Alabama consumers may have diminished in the past few decades. Specifically, beginning in 1983, the Alabama PSC began establishing "Rate Stabilization and Equalization" or RSE mechanisms for various utilities.[5] The RSE provides a simplified means for utilities to increase their rates automatically via formula—without a fully disputed rate case.[6] The Alabama PSC has discussed "the benefits to consumers of reducing rate case expense" among the benefits of its RSE mechanism.[7]

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1. *Cf.* Community Utils. of Ala., Inc., Docket No. 32553, 2023 Ala. PUC LEXIS 893, at *23 n.8 (Dec. 22, 2023).

2. *Id*. (accepting rate case expense level with "an upwards adjustment . . . for the test year").

3. Continental Tel. Co. of S. -- Ala., Docket No. 18978, 1984 Ala. PUC LEXIS 8, at *79-81 (Aug. 16, 1984).

4. *See* Mobile Gas Serv. Corp., Docket No. 24794, 1995 Ala. PUC LEXIS 626, at *13-14 (Nov. 27, 1995) (adopting a 3-year amortization period for rate case expenses as proposed by the PUC's CPA witness, over the company's proposed 2-year amortization period).

5. Alabama Gas Corp., Docket Nos. 18046 & 18328, 2013 Ala. PUC LEXIS 578, at *2 (Dec. 20, 2013). The Alabama PSC's RSE mechanism was affirmed by the state's Supreme Court. *See* Airco, Inc. v. Alabama Pub. Serv. Comm'n, 496 So.2d 21 (Ala. 1986) (*affirming* Alabama Metallurgical Corp. v. Alabama Pub. Serv. Comm'n, 441 So.2d 565 (Ala. 1983)).

6. *See generally* Alabama Metallurgical Corp. v. Ala. Pub. Serv. Comm'n, 441 So.2d 565 (Ala. 1983).

7. Community Utils. of Ala., Inc., Docket No. 32553, 2019 Ala. PUC LEXIS 362, at *6 (Oct. 8, 2019). *See also* Alabama Gas Corp., Docket Nos. 18046 & 18328, 2013 Ala. PUC LEXIS 578, at *38-39 (Dec. 20, 2013) (describing the testimony of one witness that "rate case expenses at the state level have been virtually eliminated through Rate RSE.").

ALASKA

Alaska's energy regulator, the Regulatory Commission of Alaska (RCA), typically permits utilities to include "an estimate of rate case expense in [their] revenue requirement" that is amortized over several years.[8] This is not governed by a specific statutory or regulatory provision but is rather implied by general cost-of-service ratemaking. The RCA disfavors basing the level of rate case expense "on a post-hearing calculation of the actual rate case costs incurred."[9] Rather, the RCA policy is that recoverable rate case expenses "should be based on the best determination possible of the rate case expense that will normally be incurred on an average annual basis."[10] Since 1988, the RCA has employed "a trend analysis of rate case expenses" to determine a reasonable level.[11] The RCA has also excluded "actual expenses from consideration if they were not normal or typical."[12] The RCA has also left the door open to excluding imprudently incurred litigation expenses but was clear that such expenses are not imprudent simply because they were incurred in defending an imprudent practice.[13] The RCA typically requires the utility to amortize this over a period of years intended to coincide with the time the rates will be in effect.[14] This is "usually over several years."[15]

There are exceptions to this approach, though. Notably in 2016, the RCA authorized the Trans Alaska Pipeline System (TAPS, also regulated by FERC) to recover their rate case expense through a six-year surcharge "due to the highly unusual situation presented" in the proceeding that spread over a dozen dockets, including parallel FERC litigation.[16]

ARIZONA

The Arizona Corporation Commission (ACC), the state's utility regulator, allows recovery of some (but not all) rate case expenses. As with most jurisdictions, this is not governed by a specific statutory or regulatory provision but rather is implied by general cost-of-service ratemaking. The ACC appears to

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8. Cook Inlet Nat. Gas Storage Alaska., LLC, Order No. 15, 2019 Alas. PUC LEXIS 149, at *18-19 (Aug. 16, 2019).

9. *Id*. at *19.

10. *Id*.

11. Golden Heart Utils., Inc., Order No. 20, 2011 Alas. PUC LEXIS 89, at *10 (Mar. 4, 2011).

12. *Id*. at *5 (citing College Utils. Corp., Order No. 5, Docket Nos. U-92-54 & U-92-55, at 9 (Alaska. Pub. Utils. Comm'n Dec. 8, 1992), https://rca.alaska.gov/RCAWeb/ViewFile.aspx?id=E9587B20-F876-487F-BD2E-5373A7DD6E72).

13. ConocoPhillips Trans. Alaska., Inc. Order No. 40 et al., 2016 Alas. PUC LEXIS 129, at *28-29 (June 2, 2016).

14. Cook Inlet Nat. Gas Storage Alaska., LLC, Order No. 15, 2019 Alas. PUC LEXIS 149, at *19-20 (Aug. 16, 2019); *see also* Amerada Hess Pipeline Co., Order Nos. 151 & 110, 2002 Alas. PUC LEXIS 630, at *278 (Nov. 27, 2002) ("Typically, rate case expense would be amortized over a three to five-year period. Because we are setting rates for a four-year period it would be reasonable, if this were an ordinary case, to simply take the total rate case expense, divide it by four, and include that amount in the revenue requirement for each of the years 1997-2000.").

15. ConocoPhillips Trans. Alaska., Inc., 2016 Alas. PUC LEXIS 129, at *10.

16. *Id*. at *4, 10-11.

scrutinize these costs more than most jurisdictions with an eye to the potential perverse incentives that rubber-stamping recovery would create. The ACC has articulated that although "[i]ncurring expenses in presenting a rate case for the Commission's consideration is a necessary cost of doing business that is appropriately recovered in rates collected from ratepayers . . . the level of recoverable expense is limited to what is just and reasonable."[17] Of particular note, the ACC recognizes the concern that "uncritical acceptance of all expenditure levels can promote a cycle of escalating rate case expenses."[18]

The ACC does not appear to grant recovery of the utilities' "actual" rate case expense but rather a figure based on a reasonable proxy, often lower that what was requested.[19] In assessing such reasonableness, the ACC has rejected "straightforward benchmarking" and rather employed different factors to assess the appropriate level of rate case expense to recover.[20] For instance, it has faulted the utility for sponsoring a witness who provided "duplicative testimony."[21] It has also relied on prior reasonable levels adjusted for inflation.[22]

Once a recoverable level of rate case expense is established, the ACC appears to employ a surcharge method, rather than an embedded amortized level, which expires once the allowable expense is recovered or after a set time.[23]

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17. Global Water-Palo Verde Utils. Co., Decision No. 78644, Docket No. SW-20445A-20-0214 et al., slip op. at 147 (Ariz. Corp. Comm'n July 27, 2022), https://docket.images.azcc.gov/0000207261.pdf?i=1759938067789.

18. *Id*. (also noting that "the expenditure of resources toward rate case presentation is largely within an applicant's control").

19. *See, e.g.*, *id*. at 145-49 (approving $500,000 in rate case expense when the applicant requested $755,000); Arizona Water Co., Decision No. 73736, 2013 Ariz. PUC LEXIS 45, at *69 (Feb. 20, 2013) (approving $350,000 in rate case expense when the applicant requested $476,874); *but see* Valley Utils. Water Co., Decision No. 79360, 2024 Ariz. PUC LEXIS 97, at *38-39 (May 13, 2024) (approving $160,000 level of rate case expense requested in updated exhibit but uncontested by other participants in the dispute).

20. Global Water-Palo Verde Utils. Co., Decision No. 78644, Docket No. SW-20445A-20-0214 et al., slip op. at 147 (Ariz. Corp. Comm'n July 27, 2022), https://docket.images.azcc.gov/0000207261.pdf?i=1759938067789.

21. *Id*.

22. Arizona Water Co., 2013 Ariz. PUC LEXIS 45, at *69 (encouraging the utility "thoroughly to consider, prior to preparing and filing its next rate case application, whether the effectiveness of presenting outside expert witness testimony outweighs the expense of those witnesses' services.").

23. Global Water-Palo Verde Utils. Co., Decision No. 78644, Docket No. SW-20445A-20-0214 et al., slip op. at 147-48 (Ariz. Corp. Comm'n July 27, 2022), https://docket.images.azcc.gov/0000207261.pdf?i=1759938067789 ("we find that the use of a surcharge mechanism to recover the expense is reasonable and that the amount recovered through the surcharge should be amortized over a two year period"); Valley Utils. Water Co., 2024 Ariz. PUC LEXIS 97, at *41 (utility was "authorized to implement the following rate case expense surcharge, which shall terminate without further order of the Commission four years from the effective date of this Decision, or once a total of $160,000 has been collected, whichever occurs first"); Pima Util. Co., Decision No. 73573, 2012 Ariz. PUC LEXIS 226, at *36 (Nov. 21, 2012) ("While it is certainly not inappropriate to allow recovery of rate case expense through rates, we find that the [utility's] adoption of [intervenor's] alternative recommendation for a surcharge as a means of preventing over-recovery of rate case expense is reasonable in this case.").

ARKANSAS

The Arkansas Public Service Commission (PSC) permits utilities to recover normal rate case expenses amortized over the interval of time expected between rate cases. As with most jurisdictions, this is not governed by a specific statutory or regulatory provision but is rather implied by general cost-of-service ratemaking.

As a preliminary matter, the Arkansas PSC has specifically addressed—and rejected—proposals to include rate case expense in rate base.[24] Rather, the PSC "includes a normal level of these expenses in the revenue requirement."[25] The period of amortization is intended to match the intervals between rate cases.[26] However, in at least one instance the Arkansas PSC has permitted a settlement agreement under which a utility recovered its actual rate case expense via a surcharge subject to true-up.[27]

The Arkansas PSC has not articulated specific standards for calculating the level of recoverable expense. However, it has rejected theories limiting recovery across the board. Interestingly, as noted in the main article, the Arkansas PSC has actually faced the argument "that rate case expense should be adjusted to exclude a percentage of such expense equal to the percentage of the requested revenue increase that is denied."[28] The PSC expressed an appreciation for "the financial handicaps under which [the public consumer advocate] operates in preparing for rate proceedings" but found it improper to "equally handicap the company."[29] It has also explicitly rejected the argument that all rate case expenses should be borne by shareholders as a non-recurring expense.[30]

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24. Entergy Ark. Inc, Order No. 21, Docket No. 13-028-U, slip op. at 29 & n.10 (Ark. Pub. Serv. Comm'n Dec. 30, 2013), http://www.apscservices.info/pdf/13/13-028-U_431_1.pdf. On rehearing, the Arkansas PSC permitted the utility to create a regulatory asset for rate case expense provided that the asset not be included in rate base or earn a return. *See* Entergy Ark. Inc., Order No. 35, 2014 Ark. PUC LEXIS 286, at *42-43 (Aug. 15, 2014).

25. Entergy Ark. Inc., Order No. 21, Docket No. 13-028-U, slip op. at 69 (Ark. Pub. Serv. Comm'n Dec. 30, 2013), http://www.apscservices.info/pdf/13/13-028-U_431_1.pdf.

26. Arkansas Okla. Gas Corp., Order No. 7, 2005 Ark. PUC LEXIS 430, at *16 (Dec. 1, 2005) ("The Commission finds the Company's three-year recovery period to be reasonable. The Company's method is based on the interval between the current rate case and its prior rate case, a period of three years. Notwithstanding the provisions of [other decisions], the [Arkansas PSC] finds that a far less complicated method for calculating the rate case expense recovery period is to utilize the amount of time between a utility's current rate filing and its last rate case filing, in this instance a period of three years."); *see also* Morrilton Water Co., Docket No. U-2382, 1972 Ark. PUC LEXIS 1, at *4 (Oct. 30, 1972) ("The allowable amortization period for the recovery for rate case expenses should be that which the [Arkansas PSC] judges to be a realistic interval between rate cases."); *cf.* Arkansas-Missouri Power Co., Docket Nos. U-2675 & U-2679, 1977 Ark. PUC LEXIS 9, at *11 (Sep. 9, 1977) ("We have previously indicated our preference for applying a standard three-year amortization rule rather than quibble over how often a particular utility can be expected to apply for rate increases.").

27. Coronado Utils., Inc., Decision No. 78228, 2021 Ark. PUC LEXIS 406, at *24-25 (June 23, 2021).

28. Southwestern Bell Tel. Co., Docket No. U-2916, 1979 Ark. PUC LEXIS 7, at *85-86 (Jan. 15, 1979).

29. *Id*. ("In addition, [petitioner's] proposal overlooks the fact that rate case expenditures cannot be directly related to revenue requirement. For example, the company spent a substantial amount of money on cost-of-service methodology and rate design which had no direct effect on revenue which was nonetheless very beneficial to the commission.").

30. Morrilton Water Co., 1972 Ark. PUC LEXIS 1, at *3-4.

CALIFORNIA

The California Public Utilities Commission (CPUC) takes different approaches to rate case expense recovery, permitting some utilities to recover a reasonable forecast of their rate case expense, and utilizing a backward-looking average in other contexts. California does not have specific statutory or regulatory provisions applicable to rate case expense. The CPUC sometimes refers to rate case expense in other terms including "regulatory commission expense"[31] or "rate case litigation expense,"[32] or simply including the item as a subset of outside counsel expenses.[33]

In regulating major gas and electric utilities, the CPUC appears to allow recovery of rate case expenses as part of the larger account 928 grouped with other outside legal expenses and set at a normalized level using a historic average of costs over the prior several years.[34] In water utility and oil pipeline cases the CPUC has identified that "[r]ate case litigation expenses are necessary to establish reasonable rates"[35] and employs a forecast method of recovering these expenses consistent with "its longstanding practice [which] is to set rates based on forecasted expenses and recover them during the rate case cycle in which they occur."[36] Notably, the CPUC has articulated that allowing utilities to amortize previously incurred rate case expenses constitutes retroactive ratemaking.[37] In regulating the telecommunications industry, the CPUC employs the FCC's corporate expense cap.[38] This cap was adopted in part "to reduce the burden of litigation costs on ratepayers" by creating "incentives" for applicants "to reduce

31. *See, e.g.*, San Jose Water Co., Decision No.14-08-006, 2014 Cal. PUC LEXIS 345, at *99-101 (Aug. 14, 2014).

32. *See, e.g.*, Crimson Cal. Pipeline L.P., Decision No. 24-05-007, 2024 Cal. PUC LEXIS 268, at *16 (May 9, 2024), *modified on other grounds*, Decision No. 25-12-027, 2024 Cal. PUC LEXIS 643 (Dec. 5, 2024).

33. *See, e.g.*, Southern Cal. Edison Co., Decision No. 19-05-020, 2019 Cal. PUC LEXIS 226, at *387-88 (May 16, 2019), *modified on other grounds*, Decision No. 20-01-029, 2020 Cal. PUC LEXIS 560 (Jan. 16, 2020).

34. *See generally* Southern Cal. Edison Co., Decision No. 15-11-021, 2015 Cal. PUC LEXIS 688, at *427-34 (Nov. 5, 2015) (rejecting utilities forecast of outside counsel expenses for FERC Accounts 923, 925, and 928 where utility relied on one year and instead adopting average of several years excluding anomalous ones), *modified on other grounds*, Decision No. 17-12-016, 2017 Cal. PUC LEXIS 539 (Dec. 14, 2017); Southern Cal. Edison Co., 2019 Cal. PUC LEXIS 226, at *387; San Diego Gas & Elec. Co., Decision No. 19-09-051, 2019 Cal. PUC LEXIS 569, at *767, 770-74 (Sep. 26, 2019), *modified on other grounds*, Decision No. 20-07-038, 2020 Cal. PUC LEXIS 589 (July 16, 2020).

35. Crimson Cal. Pipeline L.P., 2024 CAL. PUC LEXIS 268, at *16.

36. Suburban Water Sys., Decision No. 14-12-038, 2014 Cal. PUC LEXIS 643, at *19 (Dec. 18, 2014) (citing California-American. Water Co., Decision No. 12-06-016, 2012 Cal. PUC LEXIS 273, at *29 (June 7, 2012)).

37. *Id*.; California-American Water Co., 2012 Cal. PUC LEXIS 273, at *29.

38. *See generally* Decision Adopting Rules and Regulations in Phase 1 of the Rulemaking for the California High Cost Fund-A Program, Decision No. 14-12-084, 2014 Cal. PUC LEXIS 646 (Dec. 18, 2014), *reh'g denied* Decision No. 20-10-019, 2020 Cal. PUC LEXIS 929 (Oct. 22, 2020).

rate case litigation costs."[39] To that end, the CPUC has held that where applicable, the utilities' rate case expenses are subject to this cap.[40]

The CPUC employs the normal preponderance of the evidence standard for a utility to justify rate case expense recovery,[41] at times reducing the allowable amount significantly.[42] The CPUC has also expressed in a different context that it was "troubled by the idea of the utility being provided a blank check, paid by ratepayers, funding the defense of a claim, the defense of which is aimed, in part, at establishing the ratepayers are responsible."[43]

COLORADO

The treatment of rate case expenses in Colorado has been the subject of recent changes, with much remaining to be seen. In May 2023 the state enacted Senate Bill 291, which mandated among other things that the Colorado's Public Utilities Commission "establish rules to limit the amount of rate case expenses that a utility may recover from ratepayers."[44] The statute enumerates several options the PUC may consider, including: (1) implementing a "symmetrical incentive to motivate the utility to limit expenses," (2) limiting "the amount of expenses for outside experts, consultants, and legal resources that are recoverable," (3) setting "an overall percentage of the utility's expense in a rate case that are not recoverable," and (4) establishing discovery parameters in a rate case proceeding, and requiring technical conferences in rate cases.[45] The bill prohibits outright the recovery of other expenses such as lobbying, advertising, and more than 50% of board salaries.[46]

On August 9, 2023, the Colorado PUC adopted temporary rules to implement the reporting requirements of SB 23-291.[47] On March 27, 2024, the PUC initiated a formal rulemaking proceeding to implement SB 23-291's provisions limiting the

39. Pinnacles Tel. Co., Decision No. 19-12-011, 2019 Cal. PUC LEXIS 956, at *19-20 (Dec. 5, 2019) (citing and quoting Decision Adopting Rules and Regulations in Phase 1 of the Rulemaking for the California High Cost Fund-A Program, 2014 Cal. PUC LEXIS 646, at *41-42).

40. Decision Addressing Select General Rate Case-Related Matters of the Small Incumbent Local Exchange Carriers, Decision No. 21-06-004, 2021 Cal. PUC LEXIS 271, at *28 (June 3, 2021).

41. Crimson Cal. Pipeline L.P., Decision No. 24-05-007, 2024 Cal. PUC LEXIS 268, at *16-17 (May 9, 2024), *reh'g denied*, Decision No. 22-02-027, 2022 Cal. PUC LEXIS 51 (Feb. 24, 2022).

42. San Jose Water Co., Decision No. 14-08-006, 2014 Cal. PUC LEXIS 345, at *100-101 (Aug. 14, 2014), *modified on other grounds*, Decision No. 15-03-048, 2015 Cal. PUC LEXIS 149 (Mar. 26, 2014); *see also* Southern Cal. Edison Co., Decision No. 19-05-020, 2019 Cal. PUC LEXIS 226, *387-88 (May 16, 2019) (applying an across-the-board 10% reduction to outside counsel expenses, including to FERC accounts 923, 925, 928), *modified on other grounds*, Decision No. 20-01-029, 2020 Cal. PUC LEXIS 560 (Jan. 16, 2020).

43. Southern Cal. Edison Co., 2019 Cal. PUC LEXIS 226, at *381.

44. S.B. 23-291 § 2, 75th Gen. Assemb., Reg. Sess. (Colo. 2023) (codified at COLO. REV. STAT. § 40-3-102.5). The statute also requires utilities to provide the Commission with a "rate trend report," when filing for a rate increase.

45. *Id*. § 2(I)-(V).

46. S.B. 23-291 § 3, 75th Gen. Assemb., Reg. Sess. (Colo. 2023) (codified as amended at COLO. REV. STAT. § 40-3-114).

47. Commission Decision Adopting Temporary Rules, Decision No. C23-0538, 2023 Colo. PUC LEXIS 520 (Aug. 9, 2023).

recoverability of rate case expense.[48] The Notice of Proposed Rulemaking did not put forward specific measures but simply enumerated placeholder regulations to be developed based on comments.[49] The Colorado PUC noted that previous stakeholder discussions did not reveal any consensus as to the best approach.[50] The PUC indicated it was persuaded not to pursue incentive mechanisms but intended to "explore the use of caps and other limits" and develop a record to "establish potential rules for either overall expenditure limits or targeted allocations of costs borne by ratepayers versus the utility's shareholders."[51] A hearing was held June 3, 2024,[52] with a Recommended Decision issued March 28, 2025.[53] On May 14, 2025, the PUC issued its final order, which implemented the following rules for electric and gas utilities:

> The Commission may limit the amount of a utility's rate case expenses that are recovered through rates. When limiting recoverable expenses, the Commission shall consider the presented facts and circumstances, including, but not limited to, the associated benefits that accrue to the utility's shareholders and whether the sharing of costs motivates the utility to limit expenses. Limits may apply either to overall expenses or to expenses for outside experts, consultants, and legal resources.[54]

This is a very general standard. The PUC's rationale was short:

> SB 23-291 specifically permits the Commission to establish recoverable rate case expenses below the total amount that is incurred by the utility in litigating before the Commission [and that] [t]he rules recognize that it is reasonable for the Commission to limit the amount of rate case expenses recoverable through rates by considering the specific facts and arguments presented in the base rate case.[55]

The PUC indicated that it anticipated the comments it received would justify a more structured rule.[56] The Recommended Decision provided more elaboration, specifying that "determination of recoverable expenses is fact and case specific and cannot be determined through the promulgation of a rule of general applicability" and that after-the-fact assessment of rate case expense was unnecessary and impractical.[57] It also rejected a proposal to "deny expenses

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48. Notice of Proposed Rulemaking, Decision No. C24-0285, 2024 Colo. PUC LEXIS 258, at *1 (Mar. 27, 2024).

49. *Id*. at *48.

50. *Id*. at *48-49.

51. *Id*. at *49.

52. *See generally* COLO. PUB. UTILS. COMM'N, *24R-0168EG Proposed Rules Regul. Elec. & Gas SB23-291 – 6-3-24, HRB* (YouTube, June 3, 2024), https://www.youtube.com/watch?v=QWY1PayjQm4.

53. *See generally* Recommended Decision Adopting Rules and Closing Proceeding, Decision No. R25-0215, 2025 Colo. PUC LEXIS 203 (Mar. 28, 2025).

54. Commission Decision Addressing Exceptions to Recommended Decision No. R25-0215 and Adopting Rule Amendments, with Modifications, Decision No. C25-0376, 2025 Colo. PUC LEXIS 349, at *34 (May 14, 2025).

55. *Id*.

56. *Id*. at *33 ("The Commission anticipated this rulemaking may provide the opportunity to develop a record to help establish potential rules for either overall expenditure limits or targeted allocations of costs borne by ratepayers versus the utility's shareholders. The Commission likewise solicited further comment.").

57. Recommended Decision Adopting Rules and Closing Proceeding, 2025 Colo. PUC LEXIS 203, at *25.

related to utility requests not granted" on the ground that such an approach "is contrary to the due process" and was not justified by a history of utility conduct.[58]

With such a general standard, it remains to be seen how it will be implemented. Pending final rules, the PUC had already acted on the "clear" legislative intent to reduce the recoverable expenses of two specific witnesses by 50%, reasoning that "[t]he benefits that inure to ratepayers from a utility rate increase are at least matched, if not substantially exceeded, by the benefits enjoyed by shareholders."[59] This approach was endorsed by the Recommended Decision that led to PUC's final rule.[60]

Colorado's previous approach was to permit recovery of rate case expenses as "a normal and legitimate activity for a regulated utility."[61] It has also rejected across-the-board restrictions on rate case expense recovery, such as applying a "lodestar" test[62] or splitting the burden of rate case expenses between ratepayers and utility shareholders, finding that the "better course for controlling [such] expenses is rigorous oversight."[63] Consistent with this goal of rigorous oversight, recent decisions by the Colorado PUC have limited the recovery of rate case expenses to figures less than what the utility had sought. For instance, in a May 2023 order the PUC limited the utility's recoverable rate case expenses to "a cap of $650,000," when the utility requested $750,000, which the PUC believed would "result in recovery of only those costs prudently incurred in the preparation and presentation of this case."[64] In another decision from October 2022, the PUC encouraged the applicant "to better manage its expenses related to rate cases" and limited its recovery to $2 million, amortized over three years with no return, when the utility had requested $2.2 million.[65] It remains to be seen if Colorado will ultimately reconsider and adopt such across-the-board measures in light of recent legislation.

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58. *Id.*

59. Public Serv. Co. of Colo., Decision No. C24-0778, 2024 Colo. PUC LEXIS 702, at *111 (Oct. 16, 2024) (" . . . hence we find it appropriate for shareholders to carry an equal proportion of the cost of those consultants' services for which they too receive a benefit.").

60. Recommended Decision Adopting Rules and Closing Proceeding, 2025 Colo. PUC LEXIS 203, at *71.

61. Public Serv. Co. of Colo., Decision No. C09-1446, 2009 Colo. PUC LEXIS 1470, *60 (Dec. 3, 2009). *See also* Mountain States Tel. & Tel. Co. v. Public Utils. Comm'n, 576 P.2d 544, 547 (Colo. 1978) ("the PUC has always allowed Mountain Bell to charge off as a proper operating expense attorneys' fees and legal costs incurred in its efforts before the PUC to increase rates.").

62. Atmos Energy Corp., Decision No. C23-0293, 2023 Colo. PUC LEXIS 289, at *24-25 (Apr. 21, 2023) ("Determining whether those costs were prudently incurred (which is our charge in a rate case) is a different inquiry than determining whether the winning party in a court case incurred a reasonable amount of attorney fees (that the losing side must pay). Therefore, we decline to apply the 'lodestar test' to determine whether the legal and consulting fees—one of the utility's operating expenses—were prudently incurred so as to be recoverable in utility rates.").

63. Public Serv. Co. of Colo., 2009 Colo. PUC LEXIS 1470, at *60.

64. Atmos Energy Corp., 2023 Colo. PUC LEXIS 289, at *22-27.

65. Public Serv. Co. of Colo., Decision No. C22-0642, 2022 Colo. PUC LEXIS 511, at *67, 70 (Oct. 19, 2022). *See also* Public Serv. Co, of Colo., Decision No. R15-1204, 2015 Colo. PUC LEXIS 1312, *113 (Nov. 16, 2015) (approving $335,863 annually when company originally requested $727,704).

CONNECTICUT

Connecticut is another state adopting a new approach to rate case expense recovery. In fact, recent legislation in Connecticut imposes a bright-line prohibition against all rate case expense recovery by utilities. Specifically, in 2023 the state's General Assembly enacted updates to the "Take Back Our Grid" Act, which included the following broad prohibition:

> For any rate proceeding initiated on or after January 1, 2024, no electric distribution company, gas company, pipeline company or water company with more than seventy-five thousand customers shall recover through rates its direct or indirect costs associated with its attendance in, participation in, preparation for, or appeal of such rate proceeding. Such costs shall include, but need not be limited to, attorneys' fees, fees to engage expert witnesses or consultants, the portion of employee salaries associated with such attendance, participation, preparation or appeal of a rate proceeding and related costs identified by the [Connecticut Public Utilities Regulatory Authority ("PURA")].[66]

This provision has yet to be *applied* by PURA in a final decision. However, it has been definitively interpreted by PURA as being "plain and unambiguous and preclud[ing utilities] from recovering any rate case expenses."[67] It has also been applied to prohibit all rate case expense recovery in a non-final proposed decision, which remains pending.[68] It remains to be seen whether regulated entities will overturn or bypass this new restriction, or whether this measure will result in lower expenses and more restrained litigation on the part of utilities.

Prior to the Take Back Our Grid Act's prohibition, the Connecticut PURA had a relatively well-developed framework for scrutinizing rate case expenses, as it has recently applied and recounted.[69] Specifically, PURA conducted a "a two-step analysis."[70] The first step was to determine whether the costs reflected "prudent and efficient management" by examining whether the applicant engaged in competitive selection for the firms involved and whether the costs are consistent with past experience, other jurisdictions, and industry averages.[71]

The second step is to "weigh the interests of ratepayers and the Company in determining whether the Company is entitled to recover its costs."[72] PURA's analysis at the second step considers that "[r]ate case expenses implicate both shareholder and ratepayer interests" and that "not all rate case expenses are

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66. H.B. 6941, Gen. Assemb., Jan. Sess. (Conn. 2023) (codified at CONN. GEN. STAT. § 16-243p(b)).

67. United Illuminating Co., Docket No. 22-08-08, 2023 Conn. PUC LEXIS 498, at *366-71 (July 21, 2023) (interpreting statute to confirm reading of prior, more limited version of this provision).

68. Yankee Gas Servs. Co., Docket No. 24-12-01, 2025 Conn. PUC LEXIS 539, at *263-65 (Sep. 22, 2025). Note however, that the agency did permit the utility to recover Office of Consumer Counsel fees that the agency incurred in the proceeding under a different statutory provision). *Id.*

69. Connecticut Water Co., Docket No. 23-08-32, 2024 Conn. PUC LEXIS 305, at *165-72 (June 28, 2024).

70. *Id*. at *167-70.

71. *Id*. *See also e.g.*, *id*. (finding company did not meet burden of showing its subjective actions were reasonable in hiring firm even when the level of cost did "not appear unreasonable when compared to other recent water rate cases brought before" PURA).

72. Connecticut Water Co., 2024 Conn. PUC LEXIS 305, at *167-68.

necessary for supplying utility service to customers."[73] PURA also demonstrated a notable awareness of the incentives at play and articulated that "allocating at least some rate case expense to shareholders incentivizes the Company to control its rate case expenses."[74] In another recent order, PURA expressed concern that "there is no intrinsic motivation for the Company to curtail such expenses if the Company and its outside lawyers and consultants assume such costs will be fully recovered from ratepayers."[75]

As to the method of recovery, Connecticut, similar to many jurisdictions, amortized rate case expense over a three-year period.[76] Also like most jurisdictions, it did not permit rate case expenses to be included in rate base.[77] It did, however, allow for recovery of carrying charges calculated at the weighted average cost of capital.[78] Presumably, this prior approach would still apply to water utilities with fewer than 75,000 customers not covered by the new prohibition.

DELAWARE

Delaware's Public Service Commission maintains a "longstanding policy of normalizing rate case expense."[79] As in most states, there are no specific statutory or regulatory provisions that are directly applicable. Delaware's PSC articulated that it believes "normalization is more consistent with the essential concept that rates are set to allow the Company to recover normal recurring expenses during the period the rates are to be in effect, and not to guarantee a dollar-for-dollar recovery of past expenses."[80] The Commission has rejected the use of estimates as a rule.[81] Rather, "expenses are normalized by determining a historical cycle of

73. *Id*. at *170. ("Unlike conventional operating expenses, rate case expenses are connected to an adversarial process in which the Company's lawyers and experts advocate for a rate case outcome that best serves the Company's shareholders rather than ratepayers. For instance, in the current proceeding, the Company requested an ROE that was higher than what other parties advocated for and sought recovery for compensation expenses related to director and officer salaries and incentive compensation.").

74. *Id*. at *170-71 (The regulated utility "determines when to file a rate application, what issues to pursue in the proceeding, which consultants and attorneys to retain to advocate on its behalf, and whether to leverage internal resources or utilize outside counsel or consultants to advocate on its behalf.").

75. Aquarion Water Co., Docket No. 22-07-01RE01, 2024 Conn. PUC LEXIS 356, at *14-15 (July 31, 2024) ("In a typical attorney-client or consultant arrangement, the client is incentivized to monitor the attorney's or consultant's fees and work product to avoid inefficient or unnecessary costs. At the same time, the attorney or consultant is similarly incentivized to provide efficient services to avoid the risk that billed work will be rejected by the client. However, if full cost recovery is assumed, the incentive structure has no inherent cost containment measure. As such, the requirement that the Company produce evidence in support of the prudency of the requested rate case costs is essential to ensure just and reasonable rates.").

76. Connecticut Water Co., 2024 Conn. PUC LEXIS 305, *171-72.

77. *Id*. at *172 ("This method of recovery allows the Company to recover its costs while ensuring that rate base is not improperly inflated by the inclusion of a deferred cost with a rapidly declining annual balance").

78. *See, e.g.*, Connecticut Nat. Gas Corp., Docket No. 23-11-02, 2024 Conn. PUC LEXIS 516, at *252 (Nov. 18, 2024).

