UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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Building for the Future through Electric	)	Docket No. RM21-17
Regional Transmission Planning and	)	
Cost Allocation and Generator	)	
Interconnection	)	

Comment of the Harvard Electricity Law Initiative[1]

In the Advanced Notice of Proposed Rulemaking (ANOPR), the Commission sketches two transmission planning reform proposals and solicits comments on each proposal, including whether it is consistent with the Commission's authority under the Federal Power Act (FPA). In this comment, we show that both proposals are within the scope of the Commission's authority to remedy unduly discriminatory utility tariffs and conduct. The Commission may order transmission providers to: 1) plan for anticipated generation[2] and/or 2) implement a process aimed at unlocking location-constrained generation resources.[3] We also suggest that the Commission specify planning-related criteria that determine whether the Commission presumes a capital expense is prudent in a rate case. This policy could fulfill the Commission's duties under FPA section 202(a) to encourage regional coordination and protect consumers from excessive transmission rates.

The Commission's "broad authority to remedy unduly discriminatory behavior" applies to transmission planning.[4] As explained in Order No. 890, the Commission imposed transmission planning rules on all Public Utilities because it concluded that it could not "rely on the self-interest of transmission providers to expand the grid in a nondiscriminatory manner."[5] The transmission planning principles outlined in Order No. 890 and the subsequent planning reforms in Order No. 1000 are part of the Commission's extensive, ongoing, and obligatory efforts to address transmission-owning Public Utilities' incentives and opportunities to unduly discriminate against their customers and competitors. More broadly, the Commission's Open Access regime, which includes its transmission planning rules, aims to mitigate undue discrimination by disconnecting transmission service from transmission owners' parochial interests.

With this starting point, the ANOPR's legal questions about transmission planning are readily answerable. Planning mandates that aim to mitigate opportunities for undue discrimination fit comfortably within the Commission's authority under section 206. Both reforms mitigate Public Utilities' "incentive[s] and the ability[ies] to discriminate against

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[1] The Harvard Electricity Law Initiative is an independent organization based at Harvard Law School's Environmental & Energy Law Program. These comments do not represent the views of Harvard University or Harvard Law School.
[2] ANOPR at PP 46–53.
[3] ANOPR at PP 54–60.
[4] Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 687 (D.C. Cir. 2000); South Carolina Pub. Serv. Authority v. FERC, 762 F.3d 41, 57–69 (D.C. Cir. 2014).
[5] Order No. 890 at P 422; *see also id.* at P 524, Order No. 1000 at P 254 (noting that the Commission "bas[ed] its actions [on transmission planning in Order No. 890] on its authority to remedy undue discrimination").

third parties, particularly in areas where the pro forma [Open Access Transmission Tariff] OATT leaves the transmission provider with significant discretion."[6] In Part I of this comment, we emphasize that identifying utility conduct as unduly discriminatory is the Commission's essential task, highlight how the Commission has used its remedial authority, situate the ANOPR's transmission reforms within that context, and briefly comment on how the Commission can structure each reform so it addresses unduly discriminatory conduct.

In Part II, we discuss how the Commission can encourage further planning reforms by reviewing whether transmission investments are prudent under section 205. Currently, the Commission presumes that all transmission investments are prudent.[7] This policy does not protect consumers[8] and is hard to square with section 205(e), which places the burden of proof on any public utility seeking a rate increase to show that its proposed rate is just and reasonable.[9] Applying a default prudence presumption only to projects planned pursuant to certain criteria would ensure just and reasonable transmission rates and could further the Commission's long-standing policy of encouraging regionalization.[10]

A prudence policy could distinguish between transmission-owner (TO) planned capital investments and investments planned by an independent entity, such as an RTO. Under the policy, independently planned investments would be presumptively prudent. That presumption would not automatically apply to TO-planned projects because the Public Utility has incentives and opportunities to plan projects that are not cost-effective and do not benefit ratepayers. By distinguishing between projects based on their planning processes, the Commission could motivate transmission owners to remain in or join RTOs, delegate additional planning responsibilities to RTOs or other independent planning entities, and shift spending away from their local service territories into regional planning processes. The policy could also guard against Public Utilities' vertical market power by presuming that transmission projects facilitating entry of non-utility generation are prudent. We suggest additional criteria designed to screen out routine expenditures and projects that have been evaluated by an independent regional planner.

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[6] Order No. 890 at P 26.

[7] *Iroquois Gas Transmission System, L.P.*, 87 FERC ¶ 61,295, at p. 62,168 (1999) (quoting *Minnesota Power & Light Co.*, 11 F.E.R.C. ¶ 61,312, at pp. 61,644–45 (1980)).

[8] Paul L. Joskow, MIT Center for Energy and Environmental Policy Research, Working Paper, *Competition for Electric Transmission Projects in the U.S.: FERC Order 1000*, Mar. 2019, at 13 ("For all intents and purposes the FERC [transmission] regulatory process is a model of cost pass-through regulation with little scrutiny of costs."); CPUC, Brief on Exceptions, Docket ER16-2320-002, Oct. 31, 2018 (finding only a single instance in the past twenty years of the Commission finding a transmission expense was imprudent).