79. Tidewater Env't Serv., Inc., Order No. 8045, 2011 Del. PSC LEXIS 150, at *8 (Sep. 20, 2011).

80. Diamond State Tel. Co., Docket No. 92-47, 1993 Del. PSC LEXIS 22, at *19 (Nov. 30, 1993) (citing Artesian Water Co., Docket No. 90-10, 1991 Del. PSC LEXIS 12 (May 28, 1991)).

81. United Water Del., Order No. 4548, 1997 Del. PSC LEXIS 258, at *36 (July 15, 1997) ("The Company's claimed level of rate case expenses, however, were not 'legitimately and properly incurred;' indeed,

known and measurable costs and then averaging those costs over that specific time period."[82] However, under unique circumstances, the Delaware PSC has relied upon the most recent rate case expense level rather than a normalization.[83] The PSC has rarely disallowed specific rate case expenses[84] and has a general policy that costs actually incurred by a utility (including rate case expenses) are presumed recoverable unless shown otherwise.[85]

DISTRICT OF COLUMBIA

The District of Columbia's Public Service Commission allows utilities to recover their rate case expense via the amortization of a regulatory asset over several years. This does not originate from a specific statutory provision but rather from general cost-of-service ratemaking. Recent DC PSC decisions on this topic do not provide much elaboration on its rationale but show practical deference to utilities, generally allowing recovery of all expenses incurred.[86] For instance, the DC PSC has rejected arguments by an intervenor that "allowed recovery of rate case expenses be tied to the proportion of the Company's initial request that is ultimately approved by the Commission" when the amount incurred grew to more than $3.6 million.[87] The DC PSC has also found that "protracted schedule[s]" and "contentious" proceedings are reasonable bases for increasing recoverable rate case costs.[88] Under DC PSC policy, rate expenses are amortized over a multiyear period,[89] which is intended to match the amortization period with the historical frequency of rate case proceedings.[90]

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they were not even incurred because they are *estimates*.") (emphasis in original); *see also* Delmarva Power & Light Co., Docket No. 20-0149, 2022 Del. PSC LEXIS 25, at *63 (Jan. 26, 2022) (rejecting the partial use of a projection).

82. United Water Del., Inc. v. Public Serv. Comm'n Del., 1998 Del. Super. LEXIS 122, at *31-32 (Del. Super. Ct. 1998) (quoting United Water Del., 1997 Del. PSC LEXIS 258, at *34-35).

83. *See* Delmarva Power & Light Co., Order No. 8589, 2014 Del. PSC LEXIS 77, at * 110 (Aug. 5, 2014).

84. Cat Hill Water Co., Docket No. 88-30, 1990 Del. PSC LEXIS 16, at *30-31 (May 30, 1990) (faulting utility and witnesses for pursuing unique theories with unqualified witnesses), *aff'd* Cat Hill Water Co., Order No. 3200, 1990 Del. PSC LEXIS 29 (Aug. 28. 1990).

85. United Water Del., Inc. v. Public Serv. Comm'n Del., 1998 Del. Super. LEXIS 122, at *6 (Del. Super. Ct. 1998); *see also* Wilmington Suburban Water Corp., 367 A.2d 1338, 1347 (Del. Super. Ct. 1976) (reversing Delaware PSC on disallowance of rate case expenses).

86. *See* Potomac Elec. Power Co., No. 1156, 2021 D.C. PUC LEXIS 77, at *234-35 (June 8, 2021) (approving of all rate case expenses and rejecting intervenor argument that the utility's "mismanagement of its rate filings and multiple corrections to its testimony and exhibits have greatly protracted this proceeding and increased excess costs").

87. Potomac Elec. Power Co., No. 1139, 2017 D.C. PUC LEXIS 187, at *177-78 (July 25, 2017) ("The Commission rejects [intervenor's] recommendation and reaffirms its position regarding this issue taken as early as Formal Case No. 715 and repeated in several subsequent cases.") (citing Potomac Elec. Power Co., No. 715, 1980 D.C. PUC LEXIS 2 (May 15, 1980)).

88. Potomac Elec. Power Co., 2021 D.C. PUC LEXIS 77, at *235.

89. *See, e.g.*, Potomac Elec. Power Co., 2017 D.C. PUC LEXIS 187, at *177-78; *see also* Potomac Elec. Power Co., 2021 D.C. PUC LEXIS 77, at *235.

90. Chesapeake & Potomac Tel. Co., No. 729, 1981 D.C. PUC LEXIS 6, at *3-5, 118-20 (June 19, 1981) ("Those commissions which, by contrast, have discussed the issue on its merits uniformly have based their selection of a particular amortization period on the historical or projected frequency of rate filings by the applicant utility. . . While it is obvious that there is no precise method of predicting future occurrences, we believe that

FLORIDA

Florida utilities can recover rate case expenses amortized over a period of years, and the practice is governed by a statute in the context of water utilities. Specifically, in regulating water utilities, the Florida Public Service Commission must determine "the reasonableness of rate case expenses and shall disallow all rate case expenses determined to be unreasonable."[91] In making this determination, the statute directs the PSC to consider "the extent to which a utility has utilized or failed to utilize" separate indexing procedures for increasing rates, as well as "such other criteria as [the PSC] may establish by rule."[92] Florida statute also prohibits a water utility from recovering rate case expenses "if a utility receives staff assistance in changing rates . . . unless the Office of Public Counsel or interested parties have intervened."[93] The Florida PSC does not appear to have promulgated regulations implementing any additional criteria, but it has elaborated on its policy in its precedent.

As to energy utilities not subject to this statutory limit, the Florida PSC and courts have held that because "it is the Utility's burden to justify its requested costs," it would "constitute an abuse of discretion to automatically award rate case expense without reference to the prudence of the costs incurred in the rate case proceedings."[94] Consistent with this view, Florida's PSC has exercised more granular oversight of utility rate case expenses than most regulators, making many disallowances—some as small as a few hundred dollars.[95] Although several recent orders express more deference to the utility,[96] one interesting rule articulated by the PSC is that a utility may only recover rate case expenses incurred from appealing a PSC decision in court if that appeal is successful, reasoning that the prudency of the appeal is tied to its success.[97] The PSC has expressed mixed

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establishing an amortization period on the basis of the historical frequency of rate case filings is the appropriate way to handle the matter.").

91. FLA. STAT. § 367.081(7) (2025) ("No rate case expense determined to be unreasonable shall be paid by a consumer.").

92. *Id*.

93. FLA. STAT. § 367.0814(3) (2025).

94. Aqua Utils. Fla., Inc., Order No. PSC-09-0385-FOF-WS, 2009 Fla. PUC LEXIS 415, at *247 (May 29, 2009) (citing Meadowbrook Util. Sys., Inc. v. Fla. Pub. Serv. Comm'n, 518 So.2d 326, 327 (Fla. Dist. Ct. App. 1987) ("automatic award of rate case expense in every case, without reference to the prudence of the costs incurred in the rate case proceedings, clearly would constitute an abuse of discretion, we find no such abuse of discretion in the record before us.")). *See also* Florida Crown Util. Servs., Inc. v. Utility Regul. Bd., 274 So. 2d 597, 598 (Fla. Dist. Ct. App. 1973) ("While we recognize the well settled rule that a regulatory board is vested with broad discretion concerning the allowance of rate hearing expense, it is equally well settled that whether a rate increase is granted is not the sole criteria on which that discretion rests") (reversing *dis*allowance of rate case expense recovery).

95. *See, e.g.*, Aqua Utils. Fla., Inc., Order No. PSC-12-102-FOF-WS, 2012 Fla. PUC LEXIS 216, at *318-34 (Mar. 5, 2012) (Florida PSC disallowing and reducing numerous expenses for numerous reasons).

96. Florida Pub. Utils. Co., Order No. PSC-2023-0103-FOF-GU, 2023 Fla. PUC LEXIS 53, at *199 (Mar. 15, 2023) (granting request of utility to increase its initial request based on more data and faulting intervenor's for not conducting more vetting of the expenses they challenged); Peoples Gas Sys., Inc., Order No. PSC-2023-0288-FOF-GU, 2023 Fla. PUC LEXIS 378, at *212 (Dec. 27, 2023) (approving stipulation with three years amortization period).

97. Sunshine Utils. Of Cent. Fla., Inc., Order No. PSC-94-0738-FOF-WU, 1994 Fla. PUC LEXIS 613, at *32 (June 15, 1994) ("It is our belief that we are justified in depending upon the court's determination of success

messages regarding the argument that costs be shared between ratepayers and shareholders, stating once that there was "no statutory or precedential support" for sharing them evenly (i.e., by reducing the recoverable level),[98] but has denied earning a return on these expenses as consistent with "long-standing policy that the cost of the rate case should be shared."[99]

Florida statute prohibits water utilities from "earn[ing] a return on the unamortized balance of the rate case expense."[100] Rather, it mandates that any rate case expenses deemed reasonable "shall be apportioned for recovery over 4 years unless a longer period can be justified and is in the public interest," and requires that the utility "immediately reduce its rates by the amount of the rate case expense previously included in rates" at the conclusion of that period.[101] The PSC applies similar treatment for energy utilities not covered by the statute, although the precedent does not elaborate on the amortization period chosen.[102] However, for those utilities, the PSC has articulated that in the absence of the statutory provision, "rates are not reduced after the amortization period ends."[103] The PSC also prohibits energy utilities from earning a return on rate case expenses.[104]

GEORGIA

The Georgia Public Service Commission permits utilities to recover their rate case expenses via an amortization over several years. This practice is not governed by a specific statute. While the stated goal is not to permit over-recovery, recent Georgia PSC decisions have been relatively deferential to utilities regarding the amount of rate case expenses, although the issue has not always been vigorously contested.[105] The Georgia PSC has also rejected arguments raised by an intervenor that ratepayers "should not be required to pay for the [litigation] costs to justify increased costs."[106] Amortization periods set by the Georgia PSC are typically

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in making its determination of reasonableness or prudence. In other words, if a utility succeeds in an appeal, the Commission can fairly conclude it was prudent. On the other hand, if a utility fails in its appeal, the Commission can fairly assume it was not a prudent appeal. Because it is the ratepayers that bear the burden of appellate rate case expense, the Commission is justified in denying appellate rate case expense for appeals in which utilities are unsuccessful. Because we find that this Commission may depend on success at the appellate level as a basis for determining the reasonableness of an appeal, we also conclude that reasonable appellate rate case expense can only mean expense related to issues on which the utility prevails.").

98. Aqua Utils. Fla., Inc., 2012 Fla. PUC LEXIS 216, at *334-35.

99. Tampa Elec. Co., Order No. PSC-09-0283-FOF-EI, 2009 Fla. PUC LEXIS 251, at *79 (Apr. 30, 2009).

100. FLA. STAT. § 367.081(9) (2025).

101. *Id*. § 367.081(8).

102. Progress Energy Fla., Inc., Order No. PSC-10-0131-FOF-EI, 2010 Fla. PUC LEXIS 199, at *331 (Mar. 5, 2010) ("We do not believe [utility] has provided sufficient evidence to vary from established practice. Given the differences among the parties, the four-year period falls between the high and low amortization periods and is consistent with our recent practice. We believe a four-year amortization is appropriate."); Florida City Gas, Order No. PSC-2023-0177-FOF-GU, 2023 Fla. PUC LEXIS 174, at *129 (June 9, 2023) ("The four-year amortization period requested by [utility] is not disputed by any of the intervenors, and we find it is reasonable.").

103. Tampa Elec. Co., 2009 Fla. PUC LEXIS 251, at *77.

104. *See* Florida Pub. Utils. Co., Order No. PSC-2023-0103-FOF-GU, 2023 Fla. PUC LEXIS 53, at *89 (Mar. 15, 2023); *see also* Florida City Gas, 2023 Fla. PUC LEXIS 174, at *59.

105. *E.g.* Atmos Energy Corp., Docket No. 27163, 2008 Ga. PUC LEXIS 115, at *63-64 (Sep. 17, 2008).

106. *See generally* Atlanta Gas Light Co., Docket No. 42315, at 13 (Ga. Pub. Serv. Comm'n Dec. 19, 2019), https://services.psc.ga.gov/api/v1/External/Public/Get/Document/DownloadFile/179967/62381 (granting rate

meant to align with the interval between base rate proceedings.[107] However, on at least one occasion the Georgia PSC has found that poor economic conditions justified a shorter amortization period, insofar as those conditions made it more likely the utility would file another rate case sooner.[108]

HAWAII

The Hawaii Public Utilities Commission permits utilities to recover rate case expenses amortized over a period of years. There are no specific statute or regulatory provisions that are directly applicable. The PSC employs a range of terminology, sometimes treating it as synonymous with "regulatory commission expense,"[109] sometimes as "rate case amortization,"[110] and sometimes lumping it in with regulatory expenses.[111]

Recent contested precedent on this topic is sparse. Most recent orders by the Hawaii PUC that addressed the issue were resolved via settlement that represented a compromise between the utility and consumer advocates in terms of the recoverable level of rate case expense and its amortization period.[112] When called to resolve disputes, the Hawaii PSC has scrutinized rate case expenses and affirmatively disallowed many items as unjustified.[113] The PSC has articulated that "function of the allowance of rate case expense, like the allowance of any other expense item, is not to guarantee the dollar-for-dollar actual recovery of the expense, but to establish a representative allowance for a normal and necessary utility function."[114] Conversely, because the Hawaii PSC seeks to set rate case expense at a reasonably representative estimate, it will not make adjustments to account for past over-recovery.[115] Like most jurisdictions that have addressed the proposal, the Hawaii PSC has rejected the argument that rate case expense should

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case expenses noting that the company witness stated that the costs were "prudently incurred to support the proposals and requests in this rate case").

107. *See, e.g.*, Atmos Energy Corp., 2008 Ga. PUC LEXIS 115, at *63-64 (Sep. 17, 2008) (adopting the company's recommendation to set the amortization period at 3 years based on the company's prior two intervals between base rate proceedings); Atmos Energy Corp., Docket No. 30442, 2010 Ga. PUC LEXIS 81, at *24 (Mar. 29, 2010) (adopting the government's recommendation for a 36-month amortization period based on the past 15 years of ratemaking frequency, despite recent significant variations between such proceedings, because "it would be poor ratemaking policy to base a decision only upon the most recent history").

108. Atlanta Gas Light Co., Docket No. 31647, 2010 Ga. PUC LEXIS 290, at *23 (Oct. 27, 2010).

109. Hawaii Elec. Co., Order No. 34453, 2017 Haw. PUC LEXIS 164, at *20 (Mar. 14, 2017).

110. Laie Water Co., Docket No. 2016-0229, 2017 Haw. PUC LEXIS 137, at *30 (Feb. 27, 2017).

111. Hawaii-American Water Co., Order No. 38424, 2022 Haw. PUC LEXIS 209, at *34 (June 16, 2022); Hawaii Water Serv. Co., Order No. 34822, 2017 Haw. PUC LEXIS 513, at *21 (Sep. 15, 2017).

112. *See, e.g.*, Lanai Water Co., Docket No. 2022-0233, 2023 Haw. PUC LEXIS 270, at *24-25 (May 18, 2023).

113. Hawaii Elec. Light Co., Order No. 10993, 1991 Haw. PUC LEXIS 11, at *66-71 (Mar. 6, 1991) (allowing rate case expense of $141,000 to be recovered when utility requested $580,000).

114. Hawaii Elec. Light. Co., Order No. 13762, 1995 Haw. PUC LEXIS 3, at *31 (Feb. 10, 1995) (quoting E. Honolulu Cmty. Servs., Inc., Docket No. 7064, Decision and Order No. 12679).

115. Maui Elec. Co., Order No. 13429, 1994 Haw. PUC LEXIS 9, at *35-36 (Aug. 5, 1994).

be shared evenly with shareholders.[116] The amortization period selected by the Hawaii PSC is intended to reflect the intervals between rate cases.[117]

IDAHO

The Idaho Public Utilities Commission permits utilities to recover their rate case expenses amortized over a period of several years. As with most jurisdictions, this practice is not governed by a specific statutory provision. According to the Idaho PUC, it has "consistently found that prudent and reasonable costs for a [regulated utility] to file and litigate a rate case before us are an expense properly recoverable in rates."[118] The level of recoverable expense has been set based on the rate case at issue,[119] rather than a historic average, although estimates have also been incorporated.[120] The recoverable amount of expenses has not frequently been the focus of dispute, but when it has been, the PUC has disallowed specific items.[121] Like other jurisdictions, the Idaho PUC has rejected "requiring [utilities] to split [recoverable] rate case expense between customers and shareholders."[122]

For the method of recovery, the Idaho PUC has described rate case expense as among those items that should "be recovered through rates rather than through the surcharge" because they are "recurring expenses necessary for the operations of . . . " utilities.[123] Like most jurisdictions, the Idaho PUC has prohibited utilities from earning a return on rate case expense.[124] The Idaho PUC sets the amortization period with a goal of matching the time the rates will be in effect—that is until the next rate case is filed.[125] In one recent case, the Idaho PUC articulated that several

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116. Hawaii Elec. Light Co., 1991 Haw. PUC LEXIS 11, at *71 (citing various decisions).

117. Hawaii Elec. Light Co., 1995 Haw. PUC LEXIS 3, at *31; Maui Elec. Co., 1994 Haw. PUC LEXIS 9, at *35-36; *see also* Laie Water Co., Order No. 34428, 2017 Haw. PUC LEXIS 137, at *31 (Feb. 27, 2017) ("The four-year amortization period, in turn, is based on the estimated four-year interval between the subject 2017 test year rate case and [the utility's] next rate case.") (adopting settlement).

118. Diamond Bar Ests. Water Co., No. DIA-W-07-01, 2007 Ida. PUC LEXIS 198, at *10 (Oct. 19, 2007).

119. Diamond Bar Ests. Water Co., No. DIA-W-15-01, 2016 Ida. PUC LEXIS 100, at *24 (Aug. 29, 2016); Boise Water Corp., No. BOI-W-90-1, 1990 Ida. PUC LEXIS 182, at *19 (Nov. 1, 1990).

120. Diamond Bar Ests. Water Co., 2007 Ida. PUC LEXIS 198, at *7; United Water Idaho Inc., No. UWI-W-97-6, 1998 Ida. PUC LEXIS 178, at *45 (June 1, 1998).

121. Diamond Bar Ests. Water Co., 2016 Ida. PUC LEXIS 100, at *25 (reducing recoverable rate case expense by $200 already recovered in prior rates).

122. United Water Idaho Inc., 1998 Ida. PUC LEXIS 178, at *46.

123. Capitol Water Corp., No. CAP-W-06-01, 2006 Ida. PUC LEXIS 206, at *12 (Dec. 12, 2006).

124. Diamond Bar Ests. Water Co., 2007 Ida. PUC LEXIS 198, at *8-10 ("The Commission has not in the past allowed a return to be paid for rate case expenses . . . We have consistently found that prudent and reasonable costs for a Company to file and litigate a rate case before us are an expense properly recoverable in rates. However, this is not an item that is included in rate base to earn a return. As we have ordered in the past with numerous utilities, including this Company, the proper recovery of this expense item is to amortize over a number of years. We find that the rate case expense should be removed from rate base and recovered through an amortization of the expense for five years.").

125. Diamond Bar Ests. Water Co., 2016 Ida. PUC LEXIS 100, at *24-25 (setting the amortization period at years reflecting "the average of the years between rate cases . . . . "); United Water Idaho Inc., 1998 Ida. PUC LEXIS 178, at *46 ("We find that a three year amortization for rate case expense provides a more responsible matching of costs to the time period in which they are incurred.") (also applying a five-year amortization period for other deferred regulatory expenses); Boise Water Corp., No. BOI-W-90-1, 1990 Ida. PUC LEXIS 182, at *20 (Nov. 1, 1990) ("Rate case expense should be amortized over three years. This period represents the average of

factors, including "the frequency of rate case filings, the contested issues, the amounts in controversy, the proportional differences in recommendations from the [utility], [PUC] Staff, and [the PUC's] review of the record and evidence presented on the issue," were considered in reaching an amortization period designed to "provide the [utility] with timely recovery of the expenses incurred to process this case."[126]

ILLINOIS

Illinois's utility regulator, the Illinois Commerce Commission (ICC), allows utilities to recover reasonable, prudently incurred rate case expense from their ratepayers amortized over a period of several years under a statutory framework. By statute, the ICC is required to "specifically assess the justness and reasonableness of any amount expended by a public utility to compensate attorneys or technical experts to prepare and litigate a general rate case filing" and to "expressly address[]" that issue in its final order.[127] Illinois case law also articulates that expenses incurred to "prepare and present" a rate case are "ordinary and reasonable cost[s] of doing business."[128] The ICC is therefore generally required to include rate case expenses when setting rates "sufficient to provide for recovery of expenses."[129]

The ICC has further promulgated regulations that enumerate some of the factors it considers.[130] Relatively unique among these considerations is "the relevance of the work products to the justness and reasonableness of the proposed

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the Company's and the Staff's positions and is a reasonable time period given that Boise Water's last rate case was four years ago. If the Company files a rate case before the three-year amortization is complete, we are confident that appropriate accounting measures will be taken to recover the unamortized balance.").

126. Veolia Water Idaho Inc., No. VEO-W-22-02, 2023 Ida. PUC LEXIS 32, at *38 (Apr. 28, 2023).

127. 220 ILL. COMP. STAT. § 5/9-229(a) (2024). In 2024 a bill was introduced to amend this section to prohibit this recovery entirely. H.B. 5061, 103rd Gen. Assemb. (Ill. 2024); S.B. 2885, 103rd Gen. Assemb. (Ill. 2024). Another would have prevented meals and travel from being recovered. H.B. 2172, 103rd Gen. Assemb. (Ill. 2023).

128. Central Ill. Pub. Serv. Co. v. Illinois Com. Comm'n, 183 Ill. App. 3d 421, 432 (1993) (citing Du Page Util. Co. v. Illinois Com. Comm'n, 267 N.E.2d 662, 668 (Ill. 1971)).

129. *Id*. at 433; *see also* People *ex rel*. Madigan v. Illinois Com. Comm'n, 2015 IL 116005, 25 N.E.3d 587 (2015).

130. ILL. ADMIN. CODE tit. 83, § 288.110(b) (2025) (identifying the following without limitation: "1) The fulfillment of the required support for compensation costs as required in Section 288.110; 2) Identification of the type of service involved as either professional or support staff; 3) Novelty, complexity, or difficulty of the issues; 4) Nature, extent, and reasonableness of work performed that was considered at the time the work was performed, including, without limitation, the amount of support required for pleadings, discovery, briefing, and hearings, and the relevance of the work products to the justness and reasonableness of the proposed utility rates; 5) Requisite skill required to perform services efficiently and accurately; 6) Professional credentials, including, without limitation, education, training, experience, achievements, and reputation, in the applicable professional discipline; 7) The reasons why multiple outside counsel, outside technical experts, utility affiliate counsel, or utility affiliate technical experts addressed the same issues; 8) Relevant evidence regarding the market rates concerning fees charged for comparable services, including, as applicable, fees charged in other rate cases in Illinois or fees charged in other jurisdictions for rate cases; 9) Hourly rates applicable to outside counsel and outside technical experts representing or retained by utilities and outside counsel or outside technical experts representing or retained by other entities that regularly appear in Commission proceedings; and 10) The reasonableness of the amount of time taken to perform a task.").

utility rates."[131] The regulations also spell out the required support a utility must provide, which includes detailed descriptions of the work performed and cost control measures, as well as invoices or other documentation, and justification for the amortization period.[132] Consistent with this rigorous review, the ICC has cautioned utilities about discrepancies in their requested level—even when that issue is not disputed by the parties.[133] The ICC and Illinois courts have held that "failure to provide such information warrants disallowance of the requested rate case expense."[134] In fact, the ICC recently reduced one utility's rate case expense by more than $1.4 million where it failed to substantiate its request, the total expense and individual expert rates were higher than those of other utilities, and some costs might have been duplicative.[135] In addition, while it is not an enumerated factor in its regulations, the ICC has also considered the quantum of the rate case expense relative to the overall increase, finding "it unreasonable for rate case expense to represent 18.7%" of the overall request.[136]

The ICC allows recovery of these expenses via amortization over several years.[137] The ICC does not permit a utility to earn a return on its rate case expense by including the unamortized portion in rate base.[138] The ICC sets the amortization period for the recovery of rate case expense by estimating "the time rates approved in this proceeding will be in effect given the timeframe between [utility] rate cases."[139]

INDIANA

The Indiana Utility Regulatory Commission (IURC) allows utilities to recover their prudent and reasonable rate case expenses amortized over several years. IURC recognizes that "rate case expense is a cost of doing business," but emphasizes that "these expenditures must be prudent and reasonable given the

131. *Id*. at (b)(4).

132. *Id*. at (a)(2).

133. Northern Ill. Gas Co., 2023 Ill. PUC LEXIS 747, at *189 (Nov. 16, 2023) (utilities' "rate case expense of $5,363,900 is uncontested and therefore adopted by the Commission. While the two-time entries amounting to $562.50 are nominal, the Commission strongly encourages Nicor Gas to continue to scrutinize its legal bills for accuracy."); Utility Servs. of Ill., Inc., 2021 Ill. PUC LEXIS 735, at *66 (Dec. 1, 2021) (that it is "possible for a public utility's additional expenses resulting from the disclosure and remedy of a mistake in a rate case filing to be deemed unrecoverable if the Commission finds those costs are not just and reasonable.").

134. North Shore Gas Co., 2023 Ill. PUC LEXIS 786, at *303 (Nov. 16, 2023); *see also* Commonwealth Edison Co. v. Illinois Com. Comm'n, 2014 IL App 130302, ¶ 1, 16 N.E.3d 713, 716 (2014) ("the Commission properly concluded that it could not determine whether the amounts expended for attorney fees were just and reasonable, as there was no evidence as to specific amounts in fees, what each amount was for, the amount of time that was expended, the rates charged, or the reasonableness of those rates.").

135. North Shore Gas Co., 2023 Ill. PUC LEXIS 786, at *302.

136. *Id*.

137. *See, e.g.*, Illinois-Amercian Water Co., 2022 Ill. PUC LEXIS 764, at *86-87 (Dec. 15, 2022).

138. Utility Servs. of Ill., Inc. 2018 Ill. PUC LEXIS 1497, at *32 (Sep. 24, 2018) ("It is a long-standing Commission practice that a utility can recover its rate case costs as an expense, but that the unamortized rate case expense should not be included in rate base. In other words, the Company will recover the cost, but its investors will not be able to earn a return on it. Rate base should include investments in the utility that result in an asset that is used and useful, which rate case expense is clearly not."); *see also* Cent. Ill. Pub. Serv. Co. v. Ill. Com. Comm'n, 243 Ill. App. 3d 421, 434 (1993).

139. Illinois-American Water Co., 2022 Ill. PUC LEXIS 764, at *84-86.

complexity of the issues presented."[140] The IURC is relatively conservative in determining the overall level allowed to be recovered. For instance, the IURC has significantly reduced recoverable rate case expenses (even when actually incurred) as "neither prudent nor reasonable" when it found those costs were not justified by the complexity of the case and were incurred by a relatively small utility.[141] The IURC has rejected proposals to split the cost of rate case expenses between ratepayers and shareholders.[142] It has also declined to require utilities to competitively bid their rate case work.[143] The IURC selects the amortization period for rate case to "reflect[] the anticipated life of the rates being set . . . ."[144]

IOWA

The Iowa Utilities Board (IUB) permits utilities to recover approved rate case expenses on a dollar-for-dollar basis governed by specific statute and regulation. Specifically, the statute directs utilities, within a reasonable time of filing an application, to file "a report outlining the utility's expected expenses for litigating the case through the time period allowed by the board in rendering a decision," and to provide its actual expenses as part of closing its case.[145] It also directs the IUB to "allow recovery of costs of the litigation expenses over a reasonable period of time to the extent the board deems the expenses reasonable and just."[146] IUB regulations provide more specific guidance and require specific data to be provided.[147] Notably, the regulations generally limit recoverable rate case expenses to those "incurred in the time period from the date the initial application is filed through the filing of the utility's briefs" but also include those incurred preparing the filing and notifying ratepayers.[148] The regulations also state that approved rate case expenses should include "only reasonable, nonrecurring, incremental expenses not covered by test year expenses. . . . "[149] Procedurally, rate case expenses are recovered in a separate proceeding.[150]

Applying this regulatory framework, the IUB has disallowed many costs, giving less deference to utility arguments than many regulators. For instance, in one recent case the IUB rejected arguments regarding the novelty and complexity

140. Switzerland Cnty. Nat. Gas Co., 2019 Ind. PUC LEXIS 90, at *56 (Apr. 17, 2019).

141. Water Serv. Co. of Ind., 2013 Ind. PUC LEXIS 104, at *73-74 (Mar. 27, 2013); Switzerland Cnty. Nat. Gas Co., 2019 Ind. PUC LEXIS 90, at *60-63.

142. Switzerland Cnty. Nat. Gas Co., 2019 Ind. PUC LEXIS 90, at *57 (Ind. Util. Regul. Comm'n Apr. 17, 2019) (citing Kokomo Gas & Fuel Co., 1987 Ind. PUC LEXIS 179 (July 29, 1987); Community Nat. Gas Co., 2017 Ind. PUC LEXIS 71, at *65-66 (Mar 22, 2017)).

143. Community Nat. Gas Co., 2017 Ind. PUC LEXIS 71, at *66-67.

144. Water Serv. Co. of Ind., 2013 Ind. PUC LEXIS 104, at *77; Indiana-American Water Co., 2024 IND. PUC LEXIS 38, at *201 (Feb. 14, 2024).

145. IOWA CODE § 476.6(5) (2025).

146. *Id*.

147. IOWA ADMIN. CODE r. 199-26.7(2) (2025).

148. *Id*. at r. 199-26.7(1).

149. *Id*. at r. 199-26.7(3).

150. *Id*. at r. 199-26.7(8); Iowa-American Water Co., Docket No. RPU-2020-0001, 2023 Iowa PUC LEXIS 139, at *8 (Apr. 27, 2023) (utility "may file a request for recovery of subsequent proceeding expenses in its non-recurring expense rider, which will be considered by the Utilities Board at that time.").

of a case, finding that "those issues were created by [the utility] due to the way [it] prepared its initial filing" and raised novel arguments.[151] The IUB reasoned that "customers should not be required to bear the resulting costs."[152] For a special category of small utility proceedings, the IUB regulations also establish a rebuttable presumption that rate case expenses in excess of $150,000 are unreasonable.[153]

In terms of the method of recovery, the IUB regulations provide that authorized rate case expenses may be recovered "through base rates, by means of a rider, or otherwise" and that the "applicable recovery period will be determined in the rate proceeding."[154] The IUB "has typically amortized rate case expense over a three-year period," but remains open to shorter periods where a three-year period risks "shift[ing] more of the rate case expense obligation to future customers."[155] While styled as an "amortization," the use of a "rider" (which is "subject to a true-up or reconciliation") appears more properly characterized as a surcharge.[156] The IUB described the implementation of such a rider as "allow[ing] dollar-for-dollar recovery of rate case expense without risking over-recovery from ratepayers or under-recovery by" the utility.[157]

KANSAS

Kansas's Corporation Commission (the KCC) permits utilities to recover prudent rate case expenses through an amortization over several years. Kansas does not have a specific statute governing this issue, but the Kansas Court of Appeals has articulated that the general mandate for just and reasonable rates covers this issue.[158] Notably, the KCC has endorsed the use of a lodestar-type analysis in determining a recoverable level of rate case expense.[159]

The Kansas Court of appeals has articulated that the KCC is tasked with "deciding if rate case expenses were prudently incurred and preventing imprudent costs from being passed on to the ratepayer."[160] The KCC also expressed that "[i]n

151. Interstate Power and Light Co., Docket No. RPU-2019-0002, 2021 Iowa PUC LEXIS 266, at *14 (Aug. 10, 2021).

152. *Id*.

153. IOWA ADMIN. CODE r. 199-26.11(8) (2025).

154. *Id*. at r. 199-26.7(7) ("Recovery through a rider will end once the expense is fully recovered.").

155. Iowa-American Water Co., Docket No. RPU-2013-0002, 2014 Iowa PUC LEXIS 74, at *15-16 (Feb. 28, 2014); *see also* Liberty Utils. Corp., Docket No. RPU-2016-0003, 2017 Iowa PUC LEXIS 240, at *19 (Apr. 28, 2017) (noting that the parties agreed to a seven-year amortization period); *but see* Iowa-American Water Co., Docket No. RPU-2016-0002, 2017 Iowa PUC LEXIS 125, at *68-69 (Iowa Utils. Bd. Feb. 27, 2017) (IUB indicating it "does not believe that a potential ['immediate'] rate case provides justification to reduce the amortization period for rate case expense in this proceeding" and adopting standard three-year amortization period.).