[9] Anaheim, et al. v. FERC, 669 F.2d 799, 809 (D.C. Cir. 1981) ("The Federal Power Act imposes on the Company the 'burden of proof to show that the increased rate of charge is just and reasonable.'") (citing § 205(e)); Nanthahala Power and Light v. FERC, 727 F.2d 1342, 1351 (4th Cir. 1984) ("A utility bears the burden of justifying each component of a rate increase, and the overall increase itself, under § 205(e)."). *See also* FPC v. Tennessee Gas Transmission Co., 371 U.S. 145, 152 (1962) ("a natural gas company initiating an increase in rates under s 4(d) . . . bears the burden of establishing its rate schedule as being 'just and reasonable.'"); National Gas Fuel Supply v. FERC, 900 F.2d 340, 351 (D.C. Cir. 1990) (holding that natural gas company "bore the burden of showing that its rates were prudent, and thus that its purchase costs were reasonable").

[10] *See generally* FEDERAL POWER COMMISSION, 1964 NATIONAL POWER SURVEY 1 (1964) ("The Survey is thus encouraging the industry to initiate broader regional and interregional planning. . . . In short, the Survey was conducted by the Commission as the most effective means of carrying out the provisions of section 202(a))."

For projects that fail to meet the policy's planning-related criteria, the Public Utility would have to demonstrate, as the statute demands, that capital expenditures are prudent. The Commission presumes that wholesale rates are just and reasonable in several contexts, but it does so only when the transactions meet substantive criteria established by the Commission.[11] The Commission could follow that approach in transmission rate cases. For capital expenditures that are not presumptively prudent, the Public Utility would have to prove prudence in its case in chief.

For transmission investments not presumptively prudent, the Commission could partner with state regulators and create Independent Transmission Monitors to review prudence. Recognizing that state regulators possess considerable expertise in local transmission matters, the Commission could establish Joint Boards pursuant to Section 209(a) to scrutinize transmission planned by transmission owners. Independent Transmission Monitors could assist the Joint Boards by reporting on Public Utilities' compliance with the Commission's transmission planning rules and reviewing and providing evidence in rate cases about utility planning processes and expenditures.

[11] *See, e.g.*, *Boston Edison Co. Re: Edgar Elec. Energy Co.*, 55 FERC ¶ 61,382 (1991); *Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082 (2004); Order No. 697, 119 FERC ¶ 61,295 (2007) (adopting numerous rebuttable presumptions related to seller market power and wholesale rates); Order No. 697-A, 123 FERC ¶ 61,055 at P 111 (2008) (adopting the rebuttable presumption that RTO/ISO market monitoring and mitigation are sufficient to address market power concerns).

I. When Acting to Restrain Transmission Owners' Undue Discrimination, the Commission Has Broad Authority and May Implement the ANOPR's Planning Reforms

Because of its "strategic importance,"[12] transmission has been the focus of the Commission's efforts to promote wholesale power markets and ensure that those markets produce just and reasonable rates. Transmission is more than just the "vital link between buyers and sellers;"[13] it is the medium for coordinating supply and demand that enables the industry to unlock short-run and long-run efficiencies through trading and planning. Historically, "utilities' control of transmission facilities [gave] them the power either to refuse to deliver energy produced by competitors or to deliver competitors' power on terms and conditions less favorable than those they apply to their own transmissions."[14] The Commission's Open Access rules are premised on the fact that "the single greatest impediment to competition" in wholesale power is transmission-owning Public Utilities' "market power through control of transmission."[15]

The Commission expected that its Open Access rules would facilitate transparent pricing of wholesale power, which in turn would unleash market-based, decentralized transmission development and obviate the need for extensive planning oversight.[16] But transmission-owning Public Utilities' undue discrimination persisted. In its follow-up to Order No. 888, the Commission recognized that because "it is not in the economic self-interest of transmission providers to expand the grid to permit access to competing sources of supply,"[17] it had to impose rules designed to ensure that Public Utilities expanded the

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[12] FEDERAL POWER COMMISSION, 1964 NATIONAL POWER SURVEY at 27 (1964) ("The strategic importance of transmission is much greater than indicated by its 10 percent average share in the overall cost of electricity. . . . Interconnection is the coordinating medium that makes possible the most efficient use of facilities in any area or region."); *Extra-High-Voltage Electric Transmission Lines: Hearings Before the Comm. on Commerce,* 89th Cong., at pp. 14–15 (1966) (statement of FPC Comm'r Ross) ("[I]t is no longer the parties who control generation that control the industry — it is the parties who control the transmission, the arteries of the industry, that control the destiny of the millions of rate payers of this Nation.").