156. Iowa-American Water Co., 2017 Iowa PUC LEXIS 125, at *72.

157. *Id*.

158. Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n of State, 47 Kan. App. 2d 1112, 1125 (2012); Home Tel. Co. v. State Corp. Comm'n, 31 Kan. App. 2d 1002, 1014 (2003) (affirming 6-year amortization period)

159. *See* Kansas City Power & Light Co., Docket No. 10-KCPE-415-RTS, 2012 Kan. PUC LEXIS 89, at *89-90 (Jan. 18, 2012).

160. Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n, 47 Kan. App. 2d 1112, 1125 (2012).

general, public utilities are entitled to recover prudently incurred rate case expenses, . . . recovery is not automatic as the Commission must determine if the utility exercised proper management and discretion in incurring those expenses."[161]

The KCC addressed the issue of prudency extensively in an "Order on Rate Case Expense" from 2012.[162] The analysis is firmly rooted in the standard ratemaking framework that "long-standing policy" supports the inclusion of "fair and reasonable rate case expenses that are prudently incurred by a company in a rate case in costs to be borne by ratepayers."[163] The KCC also articulated three competing interests it must consider in addressing the issue: "(1) The utility's investors vs. the ratepayers; (2) the present ratepayers vs. the future ratepayers; and (3) the public interest."[164] The analysis also understood that recovery of rate case expense is a form of fee shifting, saying, "the custom and practice of recovering legal expenses in utility cases differs markedly from the general practices of civil and criminal litigation" and that if the KCC applied the "American Rule," then the utility "would be responsible for paying its own expenses and costs, [and] not recover any rate case expense from ratepayers."[165] The chair of the Commission wrote a concurrence that took the comparison further and proposed an alternative approach of presuming rate case expenses to be reasonable where they fell within a "zone of reasonableness" pegged at the relative share of the entire value of the case and be presumed unreasonable otherwise.[166] In its 2012 Order, the KCC significantly reduced rates, quite notably by developing a lodestar analysis for attorney work similar to that used in a civil fee recovery dispute.[167] On appeal, this order was affirmed in all respects.[168] In a more recent order from 2020, the KCC largely approved a utility's requests for recovery of rate case expense, except that the utility was not permitted to recover expenses related to expert testimony on the state regulatory environments. The KCC found this testimony was duplicative and unnecessary as the regulatory environment was within the agency's area of expertise.[169]

161. Moundridge Tel. Co., Docket No. 15-MRGT-097-AUD, 2015 Kan. PUC LEXIS 1244, at *30 (Apr. 27, 2015) (citing LaHarpe Tel. Co., Docket No. 12-LHPT-875-AUD, 2013 Kan. PUC LEXIS 1726, at *16-18 (June 26, 2013)).

162. *See* Kansas City Power & Light Co., 2012 Kan. PUC LEXIS 89.

163. *Id*. at *21-22 (citing Westar Energy, Inc., Docket No. 05-WSEE-981-RTS, 2006 Kan. PUC LEXIS 169, at *92-93 (Feb. 13, 2006) and Driscoll v. Edison Light & Power Co., 307 U.S. 104, 120-21 (1939)).

164. Kansas City Power & Light Co., 2012 Kan. PUC LEXIS 89, at *24 (citing Kansas Gas & Elec. Co. v. Kansas Corp. Comm'n, 239 Kan. 483, 488-89, 500-01 (1986), *vacated in part*, 48 U.S. 1044 (1987)).

165. *Id*. at *38-40.

166. *Id*. at *144-77.

167. *Id*. at *56-95.

168. Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n, 47 Kan. App. 2d 1112, 1135 (2012) (appeal initiated by consumer group challenging the recoverable level as too high).

169. Atmos Energy Corp., Docket No. 19-ATMG-525-RTS, 2020 Kan. PUC LEXIS 1727, at *31 (Feb. 24, 2020).

As articulated by the Court of Appeals, "[r]ate case expenses are typically amortized for a period reflecting the frequency of rate case filings."[170] A three-year amortization period appears typical.[171]

KENTUCKY

The Kentucky Public Service Commission permits utilities to recover their reasonable rate case expenses in their cost of service amortized over a period of years, typically three. The Kentucky PSC has identified a "longstanding principle that rate case expenses are appropriately included in utility rates."[172] In their applications, utilities bear the burden of proof in establishing that these expenses are just and reasonable.[173] The PSC has conducted relatively detailed analyses in finding specific rate case expenses unreasonable, such as meals and snacks not associated with travel or witness coaching.[174] The Kentucky PSC also requires significant substantiation of these costs and does not allow a utility to recover rate case expenses where it has redacted its receipts or claimed attorney-client privilege.[175] It has also reduced the recoverable expense by the amount estimated for a hearing not ultimately held.[176] Conversely, the Kentucky PSC appears to allow utilities to increase their requested level of rate case expense "to account for the difference in estimated rate case expense and the amount . . . actually incurred."[177]

Rather than match the amortization period with the frequency of rate filings, the Kentucky PSC "generally has permitted the amortization of a utility's actual rate case expenses over a 3-year period."[178] Its rationale is that utilities are allowed "to apply for rate adjustments without limitation or restriction," and initiating a new application before the amortization is complete does not incur any

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170. Home Tel. Co. v. State Corp. Comm'n, 31 Kan. App. 2d 1002, 1014 (2003); *see also* Gas Serv. Co. v. State Corp. Com., 4 Kan. App. 2d 623, 637 (1980).

171. Atmos Energy Corp., 2020 Kan. PUC LEXIS 1727, at *34 ("In Atmos's most recent rate case, the Commission ordered it to amortize its rate case expense over three years. Atmos has not provided sufficient justification to change course. Therefore, the Commission finds Atmos should amortize its rate case expense over three years.").

172. *See* Delta Nat. Gas Co., No. 99-176, 1999 Ky. PUC LEXIS 419, at *29 (Dec. 27, 1999) (citing W. Ohio Gas Co. v. Public Utils. Comm'n, 294 U.S. 63, 74 (1935)).

173. *See* Kentucky Power Co., No. 2020-00174, 2021 Ky. PUC LEXIS 21, at *26 (Jan. 13, 2021).

174. *Id*. at *26-27.

175. *See* Louisville Gas & Elec. Co., No. 2003-00433, 2004 Ky. PUC LEXIS 525, at *63-64 (June 30, 2004) (disallowing $18,929 in expenses because "when a utility seeks to recover an expenditure in its rates, the Commission is obligated to review the nature of that expenditure to verify that it is just and reasonable. In this instance, we are unable to determine from the evidence of record the nature of certain legal services performed and whether those services were related to this rate case.").

176. *See, e.g.*, Kenergy Corp., No. 2023-00276, 2024 Ky. PUC LEXIS 506, at *20 (July 31, 2024).

177. *See, e.g.*, Estill Cnty.Water Dist. No. 1, No. 2023-00371, 2024 Ky. PUC LEXIS 606, at *18 (Aug. 30, 2024).

178. Delta Nat. Gas Co., No. 2004-00067, 2004 Ky. PUC LEXIS 855, at *30 (Nov. 10, 2004) (approving of a 3-year amortization period even where the government showed that the average time between ratemaking proceedings for the utility in question was 4.5 years); *see also* Louisville Gas & Elec. Co., 2004 Ky. PUC LEXIS 525, at *63 (setting the amortization period to three years); Union Light, Heat, & Power Co., No. 91-370, 1992 Ky. PUC LEXIS 1558, a *50-51 (May 5, 1992) (amortizing actual rate case expenses over three-years).

consequences.[179] The topic of rate case expense was also briefly discussed in a recent white paper published by the Kentucky Legislative Research Commission on the topic of alternative ratemaking methods.[180]

LOUISIANA

While it has very little disputed precedent on the issue, the Louisiana Public Service Commission permits utilities to recover all their prudently incurred rate case expense over a period of several years.[181] This appears to be calculated as the actual amount incurred, including updated numbers following the close of the relevant time period.[182] Applicants for new rate changes bear the burden of proof in justifying the costs and amortization periods.[183] However, the Louisiana PSC appears to apply a strong deference to utilities.[184] The Louisiana PSC appears to set amortization periods to match the length of Formula Rate Plans (FRPs), which govern how long a new rate is to stay in effect.[185]

MAINE

The Maine Public Utilities Commission permits utilities to recover their reasonable and prudently incurred rate case expenses on a normalized test period basis via a specific formula. There is no specific statute covering this practice, but the Maine PUC has long-standing regulations for the recovery of such costs.[186] These regulations, which were revised in 2022,[187] define "Rate Case Expenses" as "those Regulatory Proceeding Expenses incurred in connection with a general

179. *See* Delta Nat. Gas Co., No. 99-176, 1999 Ky. PUC LEXIS 419, at *29 (Dec. 27, 1999) (citing KY. REV. STAT. ANN. § 278.180 (West 1986)).

180. KAYLA CARROWAY ET AL., LEGIS. RSCH. COMM'N, COSTS, BENEFITS, AND METHODS OF IMPLEMENTING ALTERNATIVE RATE MECHANISMS FOR UTILITY RATEMAKING, RSCH. MEM. NO. 531, at 13 (2022) ("Another common criticism of traditional ratemaking is the time, expense, and regulatory burden involved in a rate case determination for regulated entities, the regulating agency, and the ratepayers who ultimately bear the costs."). The paper discussed how utilities use this burden as an argument for simplified procedures whereas public interest groups and regulators found that even if fully litigated rate cases are costly, they are worth the public involvement and resulting lower rates.

181. Magnolia Water Util. Operating Co., Order No. U-35822, 2021 La. PUC LEXIS 319, at *15-16 (Oct. 20, 2021) (approving settlement and noting that "[p]rudently-incurred rate case expenses for [docket] will be amortized over the three-year term of the [Formula Rate Plan (FRP)]. With the filing of its Test Year 2022 Annual FRP Filing, [utility] shall provide the total amount of [docket] rate case expenses for which it is seeking recovery, a complete accounting of same and supporting documentation. Those expenses will be reviewed for prudence in the Test Year 2022 Annual FRP Filing.").

182. *Id*.

183. *See id*. at *37.

184. Community Utils. of La., Inc., Order No. U-34742, 2018 La. PUC LEXIS 222, at *138 (Oct. 26, 2018) (finding applicant satisfied burden of proof on issue of amortization period even though neither party "vigorously argued" it).

185. *See id*. at *136-38.

186. *See* 65-407-850 ME. CODE R. §§ 1-4 (LexisNexis 2022). These regulations were made pursuant to the Maine PUC's general rulemaking authority.

187. *See* Amendments to Regul. Proc. Expenses (Chapter 850), Docket No. 2022-00072, 2022 Me. PUC LEXIS 121 (Aug. 3, 2022).

increase in rates."[188] The regulations require utilities to "maintain records containing a detailed description and accounting of all Regulatory Proceeding Expenses of which [they] seek[] recovery."[189] They also require that any utility seeking recovery of rate case expenses to file such records and, when those expenses are incurred during the test period, to include "all actual and estimated expenses which are relied on for purposes of making an adjustment to the test year."[190]

The regulations, buttressed by precedent, dictate that "[n]o public utility shall recover from its ratepayers any Regulatory Proceeding Expense unless such expense has been found by the Commission to have been reasonable and prudently incurred."[191] The regulations identify the following non-exclusive list of factors the PSC might consider:

> 1) the customary fee for similar services, including the fees rendered in the relevant market to companies of similar size in matters of similar importance to the client; 2) the amount of money at issue; 3) the extent to which the attorney's or expert's services contributed to the presentation of the case; 4) whether the utility used a negotiations or bidding process, or otherwise considered information concerning the availability, experience, quality and cost of outside attorney and expert services when hiring outside attorneys and experts; and 5) the experience and ability of the attorney or expert.[192]

A previous version of this regulation limited recovery "of expenses for issues decided against the utility" unless "the utility demonstrates that raising the issue served the public interest."[193] Notably, the Maine Supreme Court considered this to simply be "little more than a restatement of the principle that a utility must demonstrate the justness and reasonableness of its expenses."[194]

The Supreme Court of Maine has articulated that "allowance of rate case expenses depends, as does the allowability of any other operating expenses, upon whether the expenses were prudently incurred," which "is tested with regard to both its purpose and amount."[195] It has also articulated the rule that "a public utility may not 'force rate increases upon its customers solely as a result of

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188. 65-407-850 ME. CODE R. § 1.B (LexisNexis 2022) (referencing ME. REV. STAT. tit. 35-A, § 307 for definition of general increase in rates). "Regulatory Proceeding Expenses" are defined more broadly as "any expense, fee or charge paid directly or indirectly by any public utility to any person, firm, corporation, or association other than its own employees, for legal, accounting, financial or other expert or specialized services in association with any proceeding before the Maine Public Utilities Commission or in any proceeding before the Maine Supreme Judicial Court arising out of a Commission proceeding. For purposes of this rule, regulatory proceeding expenses shall not include copying, telephone, mail, courier, or other such incidental costs . . . . " *Id*. § 1.A.

189. *Id*. § 2.A.

190. 65-407-850 ME. CODE R. § 2.B.1 (LexisNexis 2022).

191. *Id*. § 3.A.

192. *Id*. § 3.B.

193. Millinocket Water Co. v. Maine Pub. Utils. Com., 515 A.2d 749, 754 (Me. 1986) (citing 65-407-850 ME. CODE R. § 3.B (LexisNexis 2022)).

194. Millinocket Water Co. v. Maine Pub. Utils. Com., 515 A.2d 749, 754 (Me. 1986) (citing New England Tel. & Tel. Co. v. Public Util. Comm'n, 448 A.2d 272 (Me. 1982)).

195. *Id*. at 753-54 (citing Maine Water Co. v. Public Utils. Comm'n, 482 A.2d 443, 453 (Me. 1984)).

expenses incurred in abortive or frivolous rate cases.'"[196] The PSC also expressed an awareness of the perverse incentives and ratemaking principles that caution against full recovery of all test period rate case expenses.[197] This normalization approach is intended, in part, to avoid the time and effort required to litigate the prudence of specific expense items.[198] Perhaps because of meeting this goal, the Maine PSC does not appear to have recent precedent on specific rate case expenses items.

The regulations state the policy that the Maine PSC "will set regulatory proceeding expenses on a normalized test year basis."[199] The regulations spell out a clear formula for recovery of Regulatory Proceeding Expense (including rate case expenses) expressed as "RR-RPE = (ARPE--RCE) / 5 + NRCE."[200] The current versions of the regulation, as of 2022, sets the amortization period for rate case expenses as ten years in all cases.[201] Prior to that adoption, however, the Maine PSC did not set normalization periods based on the frequency of rate filings, noting that "[u]tilities and their management are in control of when to make regulatory filings and what costs to incur with each proceeding."[202] In its 2022 Amendments, the Maine PSC also added a waiver provision to these regulations.[203] There does not yet appear to be any precedent applying or considering requests under this provision.

196. Maine Water Co. v. Public Utils. Com., 482 A.2d 443, 453 (Me. 1984) (quoting Stratton Water Co. v. Maine Pub. Utils. Comm'n, 397 A.2d 188, 192 (Me. 1979) (quoting Carolina Water Co., 32 P.U.R.3d 462, 470 (N.C.U.C. 1960))).

197. *See* Amendments to Regul. Proc. Expenses (Chapter 850), Docket No. 2022-00072, 2022 Me. PUC LEXIS 121, at *5-6 (Aug. 3, 2022) ("The Commission disagrees that rate case expenses should be determined based on the actual expenses in the current, pending rate case. This approach is inconsistent with traditional ratemaking methodology and would guarantee dollar for dollar recovery, potentially rewarding overspending and inefficient use of outside counsel and consultants. The approach would also lock into rates the costs associated with a single rate case, even though those costs may not reflect normal rate case expenses.").

198. *Id*. at *4-5 (changing approach from normalization "would result in litigating the same issues in many, if not all, rate cases without providing any meaningful guidance to utilities, other parties and the public as to what standards govern the recovery of these costs. Further, given the lumpiness and unpredictability of these costs, a typical test year adjusted by known and measurable changes does not serve as an adequate or fair method for estimating the costs that should be included in future rates."); *id*. at *5-6 ("Instead, the Commission concludes that a normalization method be used for all regulatory proceeding expenses . . . This approach simplifies the rule, which promotes predictability and should limit litigation. In the event there is an extreme or unusual situation that is not adequately addressed by the rule's provision, a waiver request can be made.").

199. 65-407-850 ME. CODE R. § 3.A. (LexisNexis 2022).

200. *Id*. § 3.C. ("Where: RR-RPE = Revenue Requirement Regulatory Proceeding Expenses; ARPE = Annual Regulatory Proceeding Expenses for the previous five years; RCE = Rate Case Expenses for the previous five years; NRCE = Normalized Rate Case Expenses.").

201. *Id*.

202. Versant Power, Docket No. 2020-00316, 2021 Me. PUC LEXIS 159, at *103 (Oct. 28, 2021) ("Therefore, just because management has decided that it should "file" a proceeding every two years, even when at least one of those filings is withdrawn, is not sufficient reason to use that period in the normalization calculation . . . .").

203. 65-407-850 ME. CODE R. § 4 (LexisNexis 2022); Amendments to Regula, Proc. Expenses (Chapter 850), Docket No. 2022-00072, 2022 Me. PUC LEXIS 121, at *11 (Aug. 3, 2022).

MARYLAND

The Maryland Public Service Commission allows Maryland utilities to recover their actual rate case expenses amortized over a period of years. This practice is not governed by specific statutes or regulations. While the Maryland PSC has "emphasized the importance of ensuring that ratepayer funds are expended only as necessary to facilitate efficient and fair rate case proceedings,"[204] it does not appear inclined to reduce the amount of recoverable rate case expenses on prudence grounds.[205] For instance, it has declined to adopt an hourly cap on outside counsel rates.[206] Rather, the PSC's general policy is one of "allowing recovery of actual rate case expenses," including known and measurable outside legal fees.[207] The Maryland PSC has disallowed rate case expenses that were not adequately supported with documentation.[208] It has also expressed a policy that rate case expenses may not "result in the Company's total revenue requirement exceeding the amount requested initially."[209] Subject to this limitation, the PSC allows utilities to supplement their rate case expenses through the end of the evidentiary hearing.[210] It has declined to adopt a normalized level of rate case expense.[211]

The Maryland PSC amortizes these actual costs over a period of several years. It has articulated that the purpose of this "amortization period is to distribute the expense incurred with the frequency of rate application filings."[212] Three years appears to be typical but not universal.[213] In response to a curious finding of one of its Hearing Officers, the Maryland PSC has clarified that rate case expenses are

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204. Potomac Elec. Power Co., No. 9443, 2017 Md. PSC LEXIS 33, at *71 (Oct. 20, 2017).

205. Delmarva Power & Light Co., No. 9192, 2009 Md. PSC LEXIS 61, at *47-48 (Dec. 30, 2009) ("Because OPC did not offer evidence or testimony demonstrating that the Company's outside legal expenses were excessive, we have no basis in this record on which to make such an adjustment (especially since we find that the Company's outside counsel represented it ably). Our decision not to adjust outside counsel expenses in this case should not be read as foreclosing the possibility in another case, on the right record.").

206. Potomac Edison Co., No. 9490, 2019 Md. PSC LEXIS 18, at *40 (Mar. 22, 2019).

207. *Id*.; Baltimore Gas & Elec. Co., No. 9326, 2013 Md. PSC LEXIS 46, at *66 (Dec. 13, 2013).

208. Potomac Elec. Power Co., No. 9336, 2014 Md. PSC LEXIS 22, at *78-80 (July 2, 2014).

209. *Id*. at *77-78 ("Although individual items may rise above the Company's estimate for those items, we find it a good policy to not allow the total amount of rate case expenses to exceed the total amount the Company estimated it would expend when it initiated the rate case proceedings.").

210. Potomac Elec. Power Co., No. 9443, 2017 Md. PSC LEXIS 33, at *72 (Oct. 20, 2017) ("Although [the utility] argues that some expert witness bills may be submitted to it outside the end date of the evidentiary hearings, we find that adhering to the principle of allowing recovery only of known and measurable and prudently incurred costs outweighs the risk that some bills may not be submitted in time.").

211. Baltimore Gas & Elec. Co., No. 8278, 1990 Md. PSC LEXIS 171, at *72 (Dec. 17, 1990).

212. County Comm'rs of Allegany Cnty., No. 7716, 1984 Md. PSC LEXIS 25, at *8 (Sep. 25, 1984); *see also* Potomac Elec. Power Co., No. 9092, 2007 Md. PSC LEXIS 13, at *96 (July 19, 2007) ("The Commission believes a longer period than the three-year amortization of rate case expense proposed by the Company is appropriate, however. A five-year amortization period shall be used, as this time frame more reasonably reflects the probable lapse of time before the next rate case filing.").

213. Baltimore Gas & Elec. Co., No. 9326, 2013 Md. PSC LEXIS 46, at *66 (Dec. 13, 2013); County Comm'rs of Allegany Cnty., 1984 Md. PSC LEXIS 25, at *8; *see also* Potomac Edison Co., No. 9490, 2019 Md. PSC LEXIS 18, at *40 (Mar. 22, 2019) (three-year period not in dispute).

to be borne by all ratepayers as part of the cost of service and not only those challenging the utility's rate increase.[214]

MASSACHUSETTS

The Massachusetts Department of Public Utilities (DPU) allows utilities to recover their reasonable, appropriate, and prudently incurred rate case expenses over a period of years (which the DPU refers to as "normalization" but operates as amortization). This is not governed by specific statutes or regulations. The DPU sets the level of allowable rate case expense based on two considerations. First, the rate case expense must have "actually been incurred and, thus, is considered known and measurable," and second, the expenses "must be reasonable, appropriate, and prudently incurred."[215] The DPU frequently expresses that the "overall level of rate case expense among utilities has been, and remains, a matter of concern" and that rate case expense "like any other expenditure, is an area in which companies must seek to contain costs."[216]

Massachusetts also scrutinizes the procurement of outside legal services and mandates that utilities "must engage in a competitive bidding process" to recover these costs.[217] While such work need not always go to the lowest bidder, the DPU requires utilities to "provide an adequate justification and showing, with contemporaneous documentation, that their choice of outside services is both reasonable and cost effective."[218] The DPU has "declined to link recovery of these expenses to particular outcomes . . . unless shown to be frivolous or in bad faith."[219] The DPU may disallow recovery of rate case expenses "where such expenses are disproportionate to the relief being sought."[220] While the DPU requires costs be known and measurable, it has deferred to the utilities' numbers,

214. County Comm'rs of Allegany Cnty., 1984 Md. PSC LEXIS 25, at *8.

215. East Northfield Water Co., Docket No. D.P.U. 19-57, 2020 Mass. PUC LEXIS 99, at *47-48 (Mar. 31, 2020) (citing various decisions); Massachusetts Elec. Co., Docket No. D.P.U. 18-150, 2019 Mass. PUC LEXIS 264, at *290-91 (Sep. 30, 2019); NSTAR Elec. Co., Docket No. D.P.U. 17-05, 2017 Mass. PUC LEXIS 371, at *386-87 (Nov. 30, 2017).

216. East Northfield Water Co., 2020 Mass. PUC LEXIS 99, at *47-48 (citing various decisions); Massachusetts Elec. Co., 2019 Mass. PUC LEXIS 264, at *290-91; NSTAR Elec. Co., 2017 Mass. PUC LEXIS 371, at *386-87.

217. East Northfield Water Co., 2020 Mass. PUC LEXIS 99, at *48-49 (citing various decisions) (noting an exception for small water utilities); Massachusetts Elec. Co., 2019 Mass. PUC LEXIS 264, at *291-92; NSTAR Elec. Co., 2017 Mass. PUC LEXIS 371 at *388-90 ("The [DPU] has consistently emphasized the importance of competitive bidding for outside services in a petitioner's overall strategy to contain rate case expense. . . In seeking recovery of rate case expenses, companies must provide an adequate justification and showing, with contemporaneous documentation, that their choice of outside services is both reasonable and cost-effective.").

218. Massachusetts Elec. Co., 2019 Mass. PUC LEXIS 264, at *293; NSTAR Elec. Co., 2017 Mass. PUC LEXIS 371, at *389-90.

219. NSTAR Elec. Co., 2017 Mass. PUC LEXIS 371, at *400-401 (reasoning that doing so "would constitute an unwarranted intrusion into management affairs" and "would have the undesirable effect of chilling management's exercise of its responsibility to vigorously pursue legal rights and remedies in accordance with management's own good faith judgment.").

220. East Northfield Water Co., 2020 Mass. PUC LEXIS 99, at *47-48 (citing various decisions); Massachusetts Elec. Co., 2019 Mass. PUC LEXIS264, at *290-291; NSTAR Elec. Co., 2017 Mass. PUC LEXIS 371, at *386-87.

even when less documentation was provided than the DPU would have preferred.[221] The DPU permits utilities to recover *future* rate case expense work when the amount is a sum certain, e.g., the work is secured on a fixed-fee basis.[222]

The DPU uses some confusing terminology in describing the method of rate case expense recovery. According to the DPU, "the proper method to calculate a rate case expense adjustment is to determine the rate case expense, normalize the expense over an appropriate period, and then compare it to the test year level of rate case expense to determine the adjustment."[223] According to the DPU, this "normalization" is used "so that a representative amount [of rate case expense] is included in the cost of service."[224] As used by the DPU, the "normalization period" is the denominator applied to the allowed level of recoverable rate case expense.[225] However, at FERC and other states described in this appendix, this is how amortization of rate case expenses is done.[226] In contrast, *normalization* refers to the averaging of prior experience to reach a representative level to be included in rates.[227] Despite the DPU's professed "long-standing requirement that rate case expense be normalized rather than amortized," it is not clear how this changes the actual recovery level.[228] The DPU has articulated that although "parties often use these terms interchangeably," the DPU uses the term "normalization" for its practice because "[a]mortization implies that the utility is guaranteed a dollar-for-dollar recovery of the costs, while normalization is intended to only show a representative level of expenses in rates."[229]

Whether it is called a normalization or amortization period, the DPU, like other regulators, sets this recovery period to match the frequency of rate case filings. Specifically, the practice is to "tak[e] the average of the intervals between the filing dates of a company's last four rate cases, including the present case, rounded to the nearest whole number."[230] The DPU deviates from this formula based on the facts of the case when the period is unreasonable or "if the company

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221. East Northfield Water Co., 2020 Mass. PUC LEXIS 99, at *56 ("In what has become a recurring theme in this case, the Department notes that the letter documenting legal fees related to the compliance filing was provided with the Company's reply brief and after the close of the record. In future filings, the Company shall file documentary support for any proposed fixed fee arrangement for compliance work prior to the close of the discovery period so that the Department and all parties will have an adequate opportunity to investigate such proposals. Failure [to] comply with this directive will result in disallowance of such costs.").

222. *Id*.; NSTAR Elec. Co., 2017 Mass. PUC LEXIS 371, at *407-08.

223. East Northfield Water Co., 2020 Mass. PUC LEXIS 99, at *56-57.

224. *Id*. at *57.

225. *See, e.g.*, Massachusetts Elec. Co., 2019 Mass. PUC LEXIS 264, at *299-300; East Northfield Water Co., 2020 Mass. PUC LEXIS 99, at *59 ("the Department allowed the Company to recover a total rate case expense of $157,648. Normalizing this amount over five years results in an annual rate case expense of $31,530.").

226. *See* Part II.B.2.a. of the main article.

227. *See* Part II.B.2.b. of the main article. *See also* Alaska, Delaware, West Virginia herein.

228. Massachusetts Elec. Co., 2019 Mass. PUC LEXIS 264, at *299. *Compare id*. at *290 ("Amortizing the Company's proposed rate case expense of $2,790,731 over five years produces an annual expense of $558,146"), *with id*. at *299-300 ("Based on a five-year normalization period, the annual level of rate case expense to be included in the Company's cost of service is $558,146 ($2,790,731 divided by five years)").

229. Fitchburg Gas & Elec. Co., Docket No. D.T.E. 99-118, 2001 Mass. PUC LEXIS 92, at *56 n.6 (Oct. 18, 2001).

230. East Northfield Water Co., 2020 Mass. PUC LEXIS 99, at *57

has an inadequate rate case filing history."[231] In addition, when the calculation results in a period greater than five years, the period is instead set at five years.[232]

MICHIGAN

The Michigan Public Service Commission allows utilities to recover their forecasted rate case expenses amortized over a period of several years. There are no statutes or regulations directly bearing on this issue and relatively little analysis in the precedent. Michigan's PSC has, however, rejected the recurring proposal to split these expenses evenly between ratepayers and shareholders.[233] It has also rejected setting the expense level based on the previous rate case plus an inflationary adjustment.[234] The Michigan PSC appears deferential to utility estimates of their rate case expense.[235] The PSC has, however, lowered the recoverable level of rate case expenses after finding that "witness training" expenses were not shown to be needed.[236] While the terminology has been somewhat inconsistent, as a practical matter, the Michigan PSC has allowed utilities to recover their rate case expenses, without a return, amortized over a period of years.[237] It appears that the Michigan PSC sets the amortization period to match the expected time between rate cases.[238] It has, however, represented that utilities would be able to "recover any unamortized balance if it files another rate case" sooner.[239]

MINNESOTA

The Minnesota Public Utilities Commission permits utilities to recover their forecasted rate case expenses amortized over a period of years, subject to future crediting if the expense item is over-recovered. This practice is not governed by specific statutory or regulatory provisions, and while the issue is frequently addressed, the PUC has not articulated many specific standards. In setting the allowable level of recoverable rate case expense, the Minnesota PUC appears relatively deferential. For instance, it has affirmed the holdings of a presiding judge that "one cannot conclude that the [utility's] expenditure of resources was

231. *Id*. at *56-57.

232. Massachusetts Elec. Co., 2019 Mass. PUC LEXIS 264, at *298.

233. Consumers Energy Co., No. U-16794, 2012 Mich. PSC LEXIS 156, at *155-56 (June 7, 2012) (rate case expense was not tracked separately, and proposal represented a reduction to overall expense levels based on estimate prepared by the attorney general).

234. Indiana Mich. Power Co., No. U-21461, 2024 Mich. PSC LEXIS 117, at *170 (July 2, 2024).

235. *Id*. at *169-70 (accepting utility's expectation that it will incur approximately 74% more in rate case expenses).

236. *Id*. at *170.

237. Indiana Mich. Power Co., No. U-18370, 2018 Mich. PSC LEXIS 97, at *46-48 (Apr. 12, 2018) (accepting administrative law judge finding that was unchallenged that allowed utility to recover full costs over three years as an adjustment to working capital).

238. Indiana Mich. Power Co., 2024 Mich. PSC LEXIS 117, at *170-71 (adopting four-year period where previous rate case was four years ago).

239. *Id*. at *171.

excessive," even though the utility "was heavily staffed throughout the hearing."[240] However, in one instance, the Minnesota PUC did suspect that the requested level of rate case expenses would "likely [] be lower than initially projected" for a settled case and ordered the utility to make a compliance filing.[241] The Minnesota PUC has rejected arguments to split rate case expenses evenly between shareholders and ratepayers.[242]

The Minnesota PUC uses an amortization method to recover rate case expenses and has rejected the use of a normalized approach taking average experience as representative.[243] Like many regulators, the PUC "tries to set the cost-recovery (or, amortization) period—which determines the percentage of total rate case costs built into rates on an annual basis—to coincide with the time period between rate cases."[244] Historic averages have been used to set this interval.[245] However, as a check, the PUC also requires that "any over-recovery of the amount [] be tracked for refund in a future rate case."[246] The PUC has articulated that this measure is taken "because rate case intervals are always uncertain" and because the measure "both protects ratepayers from over-collection and eliminates any need to consider the rate-case-interval estimate accepted in this case as a factor in determining the timing of the next rate case."[247]

The Minnesota PUC has ordered these refunds to include an interest calculated at the rate of the utilities' rate of return.[248] There is conflicting precedent as to whether this true-up is reciprocal. In a recent order, where the matter was not disputed by any party, the PUC permitted the utility to "true-up any

240. Northern States Power Co., Docket No. E-002/GR-10-971, 2012 MN OAH LEXIS 306, at *146-48 (Feb. 22, 2012), *aff'd* Northern States Power Co., Docket No. E-002/GR-10-971, 2012 Minn. PUC LEXIS 132 (May 14, 2012).