[13] Proposed Rule, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities, 60 Fed. Reg. 17,662, at p. 17,664 (Apr. 7, 1995) [Order No. 888 NOPR].

[14] New York v. FERC, 535 U.S. 1, 8 (2002).

[15] Order No. 888 NOPR, *supra* note 13, at 17,664; Order No. 888, 61 Fed. Reg. 21,540, at p. 21,546 (May 10, 1996) [Order No. 888] ("The most likely route to market power in today's electric utility industry lies through ownership or control of transmission facilities. Usually, the source of market power is dominant or exclusive ownership of the facilities.").

[16] In Order No. 2000, the Commission speculated that "well-defined transmission rights and efficient price signals" would facilitate market-driven transmission expansion. Order No. 2000, 89 FERC ¶ 61,285, at pg. 200 (1999). In its Standard Market Design NOPR, the Commission proposed to require a planning process "intended to supplement [] private investment decisions, not supplant them," stating that this approach would "induc[e] efficient investment by relying primarily on price signals and independently administered Congestion Revenue Rights" rather than centralized planning. Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design, Notice of Proposed Rulemaking, 67 Fed. Reg. 55,452 at PP 335–350 (Aug. 29, 2002). Reflecting the Commission's expectations, PJM's initial transmission planning regime would "not propose construction of a transmission upgrade until it has exhausted the possibility that the market will produce a solution to congestion or similar market failures." *PJM Interconnection*, 104 FERC ¶ 61,124 at P 32 (2003).

[17] Order No. 890 at P 524.

network to meet the needs of customers and competitors.[18] Four years later, the Commission acknowledged that it is also "not in the economic self-interest of incumbent transmission providers to permit new entrants to develop transmission facilities, even if proposals submitted by new entrants would result in a more efficient or cost-effective solution to the region's needs."[19] To remedy these and other "opportunities to engage in undue discrimination,"[20] the Commission ordered regional planning and attempted to further open the planning process to non-incumbent developers.

Despite the Commission's efforts from 1996 to 2011 to separate ownership from control over the nation's high-voltage power networks, transmission development remains dominated by incumbents who have "opportunities and incentives"[21] to expand the network for their own needs to the detriment of their competitors and customers. Since Order No. 1000, transmission owners have protected their dominance by building out local infrastructure within their state-granted service territories with little oversight and no competition. The shift in spending from regionally planned infrastructure to local projects initiated by the transmission owner is particularly stark in the two largest RTOs.[22]

The Commission could find that tariffs outlining transmission planning rules continue to provide transmission-owning Public Utilities with opportunities to:

- Unduly discriminate against wholesale customers by stifling development of regional infrastructure that could deliver low-cost power, thereby locking customers in to more expensive utility-generated power;
- Unduly discriminate against wholesale customers by prioritizing local projects over regional development that could reduce congestion and reduce wholesale rates;
- Unduly discriminate against non-incumbent transmission developers by evading competitive development processes;
- Unduly discriminate against their generation and retail competitors by using their privileged positions in RTO planning processes or exercising their outright control over TO-run planning processes to obstruct development of transmission that would connect competing suppliers; and
- Unduly discriminate against transmission customers by administering or contributing to planning processes that fail to account for the interconnection queue.

Moreover, the Commission could find that this undue discrimination leads to unjust and unreasonable wholesale and transmission rates. By failing to unlock transmission-owning Public Utilities' wholesale competitors, deficient regional planning can "hinder a free market in wholesale electricity,"[23] leading to higher wholesale rates. Because regional planners are developing few projects through competitive processes, transmission rates

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[18] *Id.* at P 424.
[19] Order No. 1000 at P 256.
[20] Order No. 1000 at PP 59, 78, 147.
[21] Order No. 890 at P 26.
[22] MISO has planned a total of only $305 million in regional projects since it implemented Order No. 1000, as the value of TO-planned projects has nearly tripled to $2.7 billion per year. In PJM, the annual value of TO-planned "Supplemental" projects has tripled since Order No. 1000 implementation, as the value of regional projects has fallen by close to half. *See infra* notes 89, 92.
[23] Morgan Stanley Capital Group v. Public Util. Dist. No. 1 of Snohomish Cty., 554 U.S. 527, 536 (2008).

may also be higher than they would be if planning processes were not unduly discriminatory. The Commission has authority to address such "theoretical threats" to the justness and reasonableness of jurisdictional rates.[24]

The Commission has a duty to address transmission owners' incentives and opportunities to unduly discriminate against transmission and generation competitors and customers in the planning process. Both planning proposals outlined in the ANOPR are permissible exercises of the Commission's "broad discretion in fashioning remedies to undue discrimination."[25]

A. The Commission's Essential Task Is Identifying Unduly Discriminatory Tariffs and Conduct

The FPA "fairly bristles with concern for undue discrimination."[26] The D.C. Circuit has "consistently required the Commission to protect consumers against [transmission owners'] monopoly power."[27] Classifying jurisdictional tariffs and conduct as unduly discriminatory and remedying those FPA violations are foundational duties under the FPA that ensure just and reasonable rates. The Commission's forthcoming planning reforms should build on its decades-long, legally compelled crusade to disentangle transmission operations and planning from transmission-owning Public Utilities' financial and strategic interests. To provide context for the ANOPR's planning reforms, we begin with an historical perspective on undue discrimination and then connect this legislative history and precedent to current transmission challenges.