241. Northern States Power Co., Docket No. E-002/GR-15-826, 2017 Minn. PUC LEXIS 153, at *85, 162 (June 12, 2017). Note that this filing, on September. 8, 2017, actually reported a significantly higher level of actual rate case expense. Compliance Filing of Northern States Power Company at 2, Northern States Power Co., Docket No. E002/GR-15-826, (Minn. Pub. Utils. Comm'n filed Sep. 8, 2017), https://efiling.web.commerce.state.mn.us/documents/%7BB0D9625E-0000-CB1A-8195-BE76AFBFCEA6%7D/download?contentSequence=0&rowIndex=791.

242. Minnesota Power, Docket No. E-015/GR-09-1151, 2010 Minn. PUC LEXIS 444, at *83-84 (Nov. 2, 2010) (*aff'g* Minnesota Power, Docket No. E015/GR-09-1151, 2010 MN OAH LEXIS 134, at *138 (Aug. 17, 2010).

243. Minnesota Energy Res. Corp., Docket No. G-011/GR-17-563, 2018 Minn. PUC LEXIS 372, at *36 (Dec. 26, 2018.)

244. CenterPoint, Docket No. G-008/GR-13-316, 2014 Minn. PUC LEXIS 299, at *62 (June 9, 2014) ("It is important for these two time periods to match as closely as possible, to ensure that the utility recovers its authorized rate case costs without over-recovering them.").

245. Great Plans Nat. Gas Co., Docket No. G-004/GR-15-879, 2016 Minn. PUC LEXIS 254, at *27 (Sep. 6, 2016) ("Though the historic average does not control the Company's future rate case timing decisions, it provides a basis for a reasonable estimate.").

246. *Id*. at *27; Great Plains Nat. Gas Co., Docket No. G-004/GR-19-511, 2020 Minn. PUC LEXIS 386, at *23-24 (Oct. 26, 2020) (rejecting argument that this treatment amounted to "single-issue ratemaking"); Minnesota Energy. Res. Corp, 2018 Minn. PUC LEXIS 372, at *37.

247. Minnesota Power, 2010 Minn. PUC LEXIS 444, at *85.

248. CenterPoint, 2014 Minn. PUC LEXIS 299, at *60-61.

over-recovered *or under-recovered* rate case expenses in its next rate case."[249] However, when the parties disputed the issue, the PUC considered and rejected the utility's "arguments concerning the asymmetry of the tracker—it will protect ratepayers from over-collection, but does not provide an opportunity for the Company to increase the amount of its recovery."[250] It has also affirmed holdings of a presiding judge's reasoning that no true-up in the utility's favor is warranted because "utilities largely control the timing of their rate cases."[251]

MISSISSIPPI

In Mississippi the issue of rate case expense recovery is governed by the state Public Service Commission's Rules of Practice and Procedure, although the agency has very little contested precedent on the topic. Mississippi statute also directs the PSC to "reduce the costs of the rate-making process" where possible.[252] Besides two orders approving stipulations,[253] the only substantive discussion from the Mississippi PSC is from 1956.[254] Relying on Pennsylvania judicial precedent, the PSC found that it "cannot recognize the propriety of such an expenditure for rate-making purposes in this proceeding," because the utility's rate case was unsuccessful.[255]

Uniquely, the Mississippi PSC has a provision in its Rules of Procedure on this topic. Specifically, Rule 21 contains the following provision:

> Attorneys fees, costs and expenses associated with any adversarial proceeding, excluding periodic formulary rate plan evaluations, in which the public utility, ultimately, (i) is ordered or agrees to make a refund to ratepayers or (ii) is found to have or admits to having acted illegally or committed any wrongdoing associated with a regulated activity, excluding ordinary negligence. Attorneys'

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249. Otter Tail Power Co., Docket No. E-017/GR-20-719, 2022 Minn. PUC LEXIS 36, at *143 (Feb. 1, 2022) (*aff'g* Otter Tail Power Co., Docket No. E-017/GR-20-719, 2021 MN OAH LEXIS 152, at *47-48 (Sep. 20, 2021) (describing that this was the result of a compromise between the parties)).

250. CenterPoint, 2014 Minn. PUC LEXIS 299, at *68 ("The [utility] has had an opportunity in this case to fully litigate its rate case expenses and have them reviewed and approved for rate recovery. The tracking mechanism addresses uncertainty related to the amortization period for the rate case expense, and not uncertainty about the amount of the expense to be collected. For this reason, the Commission believes the tracker and refund provisions to be appropriate for the circumstances.").

251. Minnesota Power, Docket No. E015/GR-09-1151, 2010 MN OAH LEXIS 134, at *135-36 (Aug. 17, 2010), *aff'd* Minn. Power, 2010 Minn. PUC LEXIS 444.

252. MISS. CODE ANN. § 77-3-2(1)(h) (1972).

253. Entergy Miss., Inc., Docket No. 2014-UN-132, 2014 Miss. PUC LEXIS 259, at *18-19 (Dec. 11, 2014) (providing for amortization as regulatory assets at carrying cost of average debt); Town of Sallis, Docket No. 03-UN-007, 2003 Miss. PUC LEXIS 276, at *8 (Apr. 23, 2003) (apparently including rate case expenses as part of expenditures).

254. *See* Missesota Pub. Serv. Comm'n v. Southern Bell Tel. & Tel. Co., Docket No. U-17, 1956 Miss. PUC LEXIS 1 (Dec. 20, 1956).

255. *Id*. at *92 (citing Scranton-Spring Brook Water Serv. Co. v. Pennsylvania Pub. Serv. Comm'n, 105 Pa. Super. 203, 227-28, 160 A. 230, 239 (1935) ("Whether such an allowance should be made or not will depend largely on the final outcome of the litigation. If the company's schedule of rates, as filed by it, is substantially sustained, allowance should be made for the reasonable expense--not necessarily the actual outlay—to which it was put in order to uphold it. On the other hand, if the schedule filed is decided to have been substantially greater than the just, fair, and reasonable rates it was entitled to charge, there is no reason why the public should be asked to bear the expenses of the litigation brought on by its filing a schedule of rates found to have been greatly excessive.")).

> fees, costs and expenses associated with parts (i) and (ii) of this paragraph will be considered allowable operating expenses upon a showing by the public utility that such expenses were prudent, in the public interest and result in just and reasonable rates.[256]

There does not appear to be precedent resolving disputes under this rule. However, in promulgating it, the PSC elaborated a good deal. Specifically, it stated:

> The basic reasoning is intuitive and is compelled by a fundamental sense of fairness. For example and in simple terms, if a utility extracts money from consumers but is ordered, ultimately, to refund a portion of that money, then the consumers cannot fully recover the sums improperly extracted if that recovery is diluted by the expense incurred by the utility in opposing the proceedings that led to the refund. Likewise, consumers should not be required to bear the defense costs of a utility where it is ultimately found that the utility followed a course of action that the utility knew or should have known would harm consumers.
>
> Burdening the ratepayers with such expenses is against the public interest and fails to promote just and reasonable rates. In situations subject to the Rule, it is difficult to conceive that the associated actions of a utility could ever be considered prudent.[257]

The rationale is in line with the reasoning of the 1956 PSC decision as well as the ratemaking considerations expressed in the main article. Unfortunately, there does not appear to be any precedent applying this provision.

MISSOURI

The Missouri Public Service Commission allows utilities to recover a share of their rate case expenses relative to the utilities' success on the merits via an amortization over a period of several years. There is no statutory or regulatory provision governing this issue. Importantly, the Missouri PSC understands rate case expense to be a unique cost item insofar as:

> 1) the rate case process is adversarial in nature, with the utility on one side and its customers on the other; 2) rate case expense produces some direct benefits to shareholders that are not shared with customers, such as seeking a higher return on equity; 3) requiring all rate case expense to be paid by ratepayers provides the utility with an inequitable financial advantage over other case participants; and 4) full reimbursement of all rate case expense does nothing to encourage reasonable levels of cost containment.[258]

Beginning in 1986, the PSC has found that sharing of costs (in that case, evenly) between ratepayers and shareholders was reasonable.[259] In a more recent case, the Missouri PSC has taken a more nuanced approach.[260] First, it allocated 100% of the utility's depreciation study to ratepayers on the grounds that it was required by Commission regulations.[261] Next, it employed a formula wherein the

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256. MISS. PUB. SERV. COMM'N, PUB. UTIL. RULES OF PRACTICE AND PROCEDURE, R. 21 § 103(3)(e) (2019).

257. Proposal of Miss. Pub. Serv. Comm'n to Possibly Amend Certain Rules of Prac. & Proc., Docket No. 2011-AD-19, 2011 Miss. PUC LEXIS 97, at *3-4 (May 5, 2011).

258. Kansas City Power & Light Co., 2015 Mo. PSC LEXIS 789, at *133-34 (Sep. 2, 2015).

259. Arkansas Power & Light Co., No. ER-85-265, 1986 Mo. PSC LEXIS 30, at *28 (May 4, 1986).

260. *See* Kansas City Power & Light Co., 2015 Mo. PSC LEXIS 789.

261. *Id.* at *139.

utility could "receive rate recovery of its rate case expenses in proportion to the amount of revenue requirement it is granted as a result of this [order], compared to the amount of its revenue requirement rate increase originally requested."[262] Expressed as a formula, a utility's recoverable rate case expense would equal:

$$\frac{Required\ RCE\ +\ (Discretionary\ RCE\ \times \frac{Increase\ Granted}{Increase\ Requested})}{Amortization\ Period}$$

Note however, that the Missouri PSC has employed different amortization periods to the required expenses based on the required intervals. In employing this formula, the PSC acknowledged the disparate resources and incentives at play, finding that allowing full recovery incentivizes unreasonable spending levels.[263] The PSC reasoned that while rate case expenses were an operational expense, "[a]warding a utility all of its incurred rate case expenses could provide that utility with a significant financial advantage over other participants in the rate case process, who may be constrained by budgetary and other financial restrictions."[264]

The Missouri PSC found that traditional item-by-item prudence reviews would not provide sufficient incentives to control costs.[265] Instead it determined that tying the award of rate case expenses to the merits of the case provided proper incentives while also "directly [tying] a utility's recovery of rate case expense to both the reasonableness of its issue positions and the dollar value sought from customers in a rate case."[266] This order was affirmed by the Missouri Court of Appeals, including against the allegation that the PSC announced a new per se policy.[267]

Later, in a 2018 order addressing two utilities' rates, the PSC again employed reduced recoverable rate case expense formulaically except that, instead of employing a formula tied to success, it allocated the costs evenly between shareholders and ratepayers (i.e. allowed 50% to be recovered in rates) on the grounds that "issues controlled by the company amounted to about half of the

262. *Id*.

263. *Id*. at *126-128 ("While [the utility] is able to recoup the costs of its legal counsel and expenses through utility service rates, [the Office of People's Counsel], the entity representing ratepayers, operates within a tight annual budget, and interveners pay their own legal expenses.").

264. Kansas City Power & Light Co., 2015 Mo. PSC LEXIS 789, at *126-128 ("Such a practice does not encourage reasonable levels of cost containment in the utility's rate case expense decisions.").

265. *Id*. at *127.

266. *Id*. at *128.

267. Kansas City Power & Light Co. v. Missorui Pub. Serv. Comm'n, 509 S.W.3d 757, 777 (Mo. Ct. App. 2016) ("the PSC clearly established that the formula was proper in this case due to the unique circumstances of this rate case and it was not announcing a new policy of general applicability to all utilities. Accordingly, we find that the PSC did not engage in improper rulemaking due to their specific findings, supported by the record, that KCPL's litigation strategy, which in large part inured to the benefit of shareholders rather than ratepayers, necessitates the use of this formula in this specific case to justly and reasonably allocate rate case expenses between KCPL's ratepayers and shareholders.").

contested issues at hearing."[268] As a practical matter, this 50% figure is very close to the 53.5 and 46.5% allocations derived using the equation from the 2015 order.[269] This case was appealed to the state Supreme Court, which affirmed the PSC.[270] In a more recent decision, the PSC allowed a small water utility to recover 100% of its ($38,191) rate case expenses, as it found the expenses were required and noted that the utility did not hire experts or consultants who would provide benefits to the shareholders.[271]

The Missouri PSC amortizes actual (allowable) rate case expenses rather than using historic averages.[272] It employs an amortization period for these expenses intended to be "roughly equal to the amount of time between rate cases for" the regulated utility.[273] However, it has taken a more granular approach at times, assigning longer amortization periods for costs incurred less frequently.[274]

MONTANA

The Montana Public Service Commission permits utilities to recover a prudent level of rate case expense amortized over a period of years. There is no specific statutory or regulatory provision governing this issue. In contrast to some jurisdictions, the Montana PSC has expressed that its goal is "dollar-for-dollar" recovery of all utility expenses, which "generally includes expenses incurred by the utility in prosecuting rate review cases before" it.[275] However, it emphasizes that recovery is "generally limited to only those [expenses] which are prudently incurred" including for rate case expense.[276] To that end, the Montana PSC reduces the amounts requested, even if they reflect actually incurred costs

268. Laclede Gas Co., Docket Nos. GR-2017-0215 & GR-2017-0216, slip op. at 53 (Mo. Pub. Serv. Comm'n Mar. 7, 2018), https://efis.psc.mo.gov/Document/Display/134183; *id.* at 53-54 ("This sharing mechanism is supported by the evidence showing approximately half of the litigated issues in these cases are driven primarily by Spire Missouri, . . . the company witness admitted that the company 'padded' its revenue requirement beyond what it expected to receive by pursuing strong positions on issues it did not expect to win, which is clearly to the benefit of the shareholders over the ratepayers.").

269. *Id*., slip op. at 48 (citing Kansas City Power & Light Co., 2015 Mo. PSC LEXIS 789).

270. Spire Mo., Inc. v. Public Serv. Comm'n, 618 S.W.3d 225, 234 (Mo. 2021) ("Nothing in the PSC's authorizing statutes or this Court's precedents requires the PSC to conduct an item-by-item analysis when the issue is the degree to which a utility's case expenses should be included in calculating "just and reasonable" rates rather rejecting a particular expense as imprudent.").

271. Raytown Water Co., 2024 Mo. PSC LEXIS 14, at *84 (Jan. 18, 2024).

272. *Id*. at *81-82 ("A normalization that included this case would not allow recovery of the current rate case actual costs").

273. Laclede Gas Co., Docket Nos. GR-2017-0215 & GR-2017-0216, at 55 (Mo. Pub. Serv. Comm'n Mar. 7, 2018), https://efis.psc.mo.gov/Document/Display/134183.

274. Kansas City Power & Light Co., 2015 Mo. PSC LEXIS 789, at *139 (amortizing over five years, the required interval for the depreciation studies that could be fully recovered from ratepayers).

275. North Star Planned Unit Dev. LLC, Order No. 7105f, 2020 Mont. PUC LEXIS 85, at *69-70 (Aug. 11, 2020).

276. *Id*. at *70 (citing CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES, 243-44, 261-62 (3d ed. 1988)).

relatively freely.[277] Requested rate case expenses are based on estimates,[278] and the PSC does not consider evidence after the close of the record.[279] Like many jurisdictions, the Montana PSC implements this recovery through amortization, holding that "the ideal amortization period for rate case costs should match the time interval between rate applications for the utility because that period allows a utility to recover the allowed amount."[280] In determining this interval, the PSC looks to historic averages.[281]

NEBRASKA

There is little recent precedent from Nebraska on the issue of rate case expense recovery, but the state's PSC allows utilities to recover their forecasted rate case expense amortized over several years. There is no specific statutory or regulatory provision governing this issue. In general, the PSC has been deferential to the utility estimates, including endorsing recovery of "some allowance for possible appeals."[282] However, it does not allow recovery of prior expenses from previous rate cases.[283] The Nebraska PSC does not employ a surcharge method of recovery, as they are authorized only "when specifically allowed under statute" and "including costs in rates encourages the Company to find efficiencies and economies when operating its business, policy goals the Commission promotes."[284] Note, however, the Nebraska PSC previously did employ a surcharge method in orders that were affirmed by the state Supreme Court against

277. *Id.* at *73-74 (record shows "that by freely changing positions throughout the course of the proceeding [the utility] incurred legal and consulting fees that could have been avoided with prudent planning" and that because "incurred additional regulatory expense which, as indicated above, could have been avoided with prudent planning," recoverable expenses would be limited to $30,000); Midvale Water Serv., Order No. 5785a, 1995 Mont. PUC LEXIS 25, at *9 (Mar. 14, 1995) (utility requested $9,022, but PSC limited to $3,600 which it considered "[a] generous rate case expense for a utility as small"); *id*. ("the Commission cannot allow recovery in rates for on-the-job training at levels higher than counsel and accountant, combined."); Mountain Water Co., Order No. 5449a, 1990 Mont. PUC LEXIS 12, at *23 (Apr. 3, 1990) ("Since neither party's estimate is clearly correct the Commission is placed in the position of having to make a subjective determination regarding the appropriate expense allowance. The Commission finds that a reasonable expense recovery for this item of expense is $75,000.").

278. North Star Planned Unit Dev. LLC, 2020 Mont. PUC LEXIS 85, at *72.

279. Energy W. Mont., Order No. 7132c, 2011 Mont. PUC LEXIS 72, at *39 (Nov. 17, 2011)

280. North Star Planned Unit Dev. LLC, 2020 Mont. PUC LEXIS 85, at *76.

281. Aquanet, Inc., Order No. 7056f, 2012 Mont. PUC LEXIS 67, at *22 (Oct. 25, 2012); North Star Planned Unit Dev. LLC, 2020 Mont. PUC LEXIS 85, at *78 (using historic data for contested proceedings even when regulations mandated more frequent filings that might or might not be contested).

282. SourceGas Distrib. LLC, 2012 Neb. PUC LEXIS 145, at *44 (May 22, 2012) (accepting utility's $800,450 estimate and noting that "[w]hether an appeal will be taken is not solely within the company's control but is also within the discretion of the Public Advocate."); Black Hills Energy, Omaha, 2010 Neb. PUC LEXIS 263, at *60 (Aug.17, 2010) (accepting utility's unchallenged $750,000 estimate of rate case expenses).

283. Black Hills Energy, Omaha, 2010 Neb. PUC LEXIS 263, at *58-59. Note however, that utilities may recover for previous assessments of Commission and intervenor expenses per a specific statutory provision. *See* SourceGas Distrib. LLC, 2012 Neb. PUC LEXIS 145, at *26 (discussing NEB. REV. STAT. § 66-1841(6)-(b) (2026)).

284. SourceGas Distrib. LLC, 2012 Neb. PUC LEXIS 145, at *42-43.

challenges to the recovery period.[285] The Nebraska PSC strives to set the time period for amortization "[c]onsistent[ly] with the history of rate filings for utilities."[286]

NEVADA

Nevada's Public Utilities Commission permits utilities to recover their rate case expenses through the use of a regulatory asset that does not earn a return. There are no statutes or regulations directly governing this issue for energy utilities.[287] One complicating factor for the recovery of rate case expenses is that the Nevada legislature has imposed a higher burden of proof for utilities before they can recover costs based on expected future changes in circumstance.[288] This limits the ability of utilities to recover projected rate case expenses in future rates.[289] However, this does not present an issue when such costs are "recorded in a regulatory asset for recovery in the next rate case," as the Nevada PUC permits.[290] While not entirely consistent on this point, the Nevada PUC has more recently explicitly denied utilities permission to assess carrying costs on their rate case expense on the basis that they should not earn a return.[291] The period of amortization is intended to match the frequency of rate filings, often every three years.[292]

NEW HAMPSHIRE

The New Hampshire Public Utilities Commission permits utilities to recover their prudently incurred rate case expenses through a surcharge. While no statute governs this practice, in 2013 the New Hampshire PUC adopted relatively specific regulations governing the recovery of rate case expenses.[293] Even before these regulations, the NH PUC "has historically viewed prudently incurred rate case expenses as a legitimate cost of service and thus appropriate for recovery through rates."[294] Now, these regulations govern both the level of rate expense that is recoverable and the means of recovery.

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285. K N Energy, Inc. v. Scottsbluff, 233 Neb. 644, 667, 447 N.W.2d 227, 242 (1989) ("The statute does not provide any specific method for utilities to collect rate case expense, except to allow for its collection. § 19-4617(1)(b). It is reasonable that the surcharge be amortized to reflect the actual cost of the rate case expense.").

286. SourceGas Distrib. LLC, 2012 Neb. PUC LEXIS 145, at *43-44 ("It is true if the Company initiates a general rate case in less than three years from this current proceeding, it will not recover the entire amount of the cost it estimates for this rate case proceeding; however, a two year amortization period would be more likely to cause the Company to over-recover from ratepayers.").

287. Note that certain regulations govern water and sewer utilities. *See* NEV. ADMIN. CODE § 704.583 (2025).

288. NEV. REV. STAT. ANN. § 704.110(4) (West 2025).

289. Southwest Gas Corp., Docket No. 09-04003, 2009 Nev. PUC LEXIS 237, at *66 (Nov. 3, 2009).

290. Nevada Power Co., Docket No. 11-06006, 2011 Nev. PUC LEXIS 233, at *270-71 (Dec. 23, 2011).

291. Sierra Pac. Power Co., Docket No. 22-06014, 2023 Nev. PUC LEXIS 17, at *202-03 (Feb. 13, 2023). *But see id*. at *203-04 (acknowledging inconsistent treatment).

292. Spring Creek Utils. Co., Docket No. 08-06036, 2009 Nev. PUC LEXIS 26, at *61 (Mar. 19, 2009).

293. N.H. CODE ADMIN. R. ANN. PUC §§ 1900.01-8.01 (2024).

294. Lakes Region Water Co., Order No. 24,708, 2006 N.H. PUC LEXIS 144, at *6 (Dec. 8, 2006)

In setting the level of recoverable expenses, New Hampshire regulations prohibit recovery of any rate case expense unless it is found by the PUC to conform with the regulations and be "just and reasonable and in the public interest."[295] The New Hampshire PUC has articulated that it will separately scrutinize recovery of rate case expense in rate cases resolved by settlement.[296] These expenses must be "actual, known, and measurable" and "associated with a full rate case proceeding" and must fit certain enumerated categories, such as legal fees, expert fees, and travel expenses.[297] Certain categories of expense are explicitly not recoverable, including lobbying, tasks normally handled in-house, and the cost of interest on the expenses.[298] The regulations also identify factors the PUC shall consider in determining whether rate case expenses should be recoverable, including the complexity of the case, the market cost for the work, the necessity of the work performed, and whether the requested rate case itself was just and reasonable.[299]

The regulations also govern the procedures for requesting and documenting rate case expenses and require that larger utilities expecting to incur more than $10,000 of the same, undertake a competitive bidding process.[300] The regulations require that a utility recovering rate case expenses provide all supporting documentation within 30 days of the order setting their rates.[301] The regulations provide that rate case expenses shall be recovered through a surcharge.[302]

NEW JERSEY

The New Jersey Board of Public Utilities (BPU) permits utilities to recover half of their rate case expenses amortized over a period of years. There is no specific regulatory or statutory provision governing this practice in New Jersey. However, the BPU "first began sharing rate case expense between shareholders and ratepayers in the early 1980's."[303] The rationale for this treatment is that "some portion of that expense is a cost of maintaining the stockholders

295. N.H. CODE ADMIN. R. ANN. PUC § 1904.01 (2024).

296. Liberty Utils. Corp., Order No. 26,505, 2021 N.H. PUC LEXIS 56, at *17-18 (July 30, 2021) ("We emphasize that the Commission's approval of rate case expenses is based on the criteria identified in Puc Ch. 1900, and contingent on our independent finding that the expenses to be recovered are just and reasonable and in the public interest. *See* Puc 1901.01(b). Our approval of the Settlement Agreement is not a finding that Liberty has met its burden to prove that its rate case expenses have met this standard.").

297. N.H. CODE ADMIN. R. ANN. PUC § 1904.02(a)(1) (2024) (citing N.H. CODE ADMIN. R. ANN. PUC §§ 1903.04, 1906 (2024)).

298. N.H. CODE ADMIN. R. ANN. PUC § 1907.01 (2024).

299. N.H. CODE ADMIN. R. ANN. PUC § 1904.02(b) (2024).

300. N.H. CODE ADMIN. R. ANN. PUC § 1905 (2024). *See also* N.H. CODE ADMIN. R. ANN. PUC § 1905.04(c) (2024) (requiring utilities that choose a service provider other than the lowest bidder to justify that choice by "clear and convincing justification" for that choice).

301. N.H. CODE ADMIN. R. ANN. PUC § 1905.02 (2024).

302. N.H. CODE ADMIN. R. ANN. PUC § 1908.01 (2024).

303. Suez Water Arlington Hills Inc., Docket No. WR16060510, 2017 N.J. PUC LEXIS 253, at *24 (Nov. 13, 2017) (citing South Jersey Gas Co., Docket No. 818-754 (Nov. 24, 1982)). *See also id*. at *95 ("It is without question that the [BPU's] long-established policy is that rate-case expenses are to be shared 50/50 between the company and its ratepayers.")

investment."[304] Perhaps as a result of this simplified approach, there does not appear to be precedent disallowing specific rate case expense items.

New Jersey utilities can recover these expenses by amortizing recoverable costs, with the New Jersey Supreme Court endorsing amortization periods meant to align with cyclical rate filings.[305] However, the New Jersey DPU has set the amortization period significantly shorter when the interval between recent rate cases appears "unusually long."[306]

NEW MEXICO

New Mexico's Public Regulation Commission (PRC) permits utilities to recover prudent rate case expenses amortized over a period of years. New Mexico statute mandates that "[i]n any commission rate proceeding in which the utility seeks rates to recover adjusted test-year litigation expenses [i.e., rate case expenses] there shall be no presumption that the litigation expenses are prudent."[307] This statute is understood to impose "a 'heightened burden' of demonstrating the reasonableness of its requested litigation expenses."[308] In addition, New Mexico PRC regulations impose reporting requirements for utilities to separately identify rate case expenses in their FERC USofA accounts.[309]

Cutting against this heightened statutory burden, New Mexico's Supreme Court has ruled that the PRC was wrong to deny recovery of *any* rate case expense, even where the utility failed to meet its burden, if the record established the utility had incurred some prudent rate case expenses.[310] Perhaps driven by this precedent, the New Mexico PRC has been relatively deferential as to the level of recoverable rate case expenses. For instance, the PRC recently approved PNM's request to recover more than three and a half million dollars in rate case expenses, despite

304. *Id*. at *96 (quoting South Jersey Gas Co., Docket No. 818-754 (Nov. 24, 1982)).

305. New Jersey Bell Tel. Co. v. Department of Pub. Utils., 12 N.J. 568, 598, (1953) ("Upon further proceedings, *i.e*., new proceedings instituted under the statute for changes in the Company's rates, consideration of rate case expense items should be made upon appropriate evidence, both as to reasonableness and as to probable time of recurrence. Amortization of this factor seems to be somewhat comparable to normalization of cyclic expenses, although the 'cycle' in this event is not so readily ascertainable as in the case of some categories of expense."); *see also In re* New Jersey Am. Water Co., 169 N.J. 181 (2001) (repudiating the portion of 12 N.J. 568 that applied this same standard to a utility's charitable donations).

306. Jersey Cent. Power & Light Co., Docket No. ER12111052, 2015 N.J. PUC LEXIS 65, at *310 (Mar. 26, 2015) (approving four-year amortization period when last base rate case was ten years prior).

307. N.M. STAT. ANN. § 62-13-3(B) (2024).

308. El Paso Elec. Co., No. 20-00104-UT, 2021 N.M. PUC LEXIS 39 (Apr. 6, 2021) (quoting *In re* PNM Gas Servs., 129 N.M. 1, 26 (N.M. 2000)).

309. N.M. CODE R. § 17.9.530.14 (2001); N.M. CODE R. § 17.10.630.13 (2001); N.M. CODE R. § 17.12.730.12 (2001); *see also* El Paso Elec. Co., 2021 N.M. PUC LEXIS 39.

310. *In re* PNM Gas Servs., 129 N.M. 1, 26-27 (N.M. 2000) ("When confronted with a questionable estimate of rate case expenses on one hand and irrefutable evidence that a utility has prudently incurred substantial, if unquantified, rate case expenses on the other, the Commission cannot simply deny recovery altogether; the Commission instead must determine the amount of reasonable and prudent rate case expenses incurred by the utility."); *id*. at 26 ("we agree with the Commission that PNMGS, by presenting only a budget-based estimate with no itemization of costs or evidence of reasonableness, failed to carry its burden of proving that its requested rate case expense of $925,845 was reasonable and prudent.").

objections from the attorney general as to the use of multiple law firms and their billing rates.[311]

To recover costs, the New Mexico PRC allows utilities to amortize the recoverable level of rate case expense over a number of years, which it aims to set "over a period approximating the time between rate filings."[312] The PRC previously permitted utilities to earn a return on this expense item.[313] However, it has reversed this policy on the basis that the primary beneficiaries of rate case expenses are the shareholders and such recovery allows utilities to over-recover their costs.[314]

NEW YORK

The New York Public Service Commission allows utilities to recover a reasonable level of rate case expenses utilities amortized over a period of several years. There is no statutory or regulatory provision governing this issue. For water utilities, the New York PSC frequently uses benchmarking based on historic averages to determine a reasonable level of recoverable expense.[315] This approach has frequently been affirmed by the courts, which have held the PSC "necessarily is empowered to disallow such excessive expenses in order to carry out the [statute's] general mandate of assuring safe and adequate service at just and reasonable rates."[316] The New York PSC has exercised relative diligence in scrutinizing requests to recover rate case expenses.[317] It has also raised concerns as to the quantum of the rate case expense relative to the overall revenue requirement.[318] The New York PSC amortizes this expense over a period of time of several years that is somewhat aligned to (but not strictly tied to) the frequency

311. Public Serv. Co. of N.M., Docket No. 22-00270-UT, 2024 N.M. PUC LEXIS 1, at *491 (Jan. 3, 2024); *but see* El Paso Elec. Co., 2021 N.M. PUC LEXIS 39 (disallowing rate case expenses that were not properly categorized or justified and noting that if "double disallowance" results in no recovery it was the utility's "fault because it did not provide sufficient information to meet its burden of proof.").

312. El Paso Elec. Co., 2021 N.M. PUC LEXIS 39 ("In this manner, the utility recovers its regulatory expenses and ratepayers do not pay the entire expense every year.").

313. Public Serv. Co. of N.M., No. 15-00261-UT, 2016 N.M. PUC LEXIS 74, at *99-100 (Sep. 28, 2016) (declining to change policy despite arguments by attorney general).

314. El Paso Elec. Co., 2021 N.M. PUC LEXIS 39 ("excluding the unamortized balance of rate case expenses from rate base accomplishes some sharing of rate case expenses between shareholders and ratepayers."); *but see* Public Serv. Co. of N.M., 2024 N.M. PUC LEXIS 1, at *491 (permitting water utility rate case expense to "be included in rate base and earn a return on investment.").

315. *E.g.*, Windemere Highlands, Inc., No. 23-W-0599, 2024 N.Y. PUC LEXIS 336, at *20, n.20 (July 22, 2024); Bristol Water-Works Corp., No. 17-W-0010, 2018 N.Y. PUC LEXIS 353, at *74 (July 16, 2018).

316. Hurley Water Co. v. New York State Pub. Serv. Comm'n., 505 N.Y.S.2d 228, 230 (N.Y. App. Div. 1986); *see also* Emerald Green Lake Louise Marie Water Co. v. Public Serv. Comm'n of N.Y., 172 N.Y.S.3d 498, 500-01 (App. Div. 2022); Rolling Meadows Water Corp. v Public Serv. Comm'n of N.Y., 115 N.Y.S.3d 470, 471 (App. Dev. 2019); Crescent Ests. Water Co. v Public Serv. Comm'n of N.Y., 555 N.Y.S.2d 928, 930 (App. Dev. 1990).

317. *See, e.g.*, Village of Freeport, No. 19-E-0538, 2020 N.Y. PUC LEXIS 571, at *16-18 (June 15, 2020) (reviewing $282,734 in invoices and finding that only $74,811 was recoverable as rate case expenses); Penn Yan Mun. Utils. Bd., No. 23-E-0728, 2024 N.Y. PUC LEXIS 287, at *12 (June 21, 2024) (reducing a $5,000 estimate by $500 following the conclusion of the hearing for an annual impact of $167).

318. Bristol Water-Works Corp., 2018 N.Y. PUC LEXIS 353, at *69-74 (company's rate case expense exceeded its revenues and represented the majority of the requested rate increase).

of rate filings.[319] In addition, though it does not elaborate on why, the New York PSC includes the unamortized balance of rate case expense in a utility's rate base, allowing it to earn a return on it.[320]

NORTH CAROLINA

The North Carolina Utilities Commission (NCUC) appears to allow utilities to recover their actual level of rate case expense amortized over a period of years. There are no statutes or regulations directly governing this practice. Many recent orders have been settled by stipulation or settlement, limiting the insight they can provide. The NCUC has previously held "that rate case expenses should be borne by the stockholders rather than the ratepayers where proposed rates have not been justified and there is no merit for a request for a rate increase."[321] There does not appear to be recent precedent applying this standard or otherwise reducing the level of recoverable rate case expenses. The NCUC appears to allow utilities to update their requested level of rate case expenses to recover their total level of expenses, rather than rely entirely on forecasts.[322] The NCUC has selected the amortization period with a goal of matching the interval until the next rate case proceeding.[323] Furthermore, the NCUC appears to endorse the policy of not

319. *See, e.g.*, Municipal Comm'n of Boonville, No. 24-E-0244, 2024 N.Y. PUC LEXIS 454, at *16 (Sep. 20, 2024) ("Given that Boonville last filed a rate case five years ago, the Commission finds a three-year amortization period to be shorter than necessary. Accordingly, the Commission developed a forecast of rate case expense using a five-year amortization period."); Village of Churchville., No. 23-E-0159, 2023 N.Y. PUC LEXIS 405, at *21 (Sep. 14, 2023) ("Given that the Village last filed a rate case over a decade ago, the Commission finds a three-year amortization period to be shorter than necessary. Accordingly, the Commission authorizes a five-year amortization of rate case expenses, which allows ample time for Churchville to recover the expense of this rate case and mitigate customer impacts."); AuSable Valley Tel. Co., No. 89-C-008, 1990 N.Y. PUC LEXIS 8, at *19 (Jan. 11, 1990) ("The factors affecting a telephone company's revenue requirement, and changes to it, are complex, and it is difficult to project when another rate case might be filed. Based on all the information available, the Judge's adoption of a three-year amortization is reasonable.").

320. *See, e.g.*, Municipal Comm'n of Boonville, 2024 N.Y. PUC LEXIS 454, at *16 ("Additionally, the Commission makes a corresponding adjustment to reflect the unamortized balance of rate case expense in the forecast of the rate base to allow Boonville to receive a return on the amounts that are not recovered in the Rate Year."). *See also* Hurley Water Co., No. 28820, 1985 N.Y. PUC LEXIS 668, at *11 (Mar. 21, 1985) (stating that as the policy).

321. Carolina Water Co., Docket No. W-S4, 1960 N.C. PUC LEXIS 5, at *17-18 (Feb. 24, 1960) ("To hold otherwise would be to make it possible for a utility to force rate increases upon its customers solely as a result of expenses incurred in abortive or frivolous rate cases. When a company applies for a rate increase and it is approved by this commission, we expect to allow the amortization of its reasonable expenses incurred for that purpose during the test period; but when the increases are not justified, the stockholders should expect to bear these expenses.").

322. Pluris, LLC, Docket No. W-1282, 2012 N.C. PUC LEXIS 2207, at *10 (Dec. 10, 2012).

323. Public Serv. Co. of N.C., Docket No. G-5, 1994 N.C. PUC LEXIS 15, at *78 (Oct. 07, 1994) ("Recent experience is the best guide for determining the estimated time between rate cases."); North Carolina Nat. Gas Corp., Docket No. G-21, 1991 N.C. PUC LEXIS 10, at *106-07 (Dec. 6, 1991) ("The Commission concludes that rate case expenses should be amortized over three years based on NCNG's anticipated next general rate case filing. Although the time when NCNG will apply for another general rate increase is not known, the Commission is not persuaded that the three-year period anticipated by NCNG is unrealistic or unreasonable.").

allowing utilities to earn a return on rate case expense by including the unamortized balance in rate base or recovering carrying costs.[324]

NORTH DAKOTA

The North Dakota Public Service Commission appears to allow utilities to recover their rate case expenses amortized over a period of several years. There are no statutes or regulations governing this practice in North Dakota, and there is a dearth of recent precedent resolving disputed proceedings on the merits.[325] North Dakota PSC decisions recognize an ability to recover rate case expenses but articulate that utilities may not recover the unamortized balance of prior rate case expenses in later proceedings.[326] The agency has also articulated a policy of setting the amortization period to match the historic interval between rate cases.[327]

OHIO

The Public Utilities Commission of Ohio (PUCO) permits utilities to recover their actual rate case expenses amortized over a period of time, often five years. There is no specific statutory provision applicable to this practice. However, PUCO regulations provide standard filing requirements that require rate increase applicants to disclose information about their rate case expenses, including the reason outside counsel was utilized, the relative cost of outside and in-house counsel, hourly rates and estimate of hours, explanations of cost control measures, and a final update within 10 days of the close of the record.[328]

The Supreme Court of Ohio has ruled on this issue several times, most recently articulating that the recoverability of rate case expenses turns on "whether [they] are ordinary and necessary expenses in obtaining rate relief as provided by law."[329] It has therefore reversed PUCO decisions that "deny recovery of the expenses incurred to obtain timely rate relief."[330] The PUCO has articulated that

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324. Old N. State Water Co., Docket No. W-1300, 2022 N.C. PUC LEXIS 653, at *42 (June 13, 2022) ("The Commission also concludes that it is appropriate that total rate case expense for the current proceeding be excluded from rate base and not earn a return, and be amortized over three years resulting in an annual rate case expense of $67,623. The Commission also concludes that it is reasonable that the Company be able to request any unamortized rate case expense balance in computing rate case expense in its next rate case proceeding.") (issued in the context of approving a settlement).

325. For an example of recent approved settlement, *see, e.g.*, Northern States Power Co., No. PU-21-381, 2022 N.D. PUC LEXIS 61, at *16 (Oct. 27, 2022).

326. Northern States Power Co., No. PU-400-92-399, 1993 N.D. PUC LEXIS 13, at *7-8 (Apr. 7, 1993); Northern States Power Co., No. PU-400-92-399, 1992 N.D. PUC LEXIS 19, at *48-50 (Dec. 15, 1992).

327. Montana-Dakota Utils. Co., No. PU-399-02-183, 2002 N.D. PUC LEXIS 45, at *46 (Dec. 18, 2002); Northern States Power Co., 1992 N.D. PUC LEXIS 19, at *50.

328. OHIO ADMIN. CODE 4901-7-1, App. Schedule C-8 (2022). *See also* Ohio Am. Water Co., No. 09-391-WS-AIR, 2010 Ohio PUC LEXIS 479, at *65 (May 5, 2010) (faulting company of not complying with requirements).

329. Columbus S. Power Co. v. Public Utils. Comm'n, 67 Ohio St. 3d 535, 547 (1993) ("On this basis, we have upheld the PUCO's inclusion of this expense on many occasions and have generally deferred to its discretion in quantifying the level of the expense when unclear on the record."); *see e.g.* Cincinnati v. Public Utils. Comm'n, 153 Ohio St. 56 (1950); Cleveland v. Public Utils. Comm'n, 63 Ohio St. 2d 62 (1980); Canton v. Public Utils. Comm'n, 63 Ohio St. 2d 76 (1980).

330. Columbus S. Power Co. v. Public Utils. Comm'n, 67 Ohio St. 3d at 547.

when "determining the reasonableness of a rate case expense, the Commission must consider the size of the company and a comparison of the rate case expense relative to the required revenue increase."[331] The PUCO has occasionally reduced the level of rate case expense a utility has requested.[332] It has also declined to accept a utility's update that did not comply with its regulations.[333] The PUCO has "repeatedly refused to adopt the [] argument that rate case expense should be disallowed since it provides no direct and primary benefit to ratepayers."[334] It has also rejected the argument that utilities should recover only half of their rate case expenses, i.e., "share" those expenses between ratepayers and shareholders.[335]

The PUCO utilizes amortization to allow utilities to recover their rate case expenses and in setting the amortization period. It considers "the number of years for which the newly established rates are likely to remain in effect" based on historical experience.[336] The PUCO does not permit utilities to include unamortized expense in their rate base or earn a return on it.[337]

OKLAHOMA

The Oklahoma Corporation Commission (OCC) permits utilities to recover their prudent, non-duplicative rate case expenses amortized over a period of years. There are no statutes or regulations specifically governing this practice. The Supreme Court of Oklahoma, however, has held that the OCC must allow a utility to recover rate case expenses when it "has reasonably and fairly employed necessary outside help in connection with . . . [the] case."[338] The OCC has exercised relatively strong scrutiny over utilities' rate case expenses—with a unique focus on the value of the testimony to the OCC itself. For instance, in a 2018 order the OCC found "that rate case expense costs should be scrutinized more

331. Water & Sewer LLC, No. 11-4509-ST-AIR, 2012 Ohio PUC LEXIS 749, at *52 (Aug. 15, 2012).

332. *Id*. ("taken into consideration with the unique size of the applicant, the Commission finds that the rate case expense of $15,000 is more reasonable than the requested $27,059 and, therefore, should be adopted."); Cleveland Elec. Illuminating Co., No. 86-2025-EL-AIR, 1987 Ohio PUC LEXIS 28, at *176 (Dec. 16, 1987) ("Given the Commission's continuing concern over the magnitude of the rate case expense incurred by CEI, we believe it is proper to reduce includable rate case expense by $53,000 from that provided in CEI's updated expense in light of the company's past over-estimations of rate case expense.").

333. Cobra Pipeline Co., No. 18-1549-PL-AEM, 2019 Ohio PUC LEXIS 1051, at *61 (Sep. 11, 2019); Ohio Am. Water Co., 2010 Ohio PUC LEXIS 479, at *65.

334. Cleveland Elec. Illuminating Co., 1987 Ohio PUC LEXIS 28, at *175.

335. Ohio Am. Water Co., 2010 Ohio PUC LEXIS 479, at *67 (finding such a policy "would be contrary to the reasonableness standard prescribed by the Commission and upheld by the Ohio Supreme Court.").

336. Cobra Pipeline Co., 2019 Ohio PUC LEXIS 1051, at *60 (also noting a "longstanding Commission practice of amortizing rate case expenses over a five year period unless a different period is warranted by the applicant's actual rate case history" (citing Columbia Gas of Ohio, Inc., No. 71-461-GA-AIR, et al. (Dec. 28, 1973)); Ohio Am. Water Co., 2010 Ohio PUC LEXIS 479, at *67 (adopting two year period based on average interval of 25.25 months). *See also* Ohio Edison Co. v. Public Utils. Comm'n, 173 Ohio St. 478, 495, 184 N.E.2d 70, 82 (1962) (affirming five-year amortization period).

337. Ohio Edison Co., No. 89-1001-EL-AIR, 1990 Ohio PUC LEXIS 912, at *74 (Aug. 16, 1990) ("Reasonable rate case expense is usually amortized over a period of time; however, no working capital is authorized."); *see also* Suburban Nat. Gas Co., No. 18-1205-GA-AIR, 2019 Ohio PUC LEXIS 1122, at *11 n.2 (Sep. 26, 2019) (clarifying a stipulation that characterized rate case expense as part of rate base).

338. Lone Star Gas Co. v. Corporation Comm'n of Okla., 648 P.2d 36, 41 (Okla. 1982) (quoting Carey v. Corporation Comm'n, 33 P.2d 788, 794 (Okla. 1934)).

closely than they have been in the past."[339] In doing so, it ruled that costs related to "an unnecessary witness that contributed nothing of substance to these proceedings, [shall] not be paid by customers but by shareholders."[340] The OCC has also rejected other cost items as unnecessary, such as witness training.[341] The OCC permits utilities to update their estimated rate case expenses throughout the proceeding and record rate case expenses incurred following the close of the record for consideration in their next rate case.[342] The OCC employs an amortization method of recovery for rate case expense and sets those periods to align with the frequency of rate filings.[343]

OREGON

Oregon is another jurisdiction with very little substantive precedent on the specific issue of rate case expense recoverability. Oregon also has no statutes or regulations that are directly applicable. The practice, however, is that utilities regulated by the Oregon Public Utility Commission can recover their actual expenses incurred, amortized over a period of time. In one decision from 1977, the Oregon Court of Appeal remanded (on procedural grounds) a PUC order disallowing recovery of some of a utility's rate case expenses.[344] Nearly every recent decision has been resolved via stipulation or settlement.[345]

PENNSYLVANIA

The Pennsylvania Public Utility Commission permits utilities to recover all their reasonable and prudently incurred current rate case expenses "normalized" (but essentially amortized) over a period of several years. There is no statute directly governing this issue; however, Pennsylvania regulations require utilities seeking rate increases to supply "detailed calculations of amortization of rate case expense" in their application.[346] Notably, Pennsylvania has a relatively robust body of state and federal judicial precedent on this issue.[347] In fact, the United States Supreme Court case of *Driscoll v. Edison Light & Power Co.*—discussed

339. Public Serv. Co. of Okla., No. PUD 201700151, 2018 Okla. PUC LEXIS 41, at *71 (Jan. 31, 2018) ("Moreover, utilities should understand that not all rate case costs should be borne by ratepayers. Necessary and reasonable costs to process a rate case should be borne by ratepayers. Ratepayers should not be burdened with unreasonably inflated legal costs and expert witness fees, especially when the testimony of some expert witnesses may appear to be duplicative and/or unnecessary testimony.").

340. *Id*. at *73.

341. Oklahoma Gas & Elec. Co., No. PUD 201500273, 2017 Okla. PUC LEXIS 491, at *161-62 (Feb. 2, 2017).

342. *Id*. at *162.

343. Public Serv. Co. of Okla., 2018 Okla. PUC LEXIS 41, at *73.

344. Cascade Nat. Gas Corp. v. Davis, 28 Or. App. 621, 629 (1977).

345. *See, e.g.*, Cascade Nat. Gas Corp., Order No. 21-001, 2021 Ore. PUC LEXIS 1, at *14-15 (Jan. 6, 2021) (noting that the PUC's Staff was opposed to recovery of prior expenses); Northwest Nat. Gas Co., Order No. 20-364, 2020 Ore. PUC LEXIS 548, at *7 (Oct. 16, 2020); *but see* Crooked River Ranch Water Co., Order No. 07-527, 2007 Ore. PUC LEXIS 430, at *37 (Nov. 29, 2007) (finding in favor of PUC staff's recommendation with no elaboration).

346. 52 PA. CODE § 53.53 (2025) ("including supporting data for outside services rendered.").

347. *See* RATE CASE EXPENSE, 40 P.L.E. PUB. UTILS. § 64 (2025).

in more details in Part II.A. of the main article—involved an appeal from an order of the Pennsylvania PUC.[348]

The Pennsylvania PUC has long articulated the policy that rate case expenses should only reflect a reasonable future level for the utility, not a dollar-for-dollar recovery.[349] In addition, the Pennsylvania PUC briefly implemented a policy of splitting rate case expenses "50-50" between ratepayers and shareholders.[350] The Pennsylvania Commonwealth Court overruled this policy, holding (somewhat in tension with the overall policy) that recovery of rate case expenses can be disallowed only when evidence in the record shows that they "were unreasonable, imprudently incurred or excessive in amount."[351] The PUC has articulated that the recoverability of costs for rate case testimony does not turn on the success of the utility's claims but on the good faith behind them.[352] Recent PUC orders have rarely disallowed rate case expenses on the grounds they were unreasonable, but the courts have affirmed them when the utility "failed to demonstrate that its expenses were reasonable and prudently incurred, and [the] reduction of [] rate case expense . . . [was] supported by an examination of the record."[353] However, the Pennsylvania PUC has denied recovery of updated expenses that were introduced "too late" in the evidentiary record.[354]

The Pennsylvania PUC firmly states that its policy is to "allow for a *normalized* amount for current rate case expense" and this does "not amortize current rate case expense."[355] However, in practice, this appear to operate in much the same way as how amortization of a current expense is described by other

348. Driscoll v. Edison Light & Power Co., 307 U.S. 104, 107-08 (1939).

349. Pennsylvania Pub. Util. Comm'n v. Philadelphia Gas Works, Docket No. R-2023-3037933 et al., 2023 PA. PUC LEXIS 298, at *45 (Nov. 9, 2023) ("the Commission described its policy regarding rate case expense in *Pa. PUC v PECO* as follows: 'Current rate case expense is not to be viewed as an expense to be recovered, but merely as a guide in determining a reasonable expense allowance for the future. If a particular utility should decide to expend more or less than its allowance, for whatever reason it may choose, that is a management decision for it to make. Our decision in this and every case is to determine the reasonable annual expense allowance to be charged to ratepayers.'") (quoting Pennsylvania Pub. Utils. Comm'n v. Philadelphia Elec. Co., Docket No. R-811719 et al., 1982 Pa. PUC LEXIS 83, at *57-58 (June 25, 1982)).

350. *See* Butler Twp. Water Co. v. Pennsylvania Pub. Util. Comm'n, 473 A.2d 219, 221 (Pa. Commw. Ct. 1984).

351. *Id*. at 221. Interestingly it appears that the PUC "abandoned" this policy simultaneously with the appeal in *Butler*. *Id*.

352. Pennsylvania Pub. Util. Comm'n v. Western Pa. Water Co., Docket No. R-870825 et al., 1988 Pa. PUC LEXIS 422, at *30 (July 1, 1988) ("The fact that the claim in support of which this study was offered was not a successful claim does not mean that the cost of this study is not a proper ratemaking expense. As stated by the ALJ, the test is not the success or failure of the issue, but one of the reasonableness and good faith with which the study was undertaken."); *see also* Pennsylvania Pub. Util. Comm'n, Docket No. R-922493 et al., 1993 Pa. PUC LEXIS 149, at *55 (July 14, 1993).

353. Popowsky v. Pennsylvania Pub. Util. Comm'n, 674 A.2d 1149, 1154 (Pa. Commw. Ct. 1996).

354. Pennsylvania Pub. Util Comm'n v. City of Lancaster, Docket No. R-2010-2179103 et al., 2011 Pa. PUC LEXIS 1685, at *57 (July 14, 2011); *but see* Pennsylvania Pub. Util. Comm'n v. City of Lancaster, Docket No. R-00049862, 2005 Pa. PUC LEXIS 44, at *70 (Aug. 26, 2005) ("Since the Recommended Decision was issued, however, the City has provided the necessary invoices and the OCA then withdrew its proposed adjustment to this claim in its Reply Exceptions. Accordingly, the additional $20,000 requested by the City is approved, for a total approved claim of $255,000 for current rate case expense.").

355. Pennsylvania Pub. Util. Comm'n v. Philadelphia Elec. Co., Docket No. R-811719 et al., 1982 Pa. PUC LEXIS 83, at *58 (June 25, 1982).

jurisdictions.[356] The PUC sets these "normalization" periods based on the historic intervals between rate cases, rather than the utility's predication of its next case.[357]

PUERTO RICO

The Puerto Rico Energy Bureau has identified that the standards for recoverability of rate case expenses is an open question, which does not appear to be resolved. There is no statute, regulation, or even precedent directly on point. However, in its 2017 order setting PREPA's[358] rates, the territory's Energy Bureau (then called the Energy Commission or CEPR) did opine on this topic. Specifically, the CEPR had found some witness testimony so unhelpful that it required PREPA to "propose to the Commission guidelines for judging the usefulness of testimony before PREPA incurs the costs to prepare and submit it."[359] CEPR directed that these guidelines "include procedures by which PREPA and the Commission can ensure that costs incurred by PREPA and charged to ratepayers are costs that help the Commission serve ratepayers" and cautioned that "until PREPA wants to find a source of litigation funds other than its customers, it must show that the value of its submissions will accrue to the customers."[360] No standard appears to have materialized in any subsequent order. Separately, there are unpublished district court opinions directing Puerto Rico's milk price regulator, the Milk Industry Regulatory Office (ORIL), to allow regulated businesses to recover their expenses for "any professional services rendered relating to presenting the administrative case" to the regulator.[361]

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356. *See, e.g.*, Pennsylvania Pub. Util. Comm'n v. City of Lancaster, 2011 Pa. PUC LEXIS 1685, at *57 ("We find that the total allowable rate case expense allowance in this proceeding should be . . . $535,926 as of January 31, 2011, normalized over a period of forty-seven months. The result is a total annual rate case expense allowance of $136,832 ($535,926/47 × 12 = 136,832)."). The Pennsylvania PUC appears to distinguish between normalization and amortization as terms of art by attributing to amortization an ability to include previous, unrecovered expenses, which the PUC does not permit. *See* Pennsylvania Pub. Util. Comm'n v. Philadelphia Gas Works, Docket No. R-2023-3037933 et al., 2023 PA. PUC LEXIS 298, at *45 (Nov. 9, 2023) ("the rate case expense should be normalized and PGW cannot recover the remainder of its 2020 rate case expenses in this proceeding.").

357. Pennsylvania Pub. Util Comm'n v. Columbia Water Co., Docket No. R-2023-3040258, 2024 PA. PUC LEXIS 23, at *20-21 (Jan. 18, 2024) ("the Company's reasoning for its intent to file a base rate case in the next three years is not persuasive to justify deviation from the Commission's traditional practice of relying on historical filing frequency in setting a normalization period."); Pennsylvania Pub. Util. Comm'n v. Philadelphia Gas Works, 2023 PA. PUC LEXIS 298, at *45 ("the normalization period should reflect the company's historical rate case frequency, not the Company's future intention for filing a rate case."); Pennsylvania Pub. Util. Comm'n v. City of Lancaster, 2011 Pa. PUC LEXIS 1685, at *57.

358. The Puerto Rico Electric Power Authority, whose assets are now operated by LUMA Energy, LLC. *See In re* Financial Oversight & Mgmt. Bd., 7 F.4th 31, 34-35 (1st Cir. 2021) (describing the privatization process).

359. Puerto Rico Elec. Power Auth., No. CEPR-AP-2015-0001, at P 121 (P.R. Energy Bureau Jan. 10, 2017), https://energia.pr.gov/wp-content/uploads/sites/7/2017/01/Final-Resolution-and-Order.pdf, *aff'd* Final Resolution (P.R. Energy Bureau Mar. 8, 2017), https://energia.pr.gov/wp-content/uploads/sites/7/2017/03/8-marzo-2017-Final-Resolution-PREPAs-Reconsideration-CEPR-AP-2015-0001.pdf.

360. *Id*.

361. Vaqueria Tres Monjitas, Inc. v. Fabre Laboy, Civil No. 04-1840, 2010 WL 11618129, at *11 (D.P.R. 2010), *opinion clarified on denial of reconsideration sub nom*., Vaqueria Tres Monjitas, Inc. v. Rivera Aquino, Civil No. 04-1840, 2011 WL 13289967 (D.P.R. 2011). *See also* Vaqueria Tres Monjitas, Inc. v. Fabre LaBoy, Civil No. 04-1840, 2007 WL 9717624, at *3 (D.P.R. 2007).

RHODE ISLAND

The Rhode Island Public Utilities Commission permits utilities to recover their current rate case expenses amortized over a period of years. There is no statute or regulation directly applicable, but there is some state Supreme Court precedent. In a 1976 decision, Rhode Island's Supreme Court remanded a PUC order that allowed the utility less than half its requested rate case expense, holding that even if the utility did not meet *its* burden, the PUC still had to establish an evidentiary basis for its allowed level.[362] On remand, the PUC stuck to its original finding supported by evidence, which was not challenged through further appeal.[363] Parties are typically allowed to update their requested rate case expenses with more recent information,[364] though this has been disallowed when done too late for effective examination by other parties.[365]

The Rhode Island PUC has expressed "deep[] concern[] with what appears to be never-ending increases to rate case expense."[366] It has also articulated that it "can not permit the pass through of unreasonable, unsubstantiated rate case expenses to the ratepayer."[367] One interesting expression of this concern is that the PUC has reduced recoverable rate case expenses significantly when the utility's starting position was unreasonably high relative to its final position.[368]

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362. Bristol Cty. Water Co. v. Public Utils. Comm'n, 363 A.2d 444, 451 (R.I. 1976) ("The commission's findings must be fairly and substantially supported by legal evidence and sufficiently specific to enable this court to ascertain if the facts upon which they are premised afford a reasonable basis for the result reached. If it is found that it is impossible to verify the entirety of the company's proposal, then the commission would be justified in allowing only so much of it as is supportable by legal evidence. In the instant case, the commission only executed the first half of this two-stage decisional process. Its conclusion that $8,500 was a sufficient amount to cover rate case expense to the service company finds no apparent support in the record. This issue is therefore remanded to the commission for supplemental or additional decision.") (internal citations omitted).

363. Bristol Cty. Water Co. v. Harsch, 386 A.2d 1103, 1106 (R.I. 1978) (noting that the company did not raise this issue but describing the actions on remand on that issue in affirming the remand decision on other points challenged).

364. A&R Marine Corp., Docket No. 4586, 2017 R.I. PUC LEXIS 20, at *22 (June 2, 2017) ("As is typical practice for the PUC, the parties were asked to update the rate case expense prior to the Commission's decision.").

365. Block Island Power Co., Docket No. 3900, 2008 R.I. PUC LEXIS 28, at *49-50 (Nov. 24, 2008) (updated two days before the Commission open meeting); *but see id*. at *61-62 (Bray, Comm'r dissenting) ("I believe that the $34,000 additional expense presented by the Company prior to the Open Meeting for this docket is a legitimate rate case expense that should have been allowed in rates.").

366. Narragansett Elec. Co., Order No. 13899, 1992 R.I. PUC LEXIS 15, at *41 (Apr. 10, 1992).

367. Blackstone Valley Elec. Co., No. 2016, 1992 WL 501574 (Mar. 16, 1992) ("We do not wish that the Company sacrifice it standards but they must put a value tag on any service which they intend to pass along to the ratepayers. They must make every effort to get the appropriate level of service at the lowest cost. It is apparent from the record that not only was the same level of service available at a lower cost but the same individual were available at a lower cost.") (allowing recovery of $494,425 when the utility requested $691,000 but clarifying that doing so "is in no way intended to endorse this rate or these costs as being in our view truly reasonable.").

368. City of Newport, Docket No. 2985, 2000 R.I. PUC LEXIS 12, at *37-38 (June 19, 2000) ("Ultimately, the utility's requested cost of service increase was less than half of that contained in the original filing. . . The Commission believes that Newport Water could have presented a revenue increase request more in line with its final position; this would have reduced the cost, time, and effort of all the parties. Also, a timely filed COS study and rate design that more closely adhered to this Commission's directive in Docket No. 2049 would have produced a better end result, and a more appropriate rate design for this utility. . . Because all of this contributed to the excessive costs of the rate case, the Commission cannot authorize collection from the utility's ratepayers

In terms of the method of recovery, the Rhode Island PUC sets the amortization period to "match[] the expected interval between rate cases."[369] The PUC does not permit utilities to recover their previously incurred rate case expenses, stating that to do so "would constitute retroactive ratemaking."[370] The Rhode Island PUC has also long understood that rate case expenses benefit both shareholders and ratepayers and that both should bear those costs.[371] The Rhode Island PUC therefore has attempted to share these costs between shareholders and ratepayers as a matter of policy. However, rather than reduce the amount of recoverable expenses, for instance by halving the recoverable amount, the PUC has articulated that costs are shared by disallowing rate base treatment (unless "unusual circumstances" justify it).[372] That is, under the PUC's rationale the costs are split insofar as "ratepayers to pay the actual, prudently incurred rate case expenses over a period of time, while stockholders pay the carrying costs on the unamortized balance."[373] The state Supreme Court has affirmed this policy and rationale.[374]

SOUTH CAROLINA

The South Carolina Public Service Commission permits utilities to recover their current (and prior) rate case expenses amortized over a period of years. There are no statutes or regulations governing this practice. In one interesting case, the South Carolina Supreme Court remanded to the PSC for second time after the PSC disallowed, on remand, recovery of costs associated with specific invoices that permitted in the agency's original order.[375] The court found the agency "employed a retaliatory standard of scrutiny."[376] Since then, the PSC has disallowed rate case expenses in at least one proceeding, where it found that "[r]atepayers should not bear the burden of expenses from proceedings that are duplicitous[377] in nature to the Company's current rate case before this Commission."[378]

The South Carolina PSC sets the amortization period to match the rate case filing intervals.[379] Somewhat uniquely, the South Carolina PSC has an established

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of the full level of rate case expense incurred by Newport Water . . . Thus, the Commission will disallow recovery of 33.3% of the $273,376 rate case expense incurred by Newport Water in this filing.").

369. Providence Gas Co. v. Malachowski, 656 A.2d 949, 952 (R.I. 1995). *See also* Narragansett Elec. Co., Docket No. 4065, 2010 R.I. PUC LEXIS 12, at *171-72 (Apr. 29, 2010) ("The Commission believes that a five year amortization period is appropriate and is supported by the time interval between the two prior cases.").

370. Block Island Power Co., 2008 R.I. PUC LEXIS 28, at *49.

371. *Malachowski*, 656 A.2d at 953.

372. *Id*. at 950.

373. *Id*. (quoting Block Island Power Co., Order No. 13769, Docket No. 1998, at 20 (1991)); *see also* United Water R.I., Docket No. 4434, 2014 R.I. PUC LEXIS 22, at *17, 21 (Sep. 2, 2014).

374. *Malachowski*, 656 A.2d at 953.

375. Daufuskie Island Util. Co. v. South Carolina Off. of Regul. Staff, 427 S.C. 458, 463 (2019).

376. *Id*. at 463.

377. This appears to be meant to say "duplicative" in the context of the order.

378. Blue Granite Water Co., Order No. 2020-306, 2020 S.C. PUC LEXIS 232, at *134 (Apr. 9, 2020).

379. Daufuskie Island Util. Co., Order No. 2018-68, 2018 S.C. PUC LEXIS 35, at *58 (Jan. 31, 2018) ("We agree with the Company that a three (3) year amortization period provides a more reasonable recovery period. [The uility] has been filing Applications for rate relief at approximately three-year intervals."); *see also* Porter v.

policy of allowing utilities to recover the unamortized balance of rate case expense in subsequent rate cases.[380] This practice was affirmed by South Carolina's Supreme Court against arguments it violated the rule against retroactive ratemaking.[381] The court reasoned—somewhat tortuously—that the unamortized portion of rate case expense fell within the rule's exception for "extraordinary" costs because it was expected that the amount would have been recovered during the amortization period.[382] The PSC does not permit utilities to include unamortized rate case expense in their rate base or otherwise earn a return, reasoning that prohibiting such recovery "presents a reasonable sharing of costs between shareholders and customers."[383]

SOUTH DAKOTA

While there is very little precedent on the matter, the South Dakota Public Utilities Commission appears to permit utilities to recover rate case expenses amortized over a period of several years. There are no statutory or regulatory provisions and extremely little recent precedent from the state's PUC. In a 1977 order, the PUC allowed the recovery of a utility's rate case expenses amounting to $50,000 over a three-year amortization period.[384] In another order, it disallowed a utility to recover out-of-state expenses from South Dakota ratepayers.[385] Furthermore, in 1978, the Supreme Court affirmed the amortization of rate case expenses over a three-year period set by a consortium of cities.[386] Recent decisions addressing this issue are consistent with this approach but appear to have been resolved via settlement.[387]

TENNESSEE

The Tennessee Public Utility Commission permits utilities to recover their current rate case expenses amortized over a period of years. There is no statute or regulation governing this practice.[388] However, in one appellate ruling, the court

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South Carolina PSC, 328 S.C. 222, 231, 493 S.E.2d 92, 97 (1997) ("Ideally the amortization period matches the expected interval between rate cases.").

380. *See id*.

381. *Porter*, 328 S.C. 222.

382. *Id*. at 231-32 ("Accordingly, the remaining unamortized rate-case expense, previously approved but unrecovered, is unanticipated and non-recurring and qualifies as an extraordinary expense.").

383. Daufuskie Island Util. Co., Order No. 2022-854, 2022 S.C. PUC LEXIS 225, at *58-59 (Dec. 21, 2022).

384. Montana-Dakota Utils. Co., Docket No. F-3159, 1977 S.D. PUC LEXIS 7, at *72-73 (Aug. 1, 1977).

385. Iowa Pub. Serv. Co., Docket No. F-3063, 1977 S.D. PUC LEXIS 8, at *84-85 (July 29, 1977).

386. Northwestern Pub. Serv. Co. v. Chamberlain, 265 N.W.2d 867, 880-81 (S.D. 1978).

387. Black Hills Power, Inc., Docket No. EL14-026, 2015 S.D. PUC LEXIS 38, at *16 (Feb. 10, 2015) (noting that "ratepayers will not incur the added rate case expense required to prepare revised rates and tariff sheets."). *See also* Amended Settlement Stipulation at 6-8, Black Hills Power, Inc., Docket No. EL14-026 (S.D. Pub. Serv. Comm'n filed Feb. 10, 2015), https://puc.sd.gov/commission/dockets/electric/2014/EL14-026/amendedstipulation.pdf (amortizing expenses over three years, allowing for a tracker for excess rate case expense, and rate basing half the recoverable level of rate case expenses).