Congress passed the Public Utility Act of 1935 "in the context of, and in response to, great concentrations of economic and even political power vested in" interstate utility holding companies.[28] The Commission has explained that "[t]he primary purposes of the Federal Power Act [or Part II of the Public Utility Act] are to curb abusive practices by public utilities and to protect customers from excessive rates and charges."[29] Backed by two unearned advantages provided by states — cost-of-service retail rates and exclusive retail

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[24] South Carolina Pub. Serv. Authority v. FERC, 762 F.3d 41, 69–70 (D.C. Cir. 2014) (discussing National Fuel Gas Supply Corp. v. FERC, 468 F.3d 831 (D.C. Cir. 2006)).

[25] Order No. 890 at P 1322; see also *Missouri Gas Energy v. Panhandle Eastern Pipeline Corp.*, 75 FERC ¶ 61,166, at p. 61,549 (1996) ("[T]he Commission has 'broad power to stamp out undue discrimination,' including the authority to impose 'suitable remedies' in an appropriate case. That authority includes the power to order an interstate pipeline to transport gas, to add new delivery points, to file certificate applications, and to construct facilities necessary to make deliveries. The Commission's powers are at their height when it remedies a violation of the statute and its regulations.") (citations omitted).

[26] Associated Gas Distributors v. FERC, 824 F.2d 981, 997 (D.C. Cir. 1987).

[27] United Distribution Cos. v. FERC, 88 F.3d 1105, 1127 (D.C. Cir. 1996).

[28] Gulf States Utilities Co. v. FPC, 411 U.S. 747, 758 (1973); North Am. Co. v. SEC, 327 U.S. 686, 703 n.13 (1946) (quoting Report of the National Power Policy Committee on Public-Utility Holding Companies, H.Doc. 137, 74th Cong., 1st Sess., at p. 5) (summarizing federal investigations that revealed that the growth of utility holding companies was often "attained with the great waste and disregard of public benefit" and was "actuated primarily by a desire for size and the power inherent in size"); *Re Dairyland Co-Op*, 37 FPC 12, at p. 15 (1967) ("The purpose of that legislation was most clear: it was designed to prevent the notorious investment and profit abuses which had developed in the industry under the domination of the holding companies.").

[29] Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design, Notice of Proposed Rulemaking, 67 Fed. Reg. 55,452 at P 100 (Aug. 29, 2002).

service territories — Public Utilities built power plants that generated nearly all of the nation's electricity sold to consumers[30] and extended their reach via transmission lines to neighboring systems. Transmission links transformed Public Utilities from state-sanctioned local service providers to interstate system operators and wholesalers. As Public Utilities increased their interstate connections and trading, state regulators faced practical and legal barriers to controlling the interstate expansion and transactions of the Public Utilities they had nurtured.

With dominant control over the interstate power industry, local-monopolist Public Utilities had incentives and opportunities to shape this critical sector for their own benefit by exercising market power. Congress, therefore, charged the Commission with encouraging their efficient coordination while also ensuring that they did not wield their dominance in an anti-competitive manner. The FPA features two strategies for achieving these twin aims. In section 202(a), Congress ordered the Commission to encourage voluntary coordination among power sector actors, "confident that enlightened self-interest" would lead to efficiency-enhancing cooperation.[31] But Congress also recognized that a voluntary regime was insufficient to mitigate Public Utilities' market power. Sections 205 and 206 require the Commission to ensure that the rates, terms, and conditions of transmission service and wholesale sales in interstate commerce are just and reasonable and not unduly discriminatory.

In regulating rates under the FPA, the Commission's initial focus was "balancing the investor and consumer interests" as it reviewed the relatively small number of wholesale transactions that Public Utilities filed.[32] Meanwhile, the Commission also adjudicated a steady stream of complaints, typically filed by non-jurisdictional non-profit utilities, that alleged harm due to anti-competitive conduct or pricing by a Public Utility.[33] In exercising its authority under various provisions of the Gas and Power Acts, the Commission understood that "competitive considerations are an important element of the 'public interest,'"[34] but it was generally reluctant to consider anti-competitive conduct in a rate

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[30] Energy Information Administration, Office of Coal, Nuclear, Electric and Alternate Fuels, *The Changing Structure of the Electric Power Industry: An Update*, Dec. 1996, at p. 6 (noting that in 1921 privately owned utilities generated 94 percent of U.S. electricity); Richard F. Hirsh, POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM (1999), at Tbl. A.1 (showing that investor-owned utilities owned 93 percent of all utility-owned generation capacity and 75 percent of all generation capacity in the country when industrial-owned capacity is included).

[31] Central Iowa v. FERC, 606 F.2d 1156, 1163 (D.C. Cir. 1979) (quoting S. Rep. No. 621, 74th Cong., 1st Sess.,at p. 49 (1935)).

[32] FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944). Most power was still sold by the utility that generated it pursuant to state-regulated transactions. Jurisdictional wholesale sales were limited in part because Public Utilities did not file Commission-jurisdictional rate schedules. *See Rate Schedules and Public Utilities*, Order No. 282, 31 FPC 972 (1964).

[33] *See, e.g.,* Brief of the American Public Power Association (APPA), Supreme Court Docket No. 71-991, Otter Tail Power Co. v. U.S., Sep. 25, 1972 (summarizing numerous allegations and proceedings).

[34] Northern Natural Gas Co. v. FPC, 399 F.2d 953, 961 (D.C. Cir. 1968) (reviewing a Commission order issued pursuant to section 7 of the Natural Gas Act). In a section 203 merger review proceeding, the Commission stated that "[t]here is a legitimate public interest in the degree of concentration of economic power in American industries and, notwithstanding the safeguard of regulation, even in the electric utility industry." The Commission determined that it must consider the "anti-competitive effect" of a merger, which required it to determine whether the merger will "bring a significant added concentration of economic power," "eliminate any

case.[35] A series of Supreme Court decisions about the intersection of the FPA and antitrust law[36] left no doubt that in section 205 and 206 proceedings the Commission may consider effects on competition and order remedies to Public Utilities' anti-competitive conduct.[37]

Following these decisions, the Commission elaborated on its role in addressing Public Utilities' anti-competitive conduct,[38] explaining that "where a utility possessing market power . . . seeks to amend a general tariff to impose conditions which . . . otherwise contribute to the acquisition or maintenance of monopoly power, its application for amendment must be rejected and found unjust and unreasonable."[39] The Commission accepted that "almost every utility [it] regulate[s] has some degree of market power,"[40] but determined that finding alone is insufficient for imposing industry-wide remedies. The Commission's response to utility efforts to "unreasonably restrain trade,"[41] therefore, proceeded on a tariff-by-tariff basis. Where there was specific evidence about a particular utility's conduct, the Commission conducted a "careful balancing"[42] to determine whether the relevant tariff provision "is the least anticompetitive method of obtaining legitimate planning or other objectives."[43]

In Order No. 888, the Commission reversed this approach, concluding that its generic presumption that utilities have incentives and opportunities to exercise market power combined with its findings about "systemic anticompetitive behavior"[44] justified industry-wide remedies under section 206.[45] The Commission classified this systemic behavior as undue discrimination, summarizing that

> Utilities owning or controlling transmission facilities possess substantial market power; that, as profit maximizing firms, they have and will continue to exercise that market power in order to maintain and increase market share, and will thus deny their wholesale customers access to competitively

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meaningful competition" in attracting new retail and wholesale load, and "have an adverse effect on competing energy sources." *Re Commonwealth Edison*, 36 FPC 927, at p. 941 (1966).

[35] *See Re Duke Power*, 48 FPC 1384, at p. 1408 (Administrative Law Judge noting that the Commission had considered competition in proceedings conducted pursuant to sections that require findings on the 'public interest' or 'public convenience and necessity' and not in rate cases but noting that a recent D.C. Circuit decision suggests the Commission could consider competition in a rate case) (citing City of Lafayette, Louisiana, et al., v. FPC, 454 F.2d 941 (D.C. Cir. 1971)).

[36] Gainesville Utilities Dept. v. Florida Power Corp., 402 U.S. 515 (1971); Gulf States Utilities v. FPC, 411 U.S. 747 (1973); Otter Tail Power v. U.S., 410 U.S. 366 (1973); FPC v. Conway Corp., 426 U.S. 271 (1976).

[37] *Re Missouri Power & Light Co.*, 5 FERC ¶ 61,086, at p. 61,140–41(1978); *Re Connecticut Power & Light Co.*, 8 FERC ¶ 61,187, at p. 61,653 ("Rather, we will look to the antitrust laws and cases to determine whether the objectives of these statutes are being hindered in cases where price discrimination has been established").

[38] *Re Florida Power & Light Co.*, 8 FERC ¶ 61,121, at p. 61,457 (1979).

[39] *Id.*, at p. 61,449 (1979); *id* at p. 61,457 (explaining that it has authority to "eliminat[e] or modify[] rate provisions, *designed by a* utility, which would otherwise facilitate price control or exclusion of competitors").

[40] *Re Kentucky Utilities Co.*, 23 FERC ¶ 61,317, at p. 61,675 (1983).

[41] *Id.*

[42] *Id.*

[43] *Re Florida Power & Light Co.*, 8 FERC ¶ 61,121, at p. 61,449 (1979).