388. *See, e.g.*, Consumer Advoc. & Prot. Div. v. Tennessee Regul. Auth., No. M2011-00028-COA-R12-CV, 2012 Tenn. App. LEXIS 355, at *50 n.30 (Tenn. Ct. App. 2012) ("There is no statute or regulation that explicitly permits the TRA to include litigation expenses as an operating expense of the utility in a rate case.

found the Tennessee PUC's authority to award litigation expenses to utilities to be "plenary" and could manifest outside the context of a rate case.[389] The PUC has rejected the argument that rate case expenses should be disallowed when no increase was warranted but rather found they may be recovered when the application was made "in good faith."[390]

The Tennessee PUC (then called the Regulatory Authority or TRA) briefly implemented the policy of reducing recoverable rate case expenses by half as a method to share costs between shareholders and ratepayers.[391] On appeal, the PUC defended this practice, arguing that "in light of the [utility's] history and pattern of filing unsubstantiated rate cases, particularly evident in this case, the inordinate costs involved here are unreasonable."[392] However, because those arguments were not contained in the order itself, the court found the one-half disallowance was arbitrary.[393] In apparent respect of that holding, the PUC has since expressed more deference to utility claims. For instance, in a 2019 order the PUC expressed "its concern regarding the high level of rate case expenses, acknowledging the benefit that both ratepayers and stockholders receive from the rate increases that generally follow the completion of rate cases."[394] However, because "the documentation and evidentiary record [was] not sufficiently detailed to determine a reasonable apportionment of rate case expense between ratepayers and shareholders," the PUC awarded the total request, expressing fear "that exclusion of a percentage or specific amount of rate case expense would be unsupported and potentially arbitrary."[395]

The Tennessee PUC aims for rate case expenses "to be amortized over the period between Rate Cases."[396] However, it appears in at least one instance the agency has permitted the issue of rate case expenses to be deferred to a later time, resulting in recovery through a surcharge.[397]

TEXAS

Both of Texas's energy regulators—the Texas Public Utility Commission (which regulates electric and non-energy utilities) and the Railroad Commission

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Rather, the practice of allowing Rate Case Expenses to be recovered by the utility has become the accepted 'policy and custom' of the TRA.") (citing Tennessee Am. Water Co. v. Tennessee Regul. Auth., 2011 Tenn. App. LEXIS 51, at *26 (Tenn. Ct. App. 2011)).

389. *Id*. at *63.

390. Chattanooga Gas Co., Docket No. 04-00034, 2004 Tenn. PUC LEXIS 323, at *29 (Oct. 20, 2004).

391. Tennessee Am. Water Co., Docket No. 08-00039, 2009 Tenn. PUC LEXIS 14, at *48-49 (Jan. 13, 2009) (rejecting application of the "American Rule" but finding it "appropriate for the shareholders to bear some of the expense of the Company's rate case.").

392. Tennessee Am. Water Co. v. Tennessee Regul. Auth., No. M2009-00553-COA-R12-CV, 2011 Tenn. App. LEXIS 51, at *75 (Tenn. Ct. App. 2011).

393. *Id*. at *76.

394. Chattanooga Gas Co., Docket No. 18-00017, 2019 Tenn. PUC LEXIS 5, at *53 (Jan. 15, 2019).

395. *Id*. at *53-54.

396. B&W Pipeline, LLC, Docket No. 15-00042, 2016 Tenn. PUC LEXIS 39, at *34 (Mar. 10, 2016).

397. Superior Wastewater Sys., LLC, Docket No. 22-00087, 2023 Tenn. PUC LEXIS 64, at *2-3 (Sep. 26, 2023); *see also* Tennessee Am. Water Co., Docket No. 10-00189, 2012 Tenn. PUC LEXIS 76, at *38 (Apr. 27, 2012) (describing that the expenses at issue in *Tennessee Am. Water Co*., 2011 Tenn. App. LEXIS 51 were recovered through a surcharge).

of Texas (RRC) (which regulates oil and natural gas)—permit utilities under their jurisdiction to recover their reasonable, relevant, and necessary rate case expenses through a surcharge. Texas statute articulates that electric utilities *may* be allowed to recover "reasonable costs of participating in a proceeding under this title not to exceed the amount approved by the regulatory authority."[398] The equivalent statutory provision regarding gas utilities is silent on this issue.[399] However, for both industries the PUC[400] and the RRC[401] have promulgated regulations governing the recovery of rate case expenses.

Both sets of regulations mandate that the utility "shall have the burden to prove the reasonableness of such rate-case expenses by a preponderance of the evidence."[402] They also require the requesting utility to "detail and itemize" the rate case expenses in their application.[403] Likewise, both sets of regulations articulate similar criteria the PUC and RRC should employ in determining the reasonableness of rate case expenses. In addition to those factors required to be detailed and itemized in the application, the RRC regs require the agency to consider the need for the testimony as well of the merits of the application itself.[404] The PUC regulations enumerate even more granular issues for which the agency must make a finding, including whether "the utility's . . . proposal on an issue in the rate case had no reasonable basis in law, policy, or fact and was not warranted by any reasonable argument for the extension, modification, or reversal of

398. TEX. UTIL. CODE ANN. § 36.061(b)(2) (West 2013).

399. TEX. UTIL. CODE ANN § 104.057 (West 1997). Note that TEX. UTIL. CODE ANN § 103.022 deals with recovery of rate case expenses by municipalities conducting or participating in rate cases, which is a distinct issue.

400. 16 TEX. ADMIN. CODE § 25.245 (2014) (PUC of Tex. regulations for electric service providers). *See also* 16 TEX. ADMIN. CODE § 24.44 (2018) (PUC of Tex. regulations for water and sewer service providers).

401. 16 TEX. ADMIN. CODE § 7.5530 (2002) (R.R. Comm'n of Tex. regulations for gas service providers).

402. 16 TEX. ADMIN. CODE § 25.245(b) (2014); 16 TEX. ADMIN. CODE § 7.5530(a) (2002) (not hyphenating "rate case"). *See also* 16 TEX. ADMIN. CODE § 24.44(b) (2019).

403. 16 TEX. ADMIN. CODE § 7.5530(a)(1)-(6) (2002) (including but not limited to showing "(1) the amount of work done; (2) the time and labor required to accomplish the work; (3) the nature, extent, and difficulty of the work done; (4) the originality of the work; (5) the charges by others for work of the same or similar nature; and (6) any other factors taken into account in setting the amount of the compensation."); 16 TEX. ADMIN. CODE § 25.245(b)(1)-(6) (2014) (including but not limited to showing "(1) the nature, extent, and difficulty of the work done by the attorney or other professional in the rate case; (2) the time and labor required and expended by the attorney or other professional; (3) the fees or other consideration paid to the attorney or other professional for the services rendered; (4) the expenses incurred for lodging, meals and beverages, transportation, or other services or materials; (5) the nature and scope of the rate case, including: (A) the size of the utility and number and type of consumers served; (B) the amount of money or value of property or interest at stake; (C) the novelty or complexity of the issues addressed; (D) the amount and complexity of discovery; (E) the occurrence and length of a hearing; and (6) the specific issue or issues in the rate case and the amount of rate-case expenses reasonably associated with each issue."). *See also* 16 TEX. ADMIN. CODE § 24.44(b) (2019).

404. 16 TEX. ADMIN. CODE § 7.5530(b)(2002) ("whether the request for a rate change was warranted, whether there was duplication of services or testimony, whether the work was relevant and reasonably necessary to the proceeding, and whether the complexity and expense of the work was commensurate with both the complexity of the issues in the proceeding and the amount of the increase sought as well as the amount of any increase granted.").

commission precedent."[405] Other situations include excessive attorneys' fees, hours, or incidentals; or duplicative services or testimony.[406]

The regulations for electric utilities also spell out clear mathematical methods for calculating allowed or disallowed rate-case expenses.[407] In addition to mandating allowance for recovery rate-case expenses shown to have been "actually and reasonably incurred" and disallowance of rate-case expenses "shown to have been not reasonably incurred,"[408] the regulations provide two interesting and compelling formulae the commission may use to calculate disallowances. In this first formula, the *disallowance* is calculated as: "the ratio of: (i) the amount of the increase in revenue requirement requested by the utility that was denied, to (ii) the total amount of the increase in revenue requirement requested in a proceeding by the utility."[409] In this equation, the recoverable level of rate case expense would be calculated as:

$$Actual\ RCE - (Actual\ RCE\ \times \frac{Increase\ Denied}{Increase\ Requested})$$

This can be algebraically simplified as calculating the *allowed* rate case expense as follows below, which in practice appears to operate identically to the Missouri formula described above to calculate recoverable "discretionary" rate case expenses where the recoverable rate case expense can be expressed as:

$$Actual\ RCE \times \frac{Increase\ Granted}{Increase\ Requested}$$

In the second mathematical approach, the disallowance of rate case expense is calculated as the ratio of "(i) the amount of the increase in revenue requirement requested by the utility in the rate case related to the issue(s) not reasonably supported by evidence of certainty and specificity to (ii) the total amount of the increase in revenue requirement requested in a proceeding by the utility."[410] The regulations also make clear that "any other appropriate methodology" may also be used to calculate a disallowance.[411]

While the RRC's regulations do not provide equivalent formulae, they do require the agency to consider "whether the request for a rate change was warranted" and "the amount of the increase sought as well as the amount of any increase granted," as well as all other relevant factors.[412] In fact, the RRC has

405. 16 TEX. ADMIN. CODE § 25.245(c)(4) (2014).

406. *Id.* § 25.245(c)(1)-(3) (2014).

407. *Id.* § 25.245(d) (2014).

408. *Id.* § 25.245(d)(1) (2014) ("A disallowance may be based on cost estimates in lieu of actual costs if reasonably accurate and supported by the evidence.").

409. 16 TEX. ADMIN. CODE § 25.245(d)(2)(A) (2014) (showing this disallowance is connected to the utilities requirements of section (c)(5)).

410. 16 TEX. ADMIN. CODE § 25.245(d)(3)(A) (2014).

411. *Id.* § 25.245(d)(2)-(3) (2014).

412. *Id.* § 7.5530(b) (2014).

previously employed an across-the-board percentage disallowance of rate case in an order affirmed by the Court of Appeals.[413] However, the RRC based this percentage on several methods, including the fraction of issues that were raised that it considered unnecessary and the share of testimony and briefing dedicated to those issues.[414] Both the PUC and RRC are relatively confident in reducing or disallowing case expenses compared with regulators in other states and their decisions to do so are generally affirmed by Texas courts.[415] For instance, the RRC has required that rate case expenses be "independently required," for the rate proceeding, rather than a longer-term cost from the utility's service.[416] The Texas courts also defer to an agency's allowance of rate case expenses in response to challenges they permitted too high a level to be recovered in rates.[417]

Until 2019, the Texas PUC also implemented a unique "51% Rule" and a "Settlement Offer Rule" in the context of water utilities.[418] Under the first rule, a utility was not permitted to recover "any rate-case expenses if the increase in revenue generated by the just and reasonable rate determined by the commission after a contested case hearing is less than 51% of the increase in revenue that would have been generated by a utility's proposed rate."[419] Under the second rule, a utility was not permitted to recover

> any rate-case expenses incurred after the date of a written settlement offer by all ratepayer parties if the revenue generated by the just and reasonable rate determined by the commission after a contested case hearing is less than or equal

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413. *See* Railroad Comm'n of Tex. v. Gulf Coast Coal. of Cities, No. 03-14-00302-CV, 2016 Tex. App. LEXIS 5732, at *28-30 (Tex. Ct. App. 2016) (citing Amarillo v. Railroad Comm'n of Tex., 894 S.W.2d 491, 496 (Tex. Ct. App. 1995)).

414. *Id*. at *24-25.

415. Entergy Tex., Inc. v. PUC of Tex., No. 03-14-00706-CV, 2016 Tex. App. LEXIS 2983, at *23 (Tex. Ct. App. 2016) ("Regarding the evidence presented about the reasonableness and necessity of a rate-case expense, the Commission is the sole judge of the weight of the evidence and the credibility of the witnesses. As long as there is a reasonable basis in the record—including in the PFD—for the Commission's determination on the evidence pertaining to a requested rate-case expense, the determination is supported by substantial evidence and is not arbitrary.") (citing Port Neches v. Railroad Comm'n of Tex., 212 S.W.3d 565, 578, 580-81 (Tex. Ct. App. 2006)). *See also* North Aus. Mun. Util., Docket No. 42857, 2015 Tex. PUC LEXIS 3267, at *26 (Oct. 14, 2015) (PUC denying all recovery of rate case expense to city that did not meet its burden); CenterPoint Energy Entex, Docket No. 9364, 2005 Railroad Commn Tex. LEXIS 384, at *174 (Apr. 15, 2005) (disallowing portion of expenses equal to expenditures of party with duplicative position); TXU Gas Distrib., Docket No. 9145-9147, 2000 Railroad Commn Tex. LEXIS 436, at *46 (Oct. 10, 2000) (disallowing expenses related to resisting discovery).

416. *Port Neches*, 212 S.W.3d at 581-82 (Tex. Ct. App. 2006) (citing TEX. UTIL. CODE ANN. § 104.055(b) (West 1997)).

417. Pioneer Nat. Res. USA, Inc. v. PUC, 303 S.W.3d 363, 376-78 (Tex. Ct. App. 2009).

418. Order Adopting Amendments to 16 TAC 24.44 for Consideration at The October 11, 2019 Open Meeting, Rulemaking to Amend 24.44 Rate-Case Expenses Pursuant to Tex. Water Code §13.187 & §13.1871, Project No. 48526, slip op. at 6 (Tex. Pub. Util. Comm'n Oct. 14, 2019), https://interchange.puc.texas.gov/Documents/48937_25_1037611.PDF.

419. Proposal For Publication of Amendment To 16 TAC § 24.44 Approved at The June 27, 2019 Open Meeting, Rulemaking to Amend 24.44 Rate-Case Expenses Pursuant to Tex. Water Code §13.187 & §13.1871, Project No. 48526, slip op. at 8 (Tex. Pub. Util. Comm'n June 27, 2019), https://interchange.puc.texas.gov/Documents/48937_15_1023704.PDF.

> to the revenue that would have been generated by the rate contained in the written settlement offer.[420]

Texas's PUC and RRC both employ a surcharge mechanism for rate case expense recovery.[421] Neither agency allows for inclusion of unamortized rate case expense in rate base.[422] RRC regulations also cover the allocation of rate case expense among affected ratepayers, allowing the burden to be borne more heavily in the municipalities that challenged the increase.[423] The PUC has previously applied a standard that expenses from prior rate cases could not be recovered in the present one absent prior authorization; however, the Texas Court of Appeals overturned this decision, finding the PUC had applied a new standard to the utility and failed to justify its position.[424] It is unclear what position either the RRC or PUC take on this issue following that decision. As a practical matter, however, both the RRC and PUC handle rate case expense issues in severed dockets.[425] Neither the RRC nor the PUC appear to set the target recovery period for these

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420. *Id*. at 7.

421. *See, e.g.*, Natgas, Inc., Docket No. 10899, 2020 Railroad Commn Tex. LEXIS 49, at *9 (Apr. 21, 2020).

422. Oncor Elec. Delivery Co., Docket No. 53601, 2023 Tex. PUC LEXIS 3573, at *58 (June 30, 2023); Reliant Energy., Docket No. 22355, 2001 Tex. PUC LEXIS 112, at *227 (Oct. 4, 2001) ("[utility] should not earn a return on the outstanding balance of its rate case expenses."); Arkansas Nat. Gas Co., Docket No. 9620, 2006 Railroad Commn Tex. LEXIS 823, at *13 (Feb. 9, 2006) ("Normally, no amount related to rate case expenses is included in rate base. Rate case expenses are typically recovered only through a surcharge, which is no longer charged once rate case expenses have been recovered.") (hearing officer's order that was not appealed); *but see* Severed Rate Case Expenses from Docket No. 9762, Docket No. 9787, 2009 Railroad Commn Tex. LEXIS 588, at *60 (Sep. 16, 2009); Rate Case Expenses Severed from Gas Utils. Docket No. 10083, Docket No. 10102, 2012 Railroad Commn Tex. LEXIS 676, at *42 (May 31, 2012) (allowing utility to "apply an interest carrying charge on the un-recovered monthly rate case expense balance at a rate of .12%, which is the 2012 [PUC] interest rate for customer deposits."). *See also* Rulemaking to Amend § 24.44 Rate-Case Expenses Pursuant to Tex. Water Code § 13.187 and § 13.1871, 2019 Tex. PUC LEXIS 2618, at *7 (Oct. 14, 2019) (discussing argument by utilities that the carrying costs associated with rate case expenses are sufficient incentive to discipline spending).

423. 16 TEX. ADMIN. CODE § 7.5530(e) (2002) ("The utility's required regulatory expenses shall be allocated uniformly to all customers affected by the proposed rate change. The utility's litigation expenses and estimated expenses, to the extent there are any, shall be allocated to affected customers in the municipalities or coalitions of municipalities participating in the appellate proceeding and affected customers subject to the original jurisdiction of the Commission."); *see also* 16 TEX. ADMIN. CODE § 7.5530(d)(1)-(3) (2002) (defining "required regulatory expenses," "litigation expenses," and "estimated expenses"). *See* Rate Case Expenses Severed from Gas Utils. Docket Nos. 9791, Docket No. 9811, 2010 Railroad Commn Tex. LEXIS 595, at *28 (June 1, 2010) ("There is also an equity issue of whether or not it is sound policy to reduce the cost of litigation to the party litigant by allocating a portion of costs to non-litigants. We recommend that the Commission not allocate rate case expenses incurred in GUD Nos. 9791 and 9811 to customers located within the GCCC cities that did not participate in GUD No. 9791."), *final order* Rate Case Expenses Severed from Gas Utils. Docket No. 10038, 10047, 10052, 10058, 10070 and 10071, Docket No. 10051, 2012 Railroad Commn Tex. LEXIS 664, at *25 (May 2012).

424. Oncor Elec. Delivery Co. LLC v. Public Util. Comm'n of Tex., 406 S.W.3d 253, 269 (Tex. Ct. App. 2013).

425. Windermere Oaks Water Supply Corp., Docket No. 50788, 2024 Tex. PUC LEXIS 827, at *24-25 (Mar. 28, 2024) ("Implementation of the rate-case expense surcharge will be overseen in Docket No. 56272, . . . the Commission severs all issues related to rate-case expenses incurred by [utility] in this appeal after January 31, 2023 into a new docket."); Texas Gas Serv. Co., Docket No. 10928, 2020 Railroad Commn Tex. LEXIS 72, at *3 (Aug. 4, 2020) (recounting reverence of rate case expense issue).

surcharges in line with the frequency of rate filings. Rather, the focus appears to be on ratepayer impact.[426]

UTAH

There does not appear to be any statutory, regulatory, or contested decisional authority governing the recoverability of rate case expenses by utilities in Utah. As a practical matter, it appears that some recent rates authorized by Utah's Public Service Commission do incorporate recovery of rate case expenses, although those applications were not resolved on the merits.[427]

VERMONT

Recent decisions by the Vermont Public Utilities Commission (formerly the Public Service Board) allow recovery of rate case expenses through normalization of a historic average level. There are no Vermont statutes or regulations that directly govern this item. In more recent decisions, the Vermont PUC has articulated that it "typically views rate case and regulatory expense as a recurring cost, and in calculating the appropriate level of costs to be included in rates for service, uses a rolling average of historic expense over three to five years, or a reasonable period of time."[428] Under this approach "rate case expenses are normalized and rates levelized over a longer period of time."[429] Of note, older decisions of the Vermont PUC and courts indicate the agency used to follow the approach of amortizing current rate case expenses.[430]

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426. Windermere Oaks Water Supply Corp., Docket No. 50788, 2024 Tex. PUC LEXIS 957, at *24 (Mar. 20, 2024) (ALJ "recommend Windermere be allowed to recover the amount through a surcharge to be assessed over a 42-month period. The Commission agrees with the [ALJ] on the amount of the surcharge but determines the surcharge should be assessed over 45 months to reduce the impact on [utility's] ratepayers."); Rate Case Expenses Severed from Gas Utils., 2012 Railroad Commn Tex. LEXIS 676, at *33.

427. *See* Community Water Co., Docket No. 17-098-01, 2018 Utah PUC LEXIS 27, at *2 (14, 2018) (adopting the rates contained in PSC staff's proposal that was not formally settled but agreed to at hearing as "sufficient to demonstrate that a change in rates is necessary"); Utah Dep't. of Com. Exhibit No. 2.0 DIR at 10-1, Community Water Co., Utah Pub. Serv. Comm'n Docket No. 17-098-01 (Feb. 13, 2018) (Redacted Direct Testimony of Gary Smith recommending a confidential level of rate case expenses be amortized over three years), https://pscdocs.utah.gov/water/17docs/1709801/300021RedacDirTestSmithDPU2-13-2018.pdf.

428. Citizens Commc'ns Co., Docket No. 6596, 2002 Vt. PUC LEXIS 275, at *156 (July 15, 2002); Citizens Utils. Co., Docket Nos. 5841 & 5859, 1997 Vt. PUC LEXIS 6, at *138 (June 16, 1997) ("Costs of regulatory proceedings are undoubtedly recurring, just as are costs of storm damage. Unprecedented levels of regulatory costs, like unprecedented costs from storm damage, are extraordinary yet recoverable (unless, of course, there is some other basis for [disallowance]). The extraordinary level of costs militates for recovery over a period of time, or for recovery of a running average, but not for disallowance.").

429. Shoreham Tel. Co., Docket No. 6914, 2004 Vt. PUC LEXIS 192, at *150 (Nov. 4, 2004) ("Otherwise, rates would fluctuate widely from year to year depending on the nature of individual proceedings before the Board.").

430. Henry G. Hastings v. Village of Stowe, Docket No. 3037, 1965 Vt. PUC LEXIS 4, at *15-16 (Jan. 28, 1965); Green Mountain Power Corp., Docket No. 3501, 1972 Vt. PUC LEXIS 2, at *15-16 (Apr. 12, 1972); Central Vt. Pub. Serv. Corp., Docket No. 5132, 1987 Vt. PUC LEXIS 16, at *59-65 (Jan. 2, 1987); Stowe Elec. Dep't, 134 Vt. 559, 563 (1976) ("Traditionally, rate case expenses have been recovered over a three-year period"); *In re* Burlington Elec. Light Dep't, 135 Vt. 114, 119 (1977) (affirming decision setting one year amortization period).

VIRGINIA

Virginia's energy regulator, the State Corporation Commission (SCC), permits utilities to recover a normalized historic average level of rate case expenses along with other regulatory expenses. There are no statutes or regulations directly addressing this issue. Unlike many other jurisdictions, however, the Virginia SCC has endorsed the idea that rate case expenses should not be treated as a regulatory asset because they are not "non-recurring, unusual or beyond the control of the company."[431] While many recent decisions have been resolved by stipulation,[432] when settling this issue on the merits the SCC has rejected requests for separate treatment.[433] The Virginia Supreme Court has upheld the SCC's discretion on this issue and held that the agency is "not required to impose upon the ratepayers whatever a utility might choose to spend for legal and accounting assistance in connection with a rate case."[434]

At times, the Virginia SCC appears to have looked to current rate case expenses in order to establish a reasonable level to be amortized over a period of years.[435] When engaged in this approach, the SCC has articulated that "a public utility's rate case expense must bear some reasonable relationship to the utility and to the utility's rate request" and that "ratepayers cannot be the guarantors of whatever [utilities] might choose to spend for rate case expense."[436]

WASHINGTON

The Washington Utilities and Transportation Commission (UTC) permits utilities to recover their reasonable and necessary rate case expenses amortized over several years. There does not appear to be any statutory or regulatory provisions governing this practice nor judicial precedent. The UTC, however, has articulated its policy that "rate case legal expenses are properly recoverable, and it is reasonable to amortize expenses from the present case" over a several-year

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431. Aqua Va., Inc., No. PUE-2014-00045, 2016 Va. PUC LEXIS 23, at *25 (Jan. 7, 2016); *see also id.* at *32 ("Staff Recommendations A-G hereby are adopted."); Virginia-American Water Co., No. PUE-2015-00097, 2017 Va. PUC LEXIS 334, at *15 (May 24, 2017) (allowing the utility to update the average data with more recent expenses).

432. *See, e.g.*, Aqua Va. Inc., 2016 Va. PUC LEXIS 23, at *26 ("the Company withdrew its request for regulatory asset treatment of rate case costs, . . . "); Virginia Nat. Gas, Inc., No. PUE-2016-00143, 2017 Va. PUC LEXIS 946, at *14 (Dec. 21, 2017).

433. Massanutten Pub. Serv. Corp., No. PUR-2017-00069, 2018 Va. PUC LEXIS 918, at *1 (Dec. 21, 2018) (this practice does "not preclude the Commission from reflecting a reasonable amount of normalized regulatory expense in the Company's annual revenue requirement for purpose of the instant proceeding. Based on the specific, unique circumstances attendant to the Company and the facts of this case, we find that it is reasonable to include a level of regulatory expense, normalized over five years, that reflects: (i) five years of regulatory costs (2013-2017); and (ii) the legal costs of the Potomac Riverkeeper Suit. This results in a normalized level of regulatory expense of $277,079, which we find reasonable for purposes of this specific rate proceeding.").

434. Lake of Woods Util. Co. v. State Corp. Comm'n, 286 S.E.2d 201, 206 (Va. 1982).

435. Virginia *ex. rel*. Desmond v. United Water Va., Inc., No. PUE970544, 1998 Va. PUC LEXIS 234, at *50 (Sep. 30, 1998) ("[I]t is the time and expense involved in preparing and presenting a rate case that determines what level of expenses is appropriate. . . ."); Virginia *ex rel*. Strock v. B&J Enters., L.C., No. PUE-2001-00716, 2003 Va. PUC LEXIS 265, at *14 (June 27, 2003).

436. Virginia *ex rel*. Strock v. B&J Enters., L.C., 2003 Va. PUC LEXIS 265, at *19-20 (citing Lake of the Woods Util. Co. v. State Corp. Comm'n, 286 S.E.2d 201, 206 (1982)).

period.[437] The UTC has rejected the argument that the costs themselves should be "shared" by reducing the recoverable amount by 50%.[438] The UTC still "may limit recovery of excessive legal or expert witness fees when the evidence establishes that certain expenses are unreasonable or unnecessary."[439] The UTC has articulated two disjunctive criteria for disallowance: first "[e]xpenses found to be 'exorbitant and imprudent'" should be entirely disallowed, and, second, expenses that are found to be "extraordinary and excessive, although not imprudent, may be disallowed in part."[440] The UTC has disallowed recovery of rate case expense where the utility has not met its burden to show them to be reasonable or necessary.[441]

The Washington UTC has explained that the amortization periods for recovering rate case expenses "vary depending on the time between rates cases, consideration of the magnitude of the cost claimed, and the effect of including such costs in rates."[442] With this approach the UTC does not necessarily aim for the amortization period to match the historic or expected rate case filing intervals.[443] Unlike several jurisdictions, however, it does permit utilities to recover unamortized expenses from prior rate cases.[444] However, it also conversely requires a utility to reduce its rates if the costs are amortized before its next rate case.[445]

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437. Washington Utils. & Transp. Comm'n v. Puget Sound Pilots, Order No. 08, 2023 Wash. UTC LEXIS 209, at *117 (Aug. 10, 2023); Washington Utils. & Transp. Comm'n v. Bremerton-Kitsap Airporter, Inc., Docket No. TC-001846, 2002 Wash. UTC LEXIS 276, at *20 (Aug. 2, 2002); Washington Utils. & Transp. Comm'n v. Continental Tel. Co. of Nw., Inc., 1977 Wash. UTC LEXIS 4, at *23 (May 6, 1977). *But see* Washington Utils. & Transp. Comm'n v. Puget Sound Energy, Inc., Order No. 08, 2012 Wash. UTC LEXIS 423, at *117 (May 7, 2012) (acknowledging prior rate case expense level established via settlement based on normalized level as reasonable).

438. Washington Utils. & Transp. Comm'n v. Puget Sound Energy, Inc., Docket No. UE-031471, 2005 Wash. UTC LEXIS 77, at *118-19 (Feb. 18, 2005).

439. Washington Utils. & Transp. Comm'n v. Puget Sound Pilots, Order No. 09, 2020 Wash. UTC LEXIS 627, at *141 (Nov. 25, 2020).

440. Washington Utils. & Transp. Comm'n v. Waste Control, Inc., Order No. 13, 2015 Wash. UTC LEXIS 672, at *49 n.79 (citing cases) (affirming numerous disallowances and adjustments).

441. Washington Utils. & Transp. Comm'n v. Puget Sound Pilots, 2023 WASH. UTC LEXIS 209 at *121 (utility "is not entitled to recover increasing legal costs without providing any justification or evidence supporting their reasonableness.").

442. Washington Utils. & Transp. Comm'n v. Waste Control, Inc., 2015 Wash. UTC LEXIS 672, at *58.

443. *Id*. at 58-59 (adopting the "longer" five-year amortization period proposed even when "it seem[ed] unlikely that [the utility] will file another general rate case within the next five years."); Washington Utils. & Transp. Comm'n v. Bremerton-Kitsap Airporter, Inc., 2002 Wash. UTC LEXIS 276 at *20.

444. Washington Utils. & Transp. Comm'n v. Puget Sound Pilots, 2023 Wash. UTC LEXIS 209, at *118-19.

445. Waste Control, Inc., Order No. 01, 2018 Wash. UTC LEXIS 223, at *3 (Sep. 27, 2018) ("We find that granting the Company an additional year to recover its prior unamortized rate case costs, which allows the Company to recover costs associated with the instant filing, is reasonable. To ensure rate case costs are not over recovered, we require the Company to file tariff revisions, effective November 1, 2021, to remove those costs from rates.").

WEST VIRGINIA

The Public Service Commission of West Virginia permits utilities to recover a normalized level of rate case expenses. There are no statutory or regulatory provisions governing this practice. However, the PSC's policy limiting recovery of actual rate case expenses has been affirmed by the state's Supreme Court.[446] The PSC's policy is "designed to provide a normalized level for the estimated future cost to litigate rate proceedings and not to capture past expenses."[447] Therefore, "actual rate case expenditures are not binding on [the PSC's] determination of recoverable expense," but rather "the level of rate case expense included for rate recovery should be a representative average or normalized amount of expected future rate case costs."[448]

WISCONSIN

The Wisconsin Public Service Commission does not provide clear guidance as to the recovery of rate case expenses. There is a statutory provision that prevents utilities from recovering "costs in a proceeding before the commission which exceed 4 times the total amount assessed to the utility" for the Commission's investigation expenses "unless the object of the expenditure has been ordered by the commission."[449] However, there does not appear to be any judicial or regulatory precedent applying this standard.[450] Moreover, even though the statute directs the PSC to implement rules for the utility to recover such costs, they do not appear to have been promulgated.[451] Some decisions of the Wisconsin

446. Jefferson Utils., Inc. v. PSC, 227 W. Va. 589 (2011). *See also* Wheeling v. Natural Gas Co., 115 W. Va. 149, 173 (1934) ("the commission, although not the manager of public utilities, has the power to scrutinize carefully extravagant expenditures in a rate case.").

447. Bluefield Gas Co., No. 12-0427-G-42T, 2013 W. Va. PUC LEXIS 215, at *41 (Jan. 30, 2013); *see also* Jefferson Utils., Inc., No. 10-0974-W-PC, 2011 W. Va. PUC LEXIS 340, at *22-23 (Feb. 18, 2011) ("our averaging mechanism is not based on allowing recovery of past rate case expenses that are so recent that the utility has not had an opportunity to fully recover them."), *aff'd*, Jefferson Utils., Inc. v. PSC, 227 W. Va. 589 (2011).