[44] Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 684 (D.C. Cir. 2000).

[45] The D.C. Circuit explained that Order No. 888 "shifts from a regulatory norm in which a user of transmission services must demonstrate to FERC an individualized need for open access to one in which a provider of transmission services must present to FERC individualized circumstances requiring relief from open access." *Id.* at 689.

priced electric generation; and that these ***unduly discriminatory practices*** will deny consumers the substantial benefits of lower electricity prices.[46]

To justify its new views about Public Utilities' unduly discriminatory conduct, the Commission examined the state of the industry and found that for the first time "new generating capacity can be built and operated at prices substantially lower" than existing assets owned by transmission-owning Public Utilities.[47] To realize the benefits of new, economic capacity, the Commission's recognized that it had to ensure that "non-traditional generators of cheaper power be able to gain access to the transmission grid on a non-discriminatory open access basis."[48] The Commission therefore concluded that it could no longer "tolerate the types of practices that were previously accepted"[49] because it could not "allow what have become unduly discriminatory practices to erect barriers between customers and the rapidly emerging competitive electricity marketplace."[50]

In subsequent reforms to the Open Access rules it initiated in Order No. 888, the Commission followed this approach.[51] In each order, the Commission found that changes in the industry have exposed long-standing utility practices as unduly discriminatory.[52] It then ordered Public Utilities to amend their tariffs in order to address the unduly discriminatory conduct.

In Order No. 888, the Commission equated undue discrimination with a traditional economic conception of market power.[53] It concluded that Public Utilities' control over transmission allowed them to exclude potential competitors and charge uncompetitive prices, two hallmarks of the exercise of market power. Subsequent Open Access reforms do not rest on similar findings about market power but instead more broadly address "opportunities for undue discrimination."[54] For instance, the Commission justified its

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[46] Order No. 888 NOPR, *supra* note 13, at 17,665 (emphasis added); *id.* at 17,664 ("market power through control of transmission is the single greatest impediment to competition"); *id.* at 17,675–77 (cataloging discriminatory IOU transmission practices).
[47] Order No. 888 at 21,550.
[48] *Id.*
[49] Order No. 888-A at 12,296 (conceding that historically it was "willing to accept utility practices that provided third parties with transmission services that were distinctly inferior to the utility's own use of the transmission system").
[50] *Id.*
[51] *See, e.g.,* Order No. 764, 139 FERC ¶ 61,246 at P 46 (2012) ("As in Order No. 890, the Commission is acting in part to remedy OATT provisions that may allow public utility transmission providers to treat some customers in an unduly discriminatory manner. Such an endeavor necessarily requires the Commission to take notice of the general developments in the electric industry in deciding what generic reforms may be needed to ensure that the pro forma OATT does not unduly discriminate against any one class of customers.") (citing Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000); Wisc. Gas Co. v. FERC, 770 F.2d 1144 (D.C. Cir. 1985); Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987)).
[52] Order No. 890 at PP 44, 57–63; Order No. 1000 at PP 25–29 42–46; Order No. 764 at PP 16–24.
[53] In general, market power refers to the ability to charge uncompetitive prices or exclude competition. SCOTT HEMPLING, REGULATING MERGERS AND ACQUISITIONS OF U.S. ELECTRIC UTILITIES: INDUSTRY CONCENTRATION AND CORPORATE COMPLICATION 29 (2020) (quoting U.S. v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) and Dept. of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines § 1.1 (1992, rev. 1997)).
[54] Order No. 1000 at P 17 (summarizing that in Order No. 890 the Commission concluded that "the OATT obligations related to transmission planning were insufficient to eliminate opportunities for undue discrimination in the provision of transmission service"); *id.* at P 59 ("We therefore exercise our broad remedial authority today to ensure that rates are not unjust and unreasonable and to limit the remaining opportunities for undue discrimination.").

transmission planning rules in part based on the theoretical threat that Public Utilities' incentives and opportunities to unduly discriminate against their competitors in planning system expansion posed to the justness and reasonableness of jurisdictional rates.[55] The D.C. Circuit has repeatedly upheld this approach to rulemaking, explaining that "the Commission [is] not required to . . . to offer empirical proof for all the propositions upon which its order depended, before promulgating a generic rule to eliminate undue discrimination."[56]

The Commission's authority to remedy undue discrimination applies even where it "believes that the nature of the alleged misconduct renders it undetectable."[57] The Commission's "reasonable and cogent explanations of predictable economic outcomes"[58] are sufficient to justify findings of undue discrimination. The Commission's task is to "make rules with prospective effect that will prevent situations that are inconsistent with the FPA from occurring;"[59] in other words to "assess current circumstances and to form a judgment on the steps necessary to avoid adverse effects on rates that it concludes are likely to arise if the present situation persists."[60] With regard to transmission planning, the Commission should presume that transmission owners will not voluntarily give up their advantages in

[55] Order No. 890 at PP 84, 422–424 (finding that a transmission provider "can have a disincentive to remedy transmission congestion when doing so reduces the value of their generation or otherwise stimulates new entry or greater competition in their area," and "does not have an incentive to increase the import or export capacity of its transmission system if doing so would allow cheaper power to displace its higher cost generation or otherwise make new entry more profitable by facilitating exports"); *id.* at 524 ("it is not in the economic self-interest of transmission providers to expand the grid to permit access to competing sources of supply"); Order No. 1000-A at P 9 (The Commission "need not make specific factual findings of discrimination to promulgate a generic rule to ensure just and reasonable rates or eliminate undue discrimination."); *Id.* at P 65 ("the Commission is authorized not simply to make generic findings but also to act on generic factual predictions"); *id.* at P 80 ("While the Commission did receive evidence that nonincumbent transmission developers experience discriminatory treatment, we think the more important point is that the practical effect of a federal right of first refusal is to discourage investment by nonincumbent transmission developers.").

[56] Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 688 (D.C. Cir. 2000) (citing Associated Gas Distributors v. FERC, 824 F.2d 981, 1008–09 (D.C. Cir. 1987)); Wisc. Gas Co. v. FERC, 770 F.2d 1144, 1158 (1985); Michigan Consol. Gas, 883 F.2d 117, 124 (D.C. Cir. 1989) ("Making predictions is clearly within the Commission's expertise and will be upheld if rationally based on record evidence."); Envtl. Action, Inc. v. FERC, 939 F.2d 1057, 1064 (D.C. Cir. 1991) (stating that "it is within the scope of the agency's expertise to make . . . a prediction about the market it regulates, and a reasonable prediction deserves . . . deference notwithstanding that there might also be another reasonable view"); Tenneco Gas, 969 F.2d 1187, 1198 (D.C. Cir. 1992) (emphasizing that "FERC is entitled to substantial deference" on "the question whether FERC's choice of regulatory alternatives is reasonable"); Louisiana Energy & Power Auth. v. FERC, 141 F.3d 364, 370 (D.C. Cir. 1998) (explaining that Commission prediction about the effect of open access transmission rules "is the kind of reasonable agency prediction about the future impact of its own regulatory policies to which we ordinarily defer") (citing Michigan Pub. Power Agency v. FERC, 963 F.2d 1574, 1580 (D.C. Cir. 1992) ("agencies are afforded wide deference in predicting the likelihood of future events")); National Fuel, 468 F.3d 831, 839–844 (D.C. Cir. 2006); Louisiana Pub. Serv. Comm'n v. FERC, 551 F.3d 1042, 1045 (D.C. Cir. 2008); Sacramento Mun. Util. Dist. v. FERC, 616 F.3d 520, 542 (D.C. Cir. 2010); Order No. 1000-A at P 58 ("The court [in *National Fuel*] specifically stated that the Commission could choose "to rely solely on a theoretical threat"); Order No. 1000-A at P 63 (discussing courts upholding rules promulgated by other agencies that were based on an agency's expert judgment).

[57] *National Fuel*, 468 F.3d at 844.

[58] Black Oak Energy v. FERC, 725 F.3d 230, 240 (D.C. Cir. 2013).

[59] Order No. 1000-A at P 65.

[60] *Id.* at P 74.

planning processes.[61] As the Commission has explained, "the inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others by . . . providing inferior transmission to competitors in the bulk power markets."[62] Absent regulatory intervention, the Commission should find that unduly discriminatory planning processes will continue.

Following the Commission's template for findings of undue discrimination and with these legal standards in mind, we suggest that the Commission lay the groundwork for its new planning rule by surveying the industry's evolving transmission needs. Today, transmission is needed to enhance reliability and system resilience in the face of climate-related disasters,[63] operational challenges,[64] and shifting supply-demand conditions.[65] In addition, as we discuss below in Part I.B.ii, new capacity additions are dominated by wind and

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[61] *See* Order No. 888 NOPR, supra note 13, at 17,676 (finding that "because utilities are naturally profit maximizers and monopoly suppliers to their native load, the vast majority of transmission-owning utilities have not agreed to give up their market power voluntarily").

[62] Order No. 888 at 21,567; Order No. 888-A, 62 Fed. Reg. 12,274, at p. 12,275 [hereinafter Order No. 888-A] ("Utility practices that were acceptable in past years, if permitted to continue, will smother the fledgling competition in electricity markets . . .").