448. Megan Oil & Gas Co., No. 11-0532-G-42T, 2011 W. Va. PUC LEXIS 2571, at *24-25 (Oct. 27, 2011) (citing Jefferson Utils., Inc., No. 10-0974-W-PC et al., 2011 W. Va. PUC LEXIS 340 (Feb. 18, 2011); West Va.-Am. Water Co., No. 10-0920-W-42T, 2011 W. Va. PUC LEXIS 901 (Apr. 18, 2011); Monongahela Power Co., No. 06-0960-E-42T et al., 2007 W. Va. PUC LEXIS 1611 (May 22, 2007); Virginia-American Water Co., No. 08-0900-W-42T, 2009 W. VA. PUC LEXIS 614 (Mar. 25, 2009)). *See also id*. at *25 ("The Commission practice for determining a representative average or normalized amount for rate case expense is to use an average of costs over some period of time. This is a normalization approach and should not be confused as a deferral or an amortization approach which the Commission does not authorize.").

449. WIS. STAT. § 196.03(4) (2025).

450. Several decisions from the 1980s summarily conclude they do not violate this limit without analysis. *See* Wisconsin Fuel & Light Co., Docket No. 6640-GR-100, 1986 Wisc. PUC LEXIS 23, at *27-28 (Oct. 7, 1986); Wisconsin Nat. Gas Co., Docket No. 6670-GR-10, 1983 Wisc. PUC LEXIS 26, at *25 (Sep. 8, 1983); Wisconsin Fuel & Light Co., Docket No. 6640-GR-10, 1983 Wisc. PUC LEXIS 24, at *14 (Sep. 23, 1983); Wisconsin Nat. Gas Co., Docket No. 6670-GR-9, 1982 Wisc. PUC LEXIS 26, at *30 (Oct. 28, 1982); Wisconsin Nat. Gas Co., Docket No. 6670-GR-7, 1981 Wisc. PUC LEXIS 32, at *26 (Sep. 29, 1981).

451. WIS. STAT. § 196.03(4) (2025) ("The commission, by rule, shall establish procedures whereby a public utility may recover its expenditures under this subsection.").

PSC have endorsed an amortization of current rate case expenses.[452] However, some recent decisions have endorsed normalization based on a historic average.[453] And in the context of water utilities, the Wisconsin PSC has filing instructions for rate increases that specify "[r]ate case expenses are included in Regulatory Commission Expense and must be normalized over an appropriate time period."[454]

WYOMING

The Wyoming Public Service Commission permits utilities to recover their current rate case expenses amortized over a period several years. There is no statute or regulation directly governing this practice. However, the Wyoming PSC has allowed utilities to recover these costs through amortization.[455] The PSC appears to generally defer to the utilities' estimate of rate case expenses.[456] In one proceeding, however, the agency faulted the utility for providing insufficient data to support its request and cautioned that such costs would be recoverable only if the agency "can be certain of the particularity of the expense" and that recovery would be denied where it was "unable to determine accurately what the expense pertains to."[457] The PSC allows utilities to update their requested rate case expense level throughout the course of the proceeding.[458]

The Wyoming PSC amortizes recoverable rate case expenses and appears to set the amortization period to align with the expected interval until the next case.[459] On at least one occasion, the PSC has directed the utility to employ a "rider" surcharge mechanism.[460] It has also cautioned that "[i]f a utility recovers

452. Madison Gas & Elec. Co., Docket No. 3270-UR-106, 1993 Wisc. PUC LEXIS 18, at *5-6 (June 24, 1993); General Tel. Co. of Wis., Docket No. 2-U-5149, 1960 Wisc. PUC LEXIS 12, at *13 (Aug. 16, 1960).

453. Northern States Power Co., Docket No. 4220-UR-121, 2015 Wisc. PUC LEXIS 537, at *45 (Dec. 23, 2015) (reducing recoverable Regulatory Commission Expense to "more consistent with 3-year average historic spending" and account for over-budgeting).

454. Wisconsin Pub. Serv. Comm'n, Application to Increase Water Rates at "Instructions" Tab, Cell D, Row 150, available for request at https://apps.psc.wi.gov/RATES/ratecase/water.aspx; *see also, e.g.*, Application of Biron Municipal Water Utility at "Instructions" Tab, Cell D, Row 150, Docket No. 510-WR-102 (Wisc. Pub. Serv. Comm'n filed Oct. 29, 2025), https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=566207 (completed form submitted by applicant).

455. *See, e.g.*, SourceGas Distrib. LLC, Docket No. 30022-148-GR-10, 2010 Wyo. PUC LEXIS 486, at *99-100 (Dec. 23, 2010); Vista W. Water Co., Docket No. 80007-29-WR-08, 2009 Wyo. PUC LEXIS 454, at *61 (Oct. 16, 2009).

456. SourceGas Distrib. LLC, 2010 Wyo. PUC LEXIS 486, at *98 ("Regarding the rate case expense, the Commission accepts the Company's revised estimate of $417,751 for this case"); Vista W. Water Co., 2009 Wyo. PUC LEXIS 454, at *61.

457. Pinedale Nat. Gas, Inc., Docket No. 30016-41-GR-06, 2008 Wyo. PUC LEXIS 381, at *114-15 (Oct. 2, 2008).

458. Vista W. Water Co., Docket No. 80007-42-WR-17, 2019 Wyo. PUC LEXIS 31, at *29 (Jan. 18, 2019) ("As to rate case expense, the estimated amount of $85,000 is reasonable given the expensive and time-consuming nature of this proceeding."); *see also* Pinedale Nat. Gas, Inc., 2008 Wyo. PUC LEXIS 381, at *113 (the Wyoming PSC "typically includes expenses incurred through hearing").

459. SourceGas Distrib. LLC, 2010 Wyo. PUC LEXIS 486, at *99-100 ("Three years seems a more likely period for any significant sea change in the economy to become manifest, or for any threats of costly pipeline regulation to be realized. Thus, three years is an appropriate period over which to amortize this expense.").

460. Nordic Ranches Water, LLC, Docket No. 80024-6-WR-18, 2019 Wyo. PUC LEXIS 672, at *27-28 (Dec. 12, 2019).

uncollected rate case expense from its last rate case in a new rate case, . . . any over-collected amount is subject to refund in the next rate case."[461]

461. Montana-Dakota Utils. Co., Docket No. 30013-351-GR-19, 2020 Wyo. PUC LEXIS 259, at *25 (Mar. 17, 2020).

POWERLESS: THE PEOPLE'S STRUGGLE FOR ENERGY

By Diana Hernández & Jennifer Laird
*Reviewed by Kenneth A. Barry**

I. INTRODUCTION

"Food insecurity" has become common parlance, among the anxieties that haunt Americans stuck on the lower rungs of the socioeconomic ladder. A new book by college professors Diana Hernández and Jennifer Laird -- *Powerless: The People's Struggle for Energy"* (2025) (*Powerless*) -- urges us to move "energy insecurity" up on the list of chronic poverty issues demanding more attention and resources.[1]

The subject has many dimensions, as the 246-page volume, divided into fourteen chapters, attests.[2] Any comprehensive examination of energy issues and real-world impacts at the retail level entails a raft of technologies old and new, extensive data analysis, law and policy initiatives, economic theory and practice, climate change, and – particularly in this instance -- sociology. Out of this multifaceted deck, the authors wisely draw first from the human element, spotlighting specific instances of catastrophic incidents because utilities, landlords, or the public sector writ large didn't care enough to address extreme energy insufficiency or defective climate control equipment.

The book's dramatic opening grabs reader's attention and forces us to contemplate whether society has overlooked or underestimated the need to provide a minimum level of household energy and comfort for all. And now, well into the first year of a new Trump Administration that is prioritizing cutbacks in federal support for social services, the authors' focus on the consequences of neglect is especially timely.

What also jumps out as you start this book is the passion the authors bring to the project. While they assiduously apply their academic disciplines – with ample helpings of statistical tables and graphs -- the professors emphasize from the get-go that this book is personal as well. In the preface, the authors recount that Professor Hernández gave a guest lecture to Professor Laird's sociology students about her research work on energy insecurity. In an ensuing student focus group, the authors learned that "energy insecurity was not an abstract concept but rather

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1. Hernández is identified as an associate professor of sociomedical studies in the Mailman School of Public Health at Columbia University. Laird is identified as an assistant professor of sociology at New York City's Lehman College, part of the CUNY system. DIANA HERNÁNDEZ & JENNIFER LAIRD, POWERLESS: THE PEOPLE'S STRUGGLE FOR ENERGY xiii (2025).

2. The book weighs in at over 300 pages when appendices, endnotes, references, and an index are taken into account.

a familiar reality among this student population" (most of whom were the first in their families to attend college).[3]

Similarly, in the introduction, the authors sound a note of distress and empathy repeated again and again in the more detailed chapters to follow:

> With access to this essential service so dependent on individual financial circumstances and resourcefulness, households too often find themselves uniquely vulnerable and frequently confronting the looming possibility of being disconnected because of unpaid bills. Individuals experiencing energy insecurity face sleepless nights, mental strain, and the guilt of failing to provide, all stemming from the unaffordability of utility services, the inefficiency of America's housing stock, and the administrative hurdles associated with seeking energy assistance. In the United States, those experiencing energy insecurity feel uncomfortable, exposed, marginalized, and dehumanized . . . . [It] becomes a source of shame that leads individuals to hide their substandard living conditions from friends and family.[4]

While the didactic element of *Powerless* is unavoidable, the authors continually splice together data on the many facets of the issue with the stories of individuals experiencing the kind of strain, suffering, and humiliation described in the quotation above. These stories were garnered in interviews the authors (especially Professor Hernández) did in researching the book, with travels across the country. The personal stories reinforce and give poignancy to the metadata distilled in cited studies replete with statistics on energy poverty, the coping techniques of those affected, and the success (or lack of same) in programs intended to mitigate energy insecurity. The book is far more compelling because the interview subjects' plights drive sympathy and compassion in ways that reams of statistics, however weighty, cannot.

The avowed goal of *Powerless* is to educate the public about an underappreciated life challenge for many Americans facing unrelenting and sometimes increasing energy bills, along with the costs of providing other human necessities. The book is also a clarion call to action, as the final paragraph of the book's preface declares:

> By providing conceptual frameworks, actionable evidence, and a treatment plan, this book aims to inspire and empower you, the reader, to take action that drives policy and social change toward household energy equity and justice.[5]

II. WHERE THE AUTHORS STAND ON PUBLIC ASSISTANCE

An ongoing, often contentious debate in the United States concerns what services constitute basic human needs the public sector (ultimately, taxpayers) should either provide gratis or subsidize where necessary. Primary and college education? Health care? Daycare? Food security? Housing? *Powerless* makes a powerful case that energy services deserve strong consideration. There are indications of this stance all along, but it is in the middle of the book – in a section on the many hurdles involved in seeking financial assistance -- that a pointed catechism lays this bare:

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3. HERNÁNDEZ & LAIRD, *supra* note 1, at xix.
4. *Id*. at 2.
5. *Id*. at xix.

> But should not everyone be entitled to a basic level of energy service? Do we believe it is fair and just for our nation to create energy haves and have-nots? Is energy a luxury? Should we allow households to be burdened by the inability to afford this basic necessity of life? Unfortunately, energy assistance programs in the United States are not designed to treat energy as a universal right.[6]

The authors' inclination is transparently obvious: no one in this country, they imply, should be forced to shiver or sweat in their homes, or cook on improvised but unhealthy and perhaps dangerous stoves, or (if their gas service is on) use their range as a space-heater, because of their inability to cover their electricity bills on their meager income. But it is not so obvious to political leaders, they posit. The book documents a patchwork of state and local agencies administering complex federal programs that may, but more frequently do not, provide enough financial assistance to enable low-income individuals to meet their monthly utility bills.

The problem may lie in under-resourcing these programs, or in a Kafkaesque maze of bureaucratic requirements to prove eligibility.[7] The authors describe the two national components of the "energy safety net": the Low-Income Home Energy Assistance Program (LIHEAP) and the Weatherization Assistance Program (WAP) but observe that "neither program comes close to reaching all eligible households."[8] To the contrary, they are both "underfunded and, in many ways, mistargeted."[9]

Chapter 7 delineates a myriad of hurdles and hassles in the way LIHEAP benefits are parceled out. First, Congress's overall funding for the budget year effectively caps what applicants nationwide might receive, regardless of individual or aggregate need. Next, the state-by-state allocations are biased in favor of cold-weather states (so heating needs outrank cooling needs).[10] Then, epitomizing the "patchwork" nature of the program, some states augment the limited federal funds, and each state has discretion in structuring eligibility and allocations (for example, are benefit dollars spread out among the widest number of those with qualifying incomes, or concentrated among the very poorest within the eligibility pool?)[11] Finally, applicants must swim the moat of paperwork submittal, with some state offices better equipped than others to render assistance:

> Negatively stereotyped by some as 'welfare bureaucrats,' benefits administrators have to help their clients navigate a complex web of eligibility rules and paperwork requirements. They often work in understaffed offices . . . The most effective case managers develop procedural work-arounds and are successful advocates for their clients.[12]

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6. *Id*. at 122.

7. Chapter 7 describes the exasperation of a woman who requested an extension from her public utility for paying her bill, just after her cancer surgery. The utility representative insisted on a note from her doctor, which only she (not her father) could bring, although she was fresh from surgery. The representative replied to this dilemma, according to the story, by saying she should have gotten the doctor's notice in the hands of the utility in advance of the operation. HERNÁNDEZ & LAIRD, *supra* note 1, at 121.

8. *Id*. at 122-23. The authors explain that LIHEAP reaches about 20% of those eligible while WAP only gets to 0.2% of qualifying homes.

9. *Id*.

10. This bias was ameliorated in 1984, but not wholly eliminated. *Id*. at 124.

11. HERNÁNDEZ & LAIRD, *supra* note 1, at 126.

12. *Id*. at 126-27.

Yet another caveat is that LIHEAP is primarily designed as aid for heating costs (whether fuel oil, gas, or electricity); but, the authors note, increasing summertime heat attributed to climate change has made *cooling* energy costs just as important to human comfort and health, especially in the Deep South states where poverty is common.

Another driver of chronic energy poverty is the dilapidated or poorly insulated condition of housing stock so often inhabited by lower-income residents. The authors devote an entire section (Chapter 4, "The Physical Dimension: Disrepair and Drafts") to this syndrome of unaffordable repairs leading to even less affordable energy costs (or simply doing without). In several case studies, the book describes how difficult it is for people with little financial means to replace broken or inefficient heating or cooling facilities, or to remedy inadequate insulation. The upshot is that such residents suffer from uncomfortable or outright unhealthy indoor environments or, alternatively, have higher energy costs to bear versus well-insulated homes. For apartment dwellers, the root of the problem may be traced to an indifferent landlord who cares little for renters' comfort and/or lacks financial incentives to invest in better equipment or insulation.[13]

Enter WAP, the federal weatherization program. But the headwinds for this program's would-be beneficiaries appear even more daunting than those facing LIHEAP applicants. The authors cite many of the same challenges: e.g., lack of awareness about the program; insufficient funding; and red tape complicating gaining eligibility.[14] Beyond that, the authors list several attitudinal factors (such as bad experiences with deceptive marketers of renewable energy or solar installations)[15] or mistrust in general in partnering with the government. Stringent criteria for payback ratios also screen out some worthwhile projects, the authors noted.[16]

The chapter includes a host of suggestions for reform of these underperforming programs. Unsurprisingly, the top recommendation is to raise the budgets, in these times of higher energy costs and "global warming [increasing] extreme weather events."[17] The challenge here, I'm sure the authors would agree, is that the current federal administration is headed in the opposite direction (looking to cut the budget for social assistance and pass the baton to the states).[18]

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13. *Id*. at 82-94.

14. *Id*. at 133.

15. In this regard, the authors draw on a case study in Michigan where only 15% of an initially identified set of applicants actually made it to the application stage and even fewer – 6% – received an assistance grant. HERNÁNDEZ & LAIRD, *supra* note 1, at 134.

16. *Id*. at 134-35.

17. *Id*.

18. See Yasmeen Abutaleb & Maeve Reston, *States Face Massive New Costs Under Trump Budget Cuts*, WASH. POST POL. (last updated Sep. 8, 2025), https://www.washingtonpost.com/politics/2025/09/08/states-medicaid-snap-cuts-trump/

III. HOW BIG IS THE "ENERGY INSECURITY" PROBLEM?

It's bigger than you might think, the authors of *Powerless* persuasively argue. Appropriately, the book dwells at length on the defining characteristics and dimensions of this peculiar form of hardship, and there are reminders scattered throughout that energy penury is more common than the public – at least those of us able to manage our monthly utility bills – might think. But the point is addressed more head-on in Chapter 2 ("The Prevalence of Energy Insecurity in the United States"). Here, the authors broadly demonstrate that their anecdotal evidence of mental stress and physical deprivation are representative of large slice of the population.

To present a clear idea of the issue's scope, Hernández and Laird have mastered a wealth of third-party survey data and rendered it digestible in cogent prose and easy-to-read graphs and charts. Especially revealing is a map of the U.S. that reflects the extent of energy insecurity being experienced in each state.[19] A major accomplishment is the development of a multi-pronged set of criteria for judging – as objectively as possible given the inherently subjective nature of some aspects – whether individual households should be deemed "energy insecure."[20]

The key findings of this chapter, along with the authors' observations as sociologists, are too meaty to summarize here, but a major takeaway is that somewhere between 10 - 13% of households in America meet the authors' definition of "energy insecure."[21] Notably, this is a much larger number than the subset of those experiencing actual disconnections – a group pegged as between 2 - 5%.[22] And while this percentage of disconnected households in a given year is relatively small, it's not negligible. The authors report that 2.2 million households endured shutoffs in 2020 – a year when the pandemic induced many states to implement disconnection moratoriums – and, going back to 2015, over 3 million homes were disconnected.[23]

In light of the acute deprivation and despair service cutoffs cause to such families – often with small children to care for and no savings to fall back on – *Powerless* devotes an entire chapter ("Disconnections") to the topic.[24] The section focuses on the ordeals of two families – one in Fresno, California, the other in Philadelphia – as they pinball between low-paying or spotty jobs, utility offices, friends or relatives (often hard up themselves), and public assistance agencies, all while trying to run a home without electricity or gas. The chapter goes on to explore the jagged landscape of state and utility forgiveness policies, which tend to show more clemency for the elderly and ill than to young families. There are also seasonal variations, so that a household with arrearages in the winter may avoid

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19. HERNÁNDEZ & LAIRD, *supra* note 1, at 56 fig. 2.6

20. *Id*. at 49-54 (presenting a long table of "Dimensions and Indicators of Energy Insecurity . . . ." spanning physical conditions of housing, economic factors and triggers, coping mechanisms, and consequences.) *Id*. at 49 fig. 2.1.

21. *Id*. at 57.

22. HERNÁNDEZ & LAIRD, *supra* note 1, at 44.

23. *Id*. at 145.

24. *Id*. at 141-157.

disconnection, only to face it in the spring. The authors advocate stronger regulations to limit disconnections and "sturdier umbrellas" in public assistance programs.[25]

IV. "STRUCTURAL DETERMINANTS": HOW HISTORY HAS STACKED THE DECK

Powerless could have maintained a tighter focus on the more literal or physical meaning of its title. That is, it could have concentrated on documenting the extent of energy insecurity in America and the stresses it causes to individual lives and families. However, the authors take it up a notch with Chapter 11 ("The Structural Determinants of Energy Insecurity") by veering into more vividly political terrain.

The overriding argument is that the sufferings, physical and economic, of the energy-deprived are the fault of an inequitable system, rooted in a long history of discrimination against the underclass. And it is part of an all-encompassing syndrome, the authors maintain:

> Energy insecurity parallels other inequities in the experience of poverty, including education, mass incarceration, eviction, and other well-recognized social problems that often attract greater public policy and scholarly attention.[26]

In this chapter, the authors adopt, in an energy context, the socio-historical critique of many Progressive academics, activists, and opinion leaders in the wake of the Black Lives Matter Movement (peaking in 2021-2022). "Structural racism," they submit, "profoundly limits the opportunities of communities of color in the United States through its effects on income and employment opportunities, health and educational trajectories, housing conditions, and environmental exposures." These "inequities," they add, "have existed for centuries" and constitute a "root cause of energy insecurity" in that they impact a person's wealth, education, *etc.*[27]

After several pages detailing these disadvantages and their interplay, the authors sum it up. The culprit is a "racialized" society, one that perpetuates the existence of a class saddled by multiple disadvantages:

> Energy insecurity is symptomatic of entrenched inequalities that manifest in divergent housing, wealth, and income trajectories. These disparities are historically embedded and perpetuated by contemporary policies and practices.[28]

This chapter also views "energy systems" – and by extension their users – as beholden to "market-based institutions." The "cost of energy," the authors maintain,

> is set by market-based institutions that control production costs, supply and demand, competition, global politics, infrastructure, and distribution and operating costs as well as regulatory pricing, taxes, and fees.[29]

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25. *Id*. at 157.
26. HERNÁNDEZ & LAIRD, *supra* note 1, at 193.
27. *Id*. at 195.
28. *Id*. at 203.
29. *Id*. at 199-200.

This is partially valid but seems too sweeping a statement. Transmission and distribution costs and rates remain regulated services in both the electricity and gas arenas, while in about half the states, generation infrastructure (and rates based on these major fixed costs) are also closely regulated. It is nevertheless true that fuel inputs in both energy industries are driven by market forces.

An ensuing chapter – (Chapter 12, "Energy Insecurity from Grid Failure and Long-Term Power Outages") -- takes a critical look at a system increasingly under stress from climate change, according to the authors. Examining the frequency of extended power outages across the U.S. and Puerto Rico, the book claims that the transition to clean energy with backup storage is "critical to mitigate the worst effects of climate change," but at the same time acknowledges that the costs of modernizing the grid will, at least in the short run, increase the cost of energy and thereby the population of those experiencing energy insecurity.[30]

Chapter 13 ("Policy Pathways to Household Energy Security for All") catalogs an assortment of guiding principles and practical steps for readers to gain more agency in reforming programs and processes the book found wanting. The latter range from inculcating "energy literacy" (enabling customers to understand their bills and the drivers behind them) to participating in regulatory and governmental forums, giving visibility and voice to those struggling to pay their utility bills.

V. CONCLUSION

First, I should acknowledge what is so plainly well-wrought and, indeed, powerful about *Powerless*. Deeply researched and consistently well written – at times rising to eloquence – it reflects the authors' commitment, their meticulous development of data, and their foregrounding of complementary, flesh-and-blood stories to paint a vivid, sometimes wrenching portrait of energy poverty in America. It succeeds admirably in its most obvious mission: imparting a stronger sense of obligation for the nation to find the resources and revamp its social services machinery to do better by the least fortunate among us.

However, the authors have resolved to go beyond this most immediate goal, by engaging in a searing critique of the political and business environment in which the under-resourcing of relief agencies has occurred. While this tack can help stir concerned people into action – a legitimate objective, to be sure – there's arguably a tradeoff. It may alienate the very individuals and institutions currently in positions to effect change and otherwise, one hopes, inclined to be sympathetic to the plight of the energy-impoverished living in a nation of self-proclaimed energy abundance.

The authors dual goals (and thus the tension) come to a crescendo in a short final chapter entitled "Shifting the Power Dynamics."[31]

This epilogue, early on, declares its intent:

30. HERNÁNDEZ & LAIRD, *supra* note 1, at 218-19.

31. *Id*. 242-246.

> Having made energy insecurity visible through firsthand accounts of people who experienced energy insecurity and two national surveys that revealed its prevalence across the U.S. population, we must now unmask its primary cause: severely imbalanced power dynamics [emphasis added].[32]

What follows is a rhetorical broadside aimed at the owners of assets in America and the legislators and regulators who allegedly protect their interests, at the expense of ordinary working (or elderly or handicapped) folks. The latter groups are the "powerless" in the secondary meaning of the book's title, in the authors perspective. The key "structures" (political, environmental, economic) are "fundamentally unequal and unjust."[33] These structures

> [R]eflect and uphold the hegemony of an unfair society in which racism, sexism, classism, and the intersection of these forces disadvantage some groups while greatly privileging others. Some segments of the population struggle to access the energy resources essential for meeting their daily needs. Others profit from exploitative practices that perpetuate hardship . . . ."[34]

Cited as actors in this chain of "exploitation" are, first, negligent property landlords, but also "entrenched politicians" who allegedly "prioritize the interests of powerful corporations and investors."[35] Later, the section depicts the "energy underclass" the book highlights as emerging from "the greed, neglect, and unchecked authority of the powerful: energy service providers, property owners, employers, and politicians."[36]

The lecture further castigates "outdated utility laws" designed to "ensure profits" even though "cloaked in the illusion of equality and fairness."[37] The section also skewers regulatory proceedings where, ostensibly, "utility providers" troop before commissioners with all the "legal representation, relationships, and money" they can muster to "all but guarantee a desirable outcome for themselves."[38]

The image is one of a rate adjudication process totally stacked against ordinary ratepayers who must, in their aftermath, face "ever-intensifying financial burdens" as "many . . . dread opening bills they cannot pay."[39]

This is strong stuff. As pure advocacy, it's not totally outlandish. In this, as in other parts of the book, the authors display a good amount of understanding about the energy business and its oversight. However, as an objective description of the regulatory process, it is a stretch. Ratepayers are generally well-represented in federal and state proceedings by staff and, frequently, by other intervenors groups present to rein in the ambitions of the utilities. The latter, by and large, have a sense of responsibility to the public, even as they work to protect their investors and lenders. Most regulators, in my experience, conscientiously seek to

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32. *Id*. at 242.
33. *Id*.
34. HERNÁNDEZ & LAIRD, *supra* note 1, at 242.
35. *Id*.
36. *Id*. at 244.
37. *Id*. at 242.
38. HERNÁNDEZ & LAIRD, *supra* note 1, at 242-43.
39. *Id*. at 243.

strike a balance between fairness and affordability to ratepayers and the need of utilities to attract investment, whether equity or debt.

The authors are perhaps on sounder ground in charging that "politicians and bureaucrats have been complicit in allowing energy insecurity to persist."[40] This is, after all, the thrust of the evidentiary portions of *Powerless.* However, the "plague on all your houses" flavor of these concluding pages has the potential to turn off potential (and powerful) allies outside the circle of left-leaning politicians that have been singing from the same hymnal for years. The seismic shift in the distribution of political power envisioned in the last chapter is probably unattainable, however earnestly wished.

Despite these reservations, the book stands as an important contribution in the cause of alleviating the desperation of households hard-pressed to pay their energy bills. Moreover, it is ultimately up to the authors to suggest who are at fault and how harshly they should be called out in the pages of their fervently written volume. And then, in turn, it's up to readers to decide how justified these critiques are, as they recalibrate their own support for overcoming the inertia and closing the gaps in the safety net.

40. *Id*.

A HOUSE WITH NO CEILING: THE RISKS OF OPEN – ENDED AGENCY AUTHORITY

Maddy Vann

I. INTRODUCTION

Spurred on by growing concerns of pollution and environmental deterioration, Congress established the Environmental Protection Agency (EPA) in 1970 to preserve human and environmental health.[1] Since then, the EPA has issued thousands of rules in furtherance of that purpose, regulating all sorts of entities and industries in the environmental realm.[2] In creating these rules, the EPA relies on authority granted by Congress, which endows the agency with limited power to issue regulations and accomplish delegated tasks.[3] As with all binding laws, claims may be brought against the agencies who create these rules

1. Lily Rothman, *Here's Why the Environmental Protection Agency Was Created*, TIME (Mar. 22, 2017, 9:00 AM), https://time.com/4696104/environmental-protection-agency-1970-history/.

2. Phil Wisman, *Background: Why the EPA Was Established*, EPA (Nov.1985), https://www.epa.gov/archive/epa/aboutepa/epa-history-1970-1985.html.

3. Off. of the Fed. Reg., A Guide to the Rulemaking Process, FED. REG. (last visited Jan. 20, 2025), https://uploads.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf.

when a party believes that, for one reason or another, the rule should not be allowed to stand.[4]

In 2007, Congress expanded the Renewable Fuel Program which required EPA to regulate aspects of the biofuel industry.[5] Under this regulatory authority, EPA crafted a rule allowing for the regulation of biogas producers for purposes of meeting renewable fuel standards; that rule created the dispute highlighted in *Coalition for Renewable Natural Gas v. EPA* (Coalition).[6] After analyzing the EPA's rule, its justifications for that rule, and the arguments presented by the Coalition, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) concluded that the EPA indeed acted within its statutory authority in creating the rule and regulating producers of biogas.[7] However, the court offered a troubling analysis to uphold its conclusion, calling the statute authorizing the EPA to regulate producers a "regulatory floor," and declining to opine what, if any, limit or "ceiling" caps the EPA's authority.[8] Lower courts and federal agencies could reach a broad interpretation: the EPA has especially wide-ranging authority, so long as it's in the name of meeting renewable fuel targets.[9]

This *Note* argues that a broad interpretation of agency authority such as the one invited by the court in *Coalition* introduces numerous risks, including heightened potential for agency overreach, increased difficulty in challenging agency actions rooted in broad interpretations of authority, and industry uncertainty. Part II of this *Note* provides insight into the parties involved in this dispute, as well as the unique characteristics of renewable fuel that were relevant in *Coalition*. These criteria include the nature and creation of biogas (the type of renewable fuel involved in this dispute), and how it relates to the broader category of renewable fuel. Part II also analyzes the legislation underpinning the EPA, its regulatory role in the renewable fuel process, and agency actions like the one discussed in *Coalition*. Part III is an in-depth analysis of the D.C. Circuit's decision, including a factual background and procedural history of the case. Part III concludes by exploring the problems associated with the court's incomplete conclusion and the potential future implications of this decision.

A. The Environmental Protection Agency

1. EPA Formation

Throughout the 1960s, the public was growing concerned about the increased pollution and contamination of the planet, and what that meant for their health.[10]

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4. *Id.*

5. *Overview of the Renewable Fuel Standard Program*, U.S. EPA (last updated May 7, 2025), https://www.epa.gov/renewable-fuel-standard-program/overview-renewable-fuel-standard-program#:~:text=The%20CAA%20provides%20EPA%20with,years%20after%202022%20via%20rulemaking.

6. *See* 108 F.4th 846, 850-51 (D.C. Cir. 2024).

7. *Id.* at 854.

8. *Id.* at 852.

9. *Id.*; *see also* Panama Refin. Co. v. Ryan, 293 U.S. 388, 415 (1935) (addressing concerns that statutory interpretations lacking clear limits allows for unfettered discretion when issuing rules based on that authority).

10. *The Origins of EPA*, U.S. EPA (last updated Nov. 6, 2025), https://www.epa.gov/history/origins-epa; *see* Kenneth Olden, *The EPA: Time to Re-Invent Environmental Protection*, 108 AM. J. PUB. HEALTH 454, 454

These concerns climbed the executive branch, which was becoming increasingly aware of these environmental issues and the impact such issues would have if they were not addressed.[11] On December 2, 1970, President Nixon signed a law that created the EPA, and made it "responsible for the protection of human health and the environment."[12] Nixon spearheaded proposed legislation that would force clean-ups of government facilities that polluted both air and water, and required contingency plans for possible future disasters.[13] Such proposals lent support to EPA's ultimate goal of protecting the human and environmental health, a goal for which EPA would require new regulations and rulemaking.[14]

2. The Clean Air Act

During this era, congressional efforts targeting environmental protection steadily increased.[15] One of the most impactful implementations of policy in relation to the EPA was the Clean Air Act (CAA) of 1970, a pivotal piece of federal legislation governing the regulation of air emissions and quality control.[16]

(2018); *Milestones in EPA and Environmental History*, U.S. EPA (last visited Nov. 7, 2025), https://19january2021snapshot.epa.gov/history/milestones-epa-and-environmental-history_.html (The public's concerns and subsequent environmental protection efforts were kickstarted by a few events in particular. Two such events were the 1962 publication of Rachel Carson's "Silent Spring," discussing the silence of the forests after birds started dying from heavy pesticide uses, and the 1969 incident on the Cuyahoga River, which was so polluted that it erupted in flames).

11. *The Origins of EPA*, *supra* note 10.; *see Remarks on Signing the National Environmental Policy Act of 1969*, THE AM. PRESIDENCY PROJECT (Jan. 1, 1970), https://www.presidency.ucsb.edu/documents/remarks-signing-the-national-environmental-policy-act-1969#:~:text=States:%201969%20%E2%80%90%201974-,Remarks%20on%20Signing%20the%20National%20Environmental%20Policy%20Act%20of%201969,be%20hard%20as%20it%20is (President Nixon's remarks when signing NEPA that it was "now or never" to work on protecting the environment); *See* Massachusetts v. EPA, 549 U.S. 497, 507 (2007) (discussing the early stages of climate change studies by the U.S. Weather Bureau, which began to monitor carbon dioxide levels in the atmosphere. Studies found a continuous increase in carbon dioxide concentration in the environment, with levels reaching 325 parts per million by the time Congress passed the Clean Air Act in 1970).

12. *U.S. Environmental Protection Agency*, U.S. DEP'T OF THE INTERIOR (last visited Jan. 14, 2025), https://www.doi.gov/recovery/about-us/primary-agencies/EPA; *Special Message to the Congress About Reorganization Plans To Establish the Environmental Protection Agency and the National Oceanic and Atmospheric Administration*, THE AM. PRESIDENCY PROJECT (July 9, 1970), https://www.presidency.ucsb.edu/documents/special-message-the-congress-about-reorganization-plans-establish-the-environmental (President Nixon's remarks in a letter to Congress about Reorganization Plan No. 3 of 1970, saying that that as environmental concerns increase, it is important to better understand the environment as a whole, and that it "has become increasingly clear that only by reorganizing our Federal efforts can we develop that knowledge, and effectively ensure the protection, development and enhancement of the total environment itself.").

13. *The Origins of EPA*, *supra* note 10.

14. *Our Mission and What We Do*, U.S. EPA (last updated Oct. 20, 2025), https://www.epa.gov/aboutepa/our-mission-and-what-we-do; *What Is Environmental Law - And Why Does It Matter?*, AM. PUB. UNIV. (June 1, 2023), https://www.apu.apus.edu/area-of-study/security-and-global-studies/resources/what-is-environmental-law/.

15. *Milestones in EPA and Environmental History*, *supra* note 10.

16. *Id*.; *Summary of the Clean Air Act*, U.S. EPA (last updated July 25, 2025), https://www.epa.gov/laws-regulations/summary-clean-air-act#:~:text=(1970),from%20stationary%20and%20mobile%20sources; Shelia Hu, *The Clean Air Act 101*, NRDC (Aug. 11, 2025), https://www.nrdc.org/stories/clean-air-act-101#why; *Clean Air Act Requirements and History*, U.S. EPA (last updated June 5, 2025), https://www.epa.gov/clean-air-act-overview/clean-air-act-requirements-and-

Formulated with previous key legislation as a blueprint, such as the Air Pollution Control Act of 1955 and the Air Quality Act of 1967, the CAA was a compelling tool to help alleviate nationwide health concerns regarding air pollution.[17] The CAA permitted the EPA to impose "national air quality, auto emission, and anti-pollution standards."[18] The EPA estimates that in the CAA's first two decades, its policies prevented the deaths of over 200,000 people by substantially lowering levels of several toxic air pollutants, including lead and sulfur dioxide.[19]

3. The Renewable Fuel Standard Program

The EPA administers the Renewable Fuel Standard (RFS) program pursuant to its delegated authority under the CAA.[20] The RFS program is a nationwide piece of legislation that "requires a certain volume of renewable fuels be used to replace or reduce the quantity of fossil fuel in transportation fuel, home heating oil, or jet fuel."[21] There are four types of renewable fuel under the RFS Program: biomass-based diesel, cellulosic biofuel, advanced biofuel, and total renewable fuel.[22] Under the CAA's renewable fuel program, the EPA is charged with setting "the applicable renewable fuel volume targets" and calculating "the applicable volumes of each biofuel category" to later be used in the U.S.'s transportation fuel.[23]

The CAA's RFS program further maintains that "obligated parties" ("refiners or importers of gasoline or diesel fuel") must remain in compliance with the program's standards by "obtaining and retiring for compliance enough credits representing renewable fuel (Renewable Identification Numbers or RINs) sufficient to meet their Renewable Volume Obligation (RVOs) for each renewable fuel category."[24] Obligated parties are responsible for calculating their own RVOs and reporting these numbers to the EPA yearly in order to maintain compliance.[25] RINs are typically created when a party produces renewable fuel, and they can be traded between other parties, whether obligated or non-obligated parties (parties such as brokers or traders).[26] Additionally, "obligated parties can obtain RINs

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history#:~:text=Congress%20established%20much%20of%20the,of%20the%20national%20environmental%20movement (Prior to the CAA's implementation, a lack of cohesive federal regulation and increased industrialization resulted in dense smog overtaking several of the nation's cities, inciting heavy concern about environmental impacts, as well as the accompanying health hazards of polluted air. In response, Congress enacted the CAA to protect the public from air contaminants.).

17. Hu, *supra* note 16.

18. *Milestones in EPA and Environmental History*, *supra* note 10.

19. *Id*.; Hu, *supra* note 16. (Since the CAA's implementation, Congress amended the CAA several times. The 1977 amendments focused on preemptive protection plans for areas not yet heavily polluted and heightened restrictive standards for those not meeting the necessary clean air standards. The CAA amendments of 1990 were especially pivotal, proposing financially friendly ways to negate the problem of air contamination. These methods included the control of acid rain and the reduction of chemicals affecting the ozone layer.).

20. *Overview of the Renewable Fuel Standard Program*, *supra* note 5.

21. *Id*.

22. *Id*.

23. *Id*.

24. *Overview of the Renewable Fuel Standard Program*, *supra* note 5.

25. *Id*.

26. *Id*.

either by separating RINs from renewable fuel after blending with gasoline or diesel, or by purchasing already-separated RINs on the open market."[27]

B. Biogas and Renewable Fuel

1. Biogas defined

Biogas-derived renewable fuel is an important part of the RFS program.[28] Parties may obtain RINs by injecting biogas into the transportation fuel pipelines, even though it mixes with other gas in the pipelines.[29] Biogas is a renewable energy source consisting of methane from decomposing organic matter such as sewage, manure, or food scraps.[30] The decayed organic matter emits gases that are then captured, refined, and transported for later use as an energy source. [31] Biogas has a value as a transportation fuel.[32] However, only fuels produced from certain renewable biomass and used for transportation fuel can qualify under the RFS program as renewable fuel.[33] A few of these approved categories include soybean oil-derived jet fuel, ethanol from sugarcane, and "renewable compressed natural gas from landfills."[34] Once the biogas is converted to a qualified type of renewable fuel, the renewable gas producers can inject said natural gas into the pipeline system and receive a RIN, demonstrating their compliance with the RFS program.[35]

C. Administrative Law

1. Introduction to Administrative Law

Administrative law is the avenue by which federal, state, and local governments seek to "convert legislative directives into enforceable regulations and policies."[36] Regulatory agencies (such as the EPA) are paramount to administrative law, and vice versa.[37] Their role is to enforce laws that "reflect legislative intentions while adapting to the dynamic needs of the sectors they oversee."[38]

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27. *Id*.
28. *Overview of the Renewable Fuel Standard Program*, *supra* note 5.
29. *Id*.
30. *What Is Biogas?*, NAT. GRID (last updated Feb. 23, 2023), https://www.nationalgrid.com/stories/energy-explained/what-is-biogas.
31. *Id*.
32. *Id*.
33. 42 U.S.C. § 7545(o)(1)(J) (2009).
34. *Overview of the Renewable Fuel Standard Program*, *supra* note 5.
35. 40 C.F.R. § 80.125 (2025).
36. *Understanding Administrative Law*, CARUSO SCH. OF L.: PEPP. L. BLOG (Mar. 19, 2024), https://law.pepperdine.edu/blog/posts/understanding-administrative-law.htm.
37. *Id*.
38. *Id*.

2. The Administrative Procedure Act

Federal agencies must follow the Administrative Procedure Act (APA), which helps maintain the integrity of the rulemaking process.[39] The APA describes how agencies must "develop and issue regulations" and makes these processes transparent to the public.[40] The APA is a crucial piece of administrative legislation, and requires agencies to publish "notices of proposed and final rulemaking in the Federal Register", which creates opportunities for the public to be heard vis-à-vis the agency's proposed rule.[41] This procedure is known as "notice and comment rulemaking" or "informal rulemaking," and is the most frequently used avenue for agency rulemaking.[42] This process gives the public meaningful due process, with an opportunity to participate in the rulemaking process and to provide agencies with feedback so that the finalized rule is (ideally) reasonable and effective.[43] The public has various avenues for their voices to be heard during rulemaking, which can consist of submitting written data and comments, arguments, and (sometimes) chances for oral presentation of their views.[44] Agencies are then obligated to take material feedback into account when formulating the final rule for publication.[45]

III. ANALYSIS

A. Factual Background

In *Coalition for Renewable Natural Gas*, the parties are the usual suspects: the Coalition for Renewable Natural Gas (Coalition) is a biogas trade group, and the EPA is (of course) the federal agency charged with administering the CAA's Renewable Fuel Program (RFP).[46] The Coalition is a non-profit trade organization with members consisting of entities involved in various parts of the renewable natural gas process, including biogas producers.[47] According to the RFP, the EPA must calculate the applicable amount of renewable fuel sold in the United States as transportation fuel yearly.[48] The EPA must also place "renewable fuel obligation[s] on refineries, blenders, and importers, as appropriate" to guarantee contributions of renewable fuel into the United States' energy market by those

39. *Summary of the Administrative Procedure Act*, U.S. EPA (last updated July 9, 2025) https://www.epa.gov/laws-regulations/summary-administrative-procedure-act.

40. *Id*.

41. *Id*. (emphasis omitted).

42. Todd Garvey, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW, CONG. RSCH. SERV., at 1, 2 (last updated Mar. 27, 2017), https://www.congress.gov/crs-product/R41546.

43. *Understanding Administrative Law*, *supra* note 36.

44. ANDREW F. POPPER ET AL., ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH 38 (4th ed. 2021).

45. *See* Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received during the period for public comment.")

46. Coalition for Renewable Nat. Gas v. EPA, 108 F.4th 846, 852 (D.C. Cir. 2024).

47. *Renewable Natural Gas Projects & Policy*, RNG COAL. (last visited Jan. 14, 2025), https://www.rngcoalition.com/#:~:text=RNG%20Coalition%20is%20a%20501,renewable%2C%20clean%20fuel%20and%20energy; *see also* Coalition for Renewable Nat. Gas v. EPA, 108 F.4th 846, 852 (2024).

48. *Coalition for Renewable Nat. Gas*, 108 F.4th at 850.

organizations.[49] These agencies listed by the RFP ("obligated parties") generate RINs through the EPA's "credit-trading program" by producing or importing renewable fuel, thus showing their compliance with the imposed renewable fuel obligations.[50]

However, the EPA noted significant technical complications with the RIN process.[51] Specifically, the fuel can only be labeled "renewable" if it satisfies two criteria.[52] First, the fuel must be used for transportation.[53] Second, the fuel must be derived from a specified source described in EPA's RFP regulations.[54] Renewable natural gas (RNG) is refined and injected into pipelines, and once it is injected it is not technically possible to track or differentiate a single RNG molecule from the other natural gas molecules.[55] As such, it proved difficult to discern not only where the biogas fuel would end up at the conclusion of the process, but where the biogas originated.[56] As a result, the EPA focuses heavily on the integrity of RINs.[57]

Further, the value of the RINs in demonstrating compliance with obligations provided an unforeseen incentive – a motive for entities to purposefully mislabel nonrenewable products as renewable fuel so that they may reap the benefits of RINs without having to comply with the tedious and expensive measures necessary to comply with existing regulations.[58] Finally, mistakes were routinely made in the creation of RINs, which created friction and inefficiency within the RIN program.[59] To help mitigate the risk of fraud and error, the EPA made significant changes to its RIN distribution process in 2023.[60] The EPA declared that "only [renewable natural gas] producers may generate RINs for renewable natural gas injected into a natural gas commercial pipeline system" and required renewable natural gas producers wanting to obtain RINs to "obtain their biogas from biogas producers that have registered with the EPA."[61] The EPA also required certain prerequisites for biogas producers hoping to take part in the RFP.[62] These requirements included, but were not limited to, having to "register with the EPA, submit reports, keep records, and follow a sampling, testing, and measuring regime."[63]

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49. *Id*. (citing 42 U.S.C. § 7454(o)(2)(A)(iii)(I) (2009)).
50. *Id*.
51. *Id*. at 851.
52. *Coalition for Renewable Nat. Gas*, 108 F.4th at 851.
53. *Id*.
54. *Id*.
55. *Id*.
56. *Coalition for Renewable Nat. Gas*, 108 F.4th at 851.
57. *Id*.
58. *Id*.
59. *Id*.
60. *Coalition for Renewable Nat. Gas*, 108 F.4th at 851.
61. *Id*. (internal citations omitted).
62. *Id*.
63. *Id*.

B. Procedural History

The decision analyzed here arises from the EPA's final agency action to publish a rule updating its regulations governing the renewable fuel process.[64] The rule, entitled "Renewable Fuel Standard (RFS) Program: Standards for 2023-2025 and Other Changes,"[65] went through the standard notice-and-comment process, during which the Coalition voiced its concerns.[66] In particular, the Coalition commented that the EPA was overstepping its authority in attempting to regulate biogas producers, and that the rule itself was too stringent on the members of the Coalition involved in the transportation fuel process.[67] The EPA ultimately published the finalized rule, which led to the Coalition petitioning the D.C. Circuit to review the rule.[68]

C. United States Court of Appeals Decision on the Coalition's Petition for Review

The D.C. Circuit reviewed the EPA's final rule under the usual standards of review under the APA, examining whether the agency's action was the "arbitrary and capricious, or "an abuse of discretion" and whether the EPA had acted properly within its statutory authority and followed the appropriate procedures in creating the rule at issue.[69] And, because the Coalition's case included a challenge to a procedural rule, the court added that it would only "invalidate EPA's rules for a procedural error" if that error was "so serious" and so central to the rule "that there is a substantial likelihood that the rule would have been significantly changed if such error had not been made."[70] With the standards of review set in place, the court went on to address all nine of the Coalition's claims against the EPA's updated regulations.[71] This Note focuses only on the Coalition's claim that the EPA exceeded its authority.

The court first analyzed the Coalition's claim that the EPA is not authorized to oversee biogas producers.[72] In justifying such regulation, the EPA pointed to section 7545 of the CAA, which entrusted the EPA with the task of introducing regulations for ensuring the appropriate volume of renewable fuel is introduced into United States transportation fuel commerce.[73] Regarding those required regulations, a later portion of section 7545 specifies that the regulations "shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to ensure that the requirements" are met ('the "shall-

64. *Coalition for Renewable Nat. Gas*, 108 F.4th at 852.

65. *Renewable Fuel Standard (RFS) Program: Standards for 2023-2025 and Other Changes*, 88 Fed. Reg. 44,468 (July 12, 2023) (to be codified at 40 C.F.R. pts. 80, 1090).

66. *Coalition for Renewable Nat. Gas*, 108 F.4th at 852.

67. *Id*.

68. *Id*.

69. *Id*.

70. *Coalition for Renewable Nat. Gas*, 108 F.4th at 852 (internal citations omitted).

71. *Id*.

72. *Id*.

73. *Id.,*; 42 U.S.C. § 7545(o)(2)(A)(i) (2009).

contain" mandate').[74] The Coalition argued that because producers were not named on that list, the EPA cannot regulate them pursuant to section 7545.[75] However, the court interpreted the "shall-contain" mandate differently, stating that because the "provision requires only that EPA regulations *include* rules governing those specified parties," the provision is thus a "regulatory floor," rather than a ceiling.[76] Considering the "shall-contain" mandate as a minimum requirement rather than an exhaustive list meant that the entities named in the Section were not the *only* entities under the EPA's umbrella of authority, but that Congress meant for the EPA to at least *include* these enumerated entities in their regulations.[77] The court's final determination was that the EPA's regulatory powers were not limited to the specific list of renewable natural gas market participants, but could instead extend to other parties.[78]

This Section imposed upon the EPA the task of ensuring transportation fuel introduced into United States commerce contained the necessary volume of renewable fuel.[79] For EPA to perform its duties under the RFP, EPA must have the technical capability to verify where the biogas they are required to account for originated.[80] Without regulating production, EPA had concerns that the verification process would be compromised; this meant EPA would fall short of its duty to ensure the appropriate volume of renewable fuel was being produced.[81] Hence, the solution of requirements for biogas producers put an end to this problem.[82] The court agreed with the EPA, finding that Congress authorized the EPA to regulate producers if they choose to opt into the RIN program, noting that the EPA's verification of renewable fuel sources per the fuel's producers is necessary to fulfill the task set before them by Congress.[83] In fact, those biogas producers are free to withdraw from the program at any time if they do not wish to comply with the regulations.[84] Biogas producer participation in the transportation-fuel economy is fully optional (and market-driven), as renewable fuel derived from biogas is only one of several ways that the EPA can meet its quota of renewable fuel.[85] If biogas producers decide that they want to participate in the EPA's RIN program, however, the court stated that they must adhere to the

74. *Coalition for Renewable Nat. Gas*, 108 F.4th at 852; 42 U.S.C. § 7454(o)(2)(A)(iii)(I) (2009).

75. *Coalition for Renewable Nat. Gas*, 108 F.4th at 852 (emphasis in original).

76. *Id*. (emphasis in original); The court's decision in *Coalition* was issued shortly after the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) overturned the principle of *Chevron* deference under which courts previously gave heightened deference to agency interpretations of ambiguous statutes. *See* Chevron, U.S.A, Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984). Accordingly, the court does not defer to the EPA's interpretation of section 7545 in issuing its decision, as it would have under *Chevron*. Instead, consistent with the ruling in *Loper*, the court's decision in *Coalition* reflects its best reading of the statutory language at issue.

77. *Coalition for Renewable Nat. Gas*, 108 F.4th at 852.

78. *Id*.

79. *Id*.

80. *Id*.

81. *Coalition for Renewable Nat. Gas*, 108 F.4th at 853.

82. *Id*.

83. *Id*.

84. *Id*.

85. *Coalition for Renewable Nat. Gas*, 180 F.4th at 853.

"anti-fraud, anti-error compliance measures that are part and parcel of the program."[86]

D. Examination of the Court's Decision

The court here, understandably, held that Congress vested in the EPA the statutory authority to regulate biogas-derived renewable fuel producers who opt into the EPA's RIN credit program.[87] However, its analysis that led to this conclusion raises some cause for concern.[88]

1. The Court's Analysis – A Potentially Slippery Slope

In the court's analysis, its interpretation of the "shall contain" mandate from which the EPA drew its authority as a "regulatory floor" as opposed to a ceiling carries the risk of vesting the EPA with more power than Congress intended.[89] The court cited the "plain text" of the mandate in determining that it merely required the EPA to *include* the enumerated entities listed therein, but that the EPA was not limited to regulating *only* those entities.[90] The court reconciled this determination in part by noting that the "shall-contain" mandate is silent in regards to restrictions on the functions of the regulations and to whom they are applicable.[91] However, the court's determination did not enumerate clear upper boundaries of the EPA's authority in light of this silence, a holding that could be construed as encouraging an open-ended and overly flexible interpretation of the EPA's regulatory authority.[92]

While this interpretation lends support to the EPA's authority and regulations, the court stopped short of addressing where that "regulatory cap" actually *ends*.[93] The Court called its decision "narrow," explaining that the EPA's authority under Sec. 7545 merely extends to regulations in furtherance of the goal of verifying renewable fuel volume targets, and that such regulations *may* be applied to participating biogas producers.[94] Despite this, the court does not draw any bright lines clarifying the upper limits of the EPA's authority.[95] Specifically, the court's interpretation does not disclose the limit of regulatory authority that the Section delegates to the EPA in congruence with its statutory obligations – and, based on the court's analysis, it could prove difficult to find a workable limit.[96] Further cause for concern stems from the court's reliance on biogas producers'

86. *Id*. at 854.

87. *Id*. at 853.

88. *See* Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 1, 56 (2000) (explaining that clear and unambiguous agency rules make it easy for regulated entities to know what regulations they are bound to and how to comply with those regulations).

89. *Coalition for Renewable Nat. Gas*, 180 F.4th at 852.

90. *Id*.

91. *Id*.

92. *Id*.

93. *Coalition for Renewable Nat. Gas*, 180 F.4th at 852-854.

94. *Id*. at 854.

95. *Id*. at 852, 854.

96. *Id.* at 852-54.

"voluntary" participation in the program as the reason they may be regulated by the EPA.[97] While the Court notes that regulating biofuel producers is necessary to ensure that the volume of biofuel qualifying as renewable is actually renewable (108 F.4th at 853), its broad interpretation of "including" could be read in future cases to grant EPA authority to regulate nearly any entity involved in the renewable fuel supply chain under the guise of moderating renewable fuel processes in adherence to their statutory duty.[98]

2. Potential Future Implications of Broad Legislative Interpretation of Agency Power

An overly broad interpretation of the EPA's statutory authority by courts breeds the possibility of future uncertainty for agencies, courts, and consumers alike.[99] First and foremost, this interpretation paves the way for regulatory overreach.[100] The court's analysis of the "shall-contain" mandate as a regulatory floor rather without a corresponding a cap imbues the EPA with significant regulatory power over parties not listed in the statute, so long as the purpose is – somehow, some way – to fulfill the renewable fuel goals under the RFP.[101] In theory, a future EPA might rely on the Court's statement that "[n]othing in the shall-contain mandate restricts what those regulations can otherwise do or to whom else [the regulations] apply" to reach even to fields far beyond the fuel itself, like preventing fraud or ensuring appropriate reporting requirements related to renewable fuel.[102] These far-flung actions would indeed fall somewhere beneath the especially wide umbrella the Court may have handed to the EPA.[103] At the same time, the court's ruling also tends to condone the EPA's creation of more rules and regulations and their imposition on any entity involved in the renewable fuel economy under the shield of fulfilling statutory duties, with no specific limitations given.[104]

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97. *Coalition for Renewable Nat. Gas*, 180 F.4th at 853-54.

98. *Id*. at 854.

99. *See* Angstreich, *supra* note 88, at 56-57 (explaining that clear and unambiguous agency rules make it easy for regulated entities to know what regulations they are bound to and how to comply with those regulations).

100. *Compare* Panama Refin. Co. v. Ryan, 293 U.S. 388, 415 (1935) (upholding concerns that statutory authority lacking clear limits or constraints allows for unfettered discretion when issuing rules based on that statutory authority), *with* Coalition for Renewable Nat. Gas, 180 F.4th at 853 (with the Court here interpreting that EPA indeed had statutory authority to implement their new regulations and enforce them upon biogas producers "as appropriate" to ensure renewable fuel targets were being met, without providing a limit or "ceiling" to that regulatory authority).

101. *Coalition for Renewable Nat. Gas*, 180 F.4th at 853-54.

102. *Id*. at 853, 855.

103. *Id*. at 852-53.

104. *Id.* ("Nothing in the shall-contain mandate restricts what those regulations can otherwise do or to whom else they can apply". While the court notes that § 7545 (o)(2)(A)(iii)(II) states "that EPA's regulations 'shall not' do certain things", no further explanation of EPA's limitations is offered by the court before concluding that EPA's regulatory authority under the shall-contain mandate constituted a regulatory floor rather than a ceiling. An examination of § 7545 (o)(2)(A)(iii)(II) reveals merely that the EPA's regulations "shall not" "(aa) restrict geographical areas in which renewable fuel may be used; or (bb) impose any per-gallon obligation for the use of renewable fuel." These restrictions provide minimal clarification on what the regulatory ceiling over the EPA would be in terms of regulating entities in the renewable fuel field or the types of regulations that may be imposed.)

Of course, there is no guarantee that the EPA would exercise what it could interpret as its nearly unlimited power in the renewable energy field to such severe heights. However, the mere opportunity to do so breeds uncertainty for regulated entities.[105] The lack of regulatory transparency and predictability could create a chilling effect that prevents market participants from engaging in the RFP space, which results in complications and unpredictability in the transportation renewable fuel field at large.[106] The issue in this case was not whether the Court should defer to the EPA's interpretation of its authority.[107] This after all was a post *Loper Bright* case[108] in which the Court reached its own interpretation of the agency's authority to issue the regulations at issue.[109] But the full scope of that authority was not answered by the Court in this case, the only guidance being that the EPA's statutory authority went far beyond what the Coalition suggested.[110] Even still, while the EPA may deign to make nothing but reasonable and transparent rules and regulations, a federal court ruling interpreting such a broad level of statutory power certainly provides justification for other agencies with similar authorization to adopt rules that "include" but do not expressly limit the parties to which those rules can be applied to test the limits of their authority under a similar claim of upholding their own statutorily required duties.[111]

Further, because the court did not clearly qualify its interpretation of the EPA's regulatory authority under the "shall-contain" mandate, it may be harder for entities to challenge the EPA on grounds of exceeding its statutory authority under the RFP.[112] Although this case is limited to regulation of entities involved in the renewable fuel economy, there will be a temptation for claimants and agencies alike to expand EPA's reach.[113] Nevertheless, the conclusion that the EPA is statutorily entitled to regulate *any* entity in the renewable fuel field for the purpose of fulfilling its Congressional duties, without a specified "cap" on such power, is enough to provide a substantial roadblock for any party attempting to

105. *See* Angstreich, *supra* note 88, at 56 (explaining that clear and unambiguous agency rules make it easy for regulated entities to know what regulations they are bound to and how to comply with those regulations).

106. *See* Panama Refin. Co. v. Ryan, 293 U.S. 388, 415 (1935) (upholding concerns that statutory authority lacking clear limits or constraints allows for unfettered discretion when issuing rules based on that statutory authority (which could deter entities from participation to avoid overregulation)).

107. *Coalition for Renewable Nat. Gas*, 180 F.4th at 852.

108. Loper Bright Enter. v. Raimondo, 608 U.S. 369, 373 (2024).

109. *Coalition for Renewable Nat. Gas*, 180 F.4th at 852.

110. *Id*.

111. Dena Adler & Max Sarinsky, *With or Without Chevron Deference, Agencies Have Extensive Rulemaking Authority, by Dena Adler and Max Sarinsky*, YALE J. ON REGUL. NOTICE & COMMENT BLOG (May 13, 2024), https://www.yalejreg.com/nc/with-or-without-chevron-deference-agencies-have-extensive-rulemaking-authority/ (stating that vague statutes "grant broad discretion to agencies to pursue their policy objectives").

112. *See* Molly Pela & Andrew Good, *Unraveling the Oversight and Authority of Rulemaking Powers by Federal Agencies*, OLIVIA GIBBS LLP (August 4, 2023), https://oglawyers.com/unraveling-the-oversight-and-authority-of-rulemaking-powers-by-federal-agencies/ (proposing that a narrowing or overturning of the Chevron doctrine (in other words, a decrease in broad deference to agency authority) would make it easier for parties to bring claims against agencies for regulatory overreach).

113. *Coalition for Renewable Nat. Gas*, 180 F.4th at 852 (2024).

challenge the EPA on grounds of exceeding its jurisdiction.[114] However, it may also have the opposite, but equally undesirable, effect.[115] If future agencies read the "shall mandate" interpretation to give them a longer leash than regulated entities believe justified, this might well encourage an influx of future claims against agencies for overreaching in their authority.[116]

3. A Flawed Analysis for an Overall Correct Conclusion

While the court's arguably insufficiently qualified interpretation of the "shall-contain" mandate raises some unanswered questions, the overall conclusion reached by the Court in this case is a sound one.[117] The Coalition's argument that the EPA lacks authority to regulate biogas producers simply because producers were not explicitly named in the "shall-contain" mandate does not hold water (or gas).[118] The mandate specifies that the EPA's renewable fuel regulations "shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to ensure that the requirements are met."[119] As the court accurately noted, the mandate does not include restrictive language such as "only" or "limited to" to specify to whom those compliance provisions may, or may not, apply.[120] Nor does the mandate indicate that the enumerated entities within make up an exhaustive list.[121] The court reasonably interprets the mandate and the words '"as appropriate' to ensure that the requirements are met" to mean that the Congressional intent behind the mandate was to empower the EPA with the authority to regulate entities directly involved in the renewable fuel process, for the specific purpose of ensuring that the annual renewable fuel targets are being met.[122]

The court then reasonably concluded that the means to accomplish this task included being able to verify the source of biogas-derived renewable fuel from its

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114. *Id*.

115. *Id*.

116. *Id*.

117. 42 U.S.C. § 7545(o)(2)(A)(i) (2009) (entrusting the EPA with the task of ensuring certain amounts of renewable fuel are being introduced into the United States transportation fuel marketplace); *see also* 42 U.S.C. § 7545(o)(1)(J) (2009) (defining renewable fuel as "fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel" thus allowing the EPA to verify renewable fuel sources to make sure that they meet this standard enumerated in the mandate).

118. *Coalition for Renewable Nat. Gas*, 180 F.4th at 852.

119. 42 U.S.C. § 7545(o)(2)(A)(iii)(I) (2009).

120. *Coalition for Renewable Nat. Gas*, 180 F.4th at 852.

121. 42 U.S.C. § 7545(o)(2)(A)(iii)(I) (2009).

122. *Coalition for Renewable Nat. Gas*, 180 F.4th at 852-53; Loper Bright Enter. v. Raimondo, 603 U.S. 369, 394 (the Court specifically stated that words like "appropriate" in a regulatory statute do indeed give agencies considerable, albeit not unbounded discretion; "In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion…to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable.'") (citing Michigan v. EPA, 576 U.S. 743, 752 (2015)); *see also* White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1266 (2014) (Judge Kavanaugh's concurring opinion describing the term "appropriate" as "the classic broad and all-encompassing term that naturally and traditionally includes consideration of all relevant factors…").

producers to ensure it could be accurately labeled as renewable.[123] It follows then, that if biogas producers are actively choosing to participate in the RFP by introducing biogas-derived renewable fuel into the transportation fuel market, a market directly under the authority of the EPA, and they are reaping the benefits of such a program, that they should be regulated as a result of that voluntary participation.[124] The Court's singular flaw in reaching this sound conclusion was failing to specify at what point the EPA's statutory authority was limited under the "shall-contain" mandate, as such an omission invites uncertainty in understanding the exact scope of the EPA's authority.[125]

IV. CONCLUSION

Ultimately, the D.C. Circuit's holding that the EPA was acting within its statutory bounds in enhancing its biogas regulations certainly passes muster when the arguments raised and responses offered are considered as a whole.[126] The court rejected the Coalition's concern that the EPA had no authority to regulate biogas producers partly because of unique technical feasibility issues.[127] The opinion highlighted that the EPA had the non-negotiable task of establishing procedures to ensure that the transportation fuel sold in the United States "contains at least the applicable volume of renewable fuel."[128] It went on to state that the statute also provided the means to complete this task, reasoning that the fuel source verification by producers is crucial to getting the job done, ultimately concluding that Congress undoubtedly allowed for the EPA's regulation of producers.[129]

While this conclusion is both reasonable and well-explained, the path to that conclusion – and the road that follows – is riddled with landmines. It's concerning for the court to characterize EPA's authority in this space as a "regulatory floor" without imagining a regulatory ceiling.[130] These concerns include the risk of regulatory overreach, increased difficulty in challenging agency actions based on broad interpretations of authority, and industry uncertainty based on the ambiguous delegation of power to the EPA, as well as the unclear precedent such a ruling sets for other federal agencies down the line.[131]

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123. *Coalition for Renewable Nat. Gas*, 180 F.4th at 852-53.

124. *Id*. at 853-54.

125. *See* Angstreich, *supra* note 88, at 56-57 (explaining that clear and unambiguous agency rules make it easy for regulated entities to know what regulations they are bound to and how to comply with those regulations, suggesting that ambiguous and unclear delegations of authority lead to confusion and uncertainty for regulated entities).

126. *Coalition for Renewable Nat. Gas*, 180 F.4th at 852-54.

127. *Id*. at 852.

128. *Id*. at 853.

129. *Id*.

130. *Coalition for Renewable Nat. Gas*, 108 F.4th at 852.

131. *See* Angstreich, *supra* note 88, 56-57 (explaining that clear and unambiguous agency rules make it easy for regulated entities to know what regulations they are bound to and how to comply with those regulations); *see also* Pela & Good, *supra* note 112 (proposing that a narrowing or overturning of the Chevron doctrine (in other words, a decrease in broad deference to agency authority) would make it easier for parties to bring claims against agencies for regulatory overreach); *see also* Panama Refin. Co. v. Ryan, 293 U.S. 388, 415 (1935) (upholding concerns that statutory authority lacking clear limits or constraints allows for unfettered discretion when issuing rules based on that statutory authority); *See* John Adams*, John Adams to Thomas Jefferson, with*

Postscript by Abigail Adams, FOUNDERS ONLINE (last visited Nov. 7, 2025), https://founders.archives.gov/documents/Jefferson/03-09-02-0285 (John Adams made the following statements on power: "Power always [s]incerely, conscientiously, de tres bon [f]oi, believes itself [r]ight. Power always thinks it has a great [s]oul, and vast [v]iews, beyond the [c]omprehension of the [w]eak; and that it is doing God Service, when it is violating all his [l]aws…And I may be deceived as much as any of them, when I say that [p]ower must never be trusted without a [c]heck.")