[63] *See* National Oceanic and Atmosphere Administration, National Center for Environmental Information, "Billion-Dollar Weather and Climate Disasters: Overview," (showing that CPI-adjusted billion-dollar disasters in the U.S. have increased in frequency from one per year in 1981 to seven per year, that 2020 had 22 such disasters, and that average cost per disaster has increased steadily to nearly $50 billion). NOAA's analysis shows that costs of tropical cyclones and severe storms constitute most of the cost increases, when comparing data from the past decade (2011–2021) to the prior three decades. Wildfire costs are the third major driver. NOAA does not attempt to attribute any specific disaster or any trend of climate-related disasters to anthropogenic climate change. The trends are consistent with projections in the National Climate Assessment. *See* Wehner, M.F., J.R. Arnold, T. Knutson, K.E. Kunkel, and A.N. LeGrande, 2017: Droughts, Floods, and Wildfires. In: Climate Science Special Report: Fourth National Climate Assessment, Volume I, U.S. Global Change Research Program (Key Finding: "The incidence of large forest fires in the western United States and Alaska has increased since the early 1980s (high confidence) and is projected to further increase in those regions as the climate warms, with profound changes to certain ecosystems (medium confidence)"); Kossin, J.P., T. Hall, T. Knutson, K.E. Kunkel, R.J. Trapp, D.E. Waliser, and M.F. Wehner, 2017: Extreme storms. In: Climate Science Special Report: Fourth National Climate Assessment, Volume I, U.S. Global Change Research Program (Key Finding: Human activities have contributed significantly to observed ocean-atmosphere variability in the Atlantic Ocean (medium confidence), and these changes have contributed to the observed upward trend in North Atlantic hurricane activity since the 1970s (medium confidence)"; Key Finding: Climate models consistently project environmental changes that would putatively support an increase in the frequency and intensity of severe thunderstorms (a category that combines tornadoes, hail, and winds), especially over regions that are currently prone to these hazards, but confidence in the details of this projected increase is *low*.").

[64] *See* North American Electric Reliability Corp. (NERC), 2019 Long-Term Reliability Assessment, at p. 6 (increased penetration of distributed energy resources "ill require a strong transmission system with good links to the distribution system to maintain an appropriate balance between load, variable energy resources (VERs), and energy storage devices."); *id.* at p. 19 ("Capacity retirements located near metropolitan areas or large load centers that have limited transmission import capability present the greatest potential risk to reliability."); *id.* at p. 35 ("While a lack of future transmission projects does not currently pose a reliability concern, the importance of a secure transmission system is amplified when considering the significant addition of variable generation resources, continuing retirement of conventional and nuclear generation, and increased demand projections throughout North America in the assessment's 10-year horizon."); *id.* at p. 37 ("Additional transmission infrastructure is therefore vital to reliably accommodating large amounts of wind and solar resources, specifically in order to interconnect VERs planned in remote areas as well as to smooth the variable generation output across a broad geographical area and resource portfolio and deliver ramping capability and ancillary services from inside and outside a balancing area to equalize supply and demand.").

[65] *See, e.g.,* Seattle City Light, Climate Change Vulnerability Assessment and Adaptation Plan, at pp. 4–5 (summarizing potentials for new demand patterns due to temperature changes and shifts in supply due to hydro availability related to reduced snowpack and higher streamflows).

solar,[66] whose transmission needs differ from traditional forms of generation. Transmission is needed to connect these location-constrained resources and to ensure that the system remains reliable with a larger share of intermittent generation.[67]

To meet these needs, the industry must scale up investment in regional and interregional transmission. While the Commission has a long-standing policy of encouraging investment in large-scale transmission infrastructure, it "deals here with conditions that are altogether new."[68] Large-scale centralized plants sited near load centers are being replaced by dispersed resources located in remote regions. Interconnection queues show that the number of potential wholesale market entrants is ever-increasing.[69] Merchant transmission projects have been unable to meet demand from potential wholesale market entrants. Competitive transmission development processes, while enshrined in jurisdictional tariffs, have failed to meet these needs or discipline transmission development, particularly in multi-state RTOs. Innovative solutions, ranging from storage to grid-enhancing technologies, are commercially viable but have yet to be deployed at scale through jurisdictional planning processes.

Yet, transmission-owning Public Utilities have incentives to impede development of infrastructure that opens opportunities for competing generators and transmission developers. For vertically integrated Public Utilities, their generation investments drive their earnings, and it is economically rational for them to forgo potential profits in transmission expansion in order to protect their generation assets.[70] For wires-only Public Utilities, transmission is forty percent of ratebase.[71] It is economically rational for these utilities to avoid competitive transmission development processes and add to their ratebase through planning processes they control. For all Public Utilities, transmission's "strategic

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[66] *Infra* notes 177–180 and accompanying text.
[67] *See* note 64.
[68] Associated Gas Distributors v. FERC, 824 F.2d 981, 1001 (D.C. Cir. 1987) ("It is finally argued that the Commission's not having imposed any requirements [like those at issue] . . . demonstrates the lack of any power to do so. . . [But] the Commission deals here with conditions that are altogether new. Thus no inference may be drawn from prior non-use.").
[69] Joseph Rand, Mark Bolinger, Ryan Wiser, Seongeun Jeong, Lawrence Berkeley National Laboratory, "Queued Up: Characteristics of Power Plants Seeking Transmission Interconnection As of the End of 2020, May 2021.
[70] For vertically integrated utilities, 2019 FERC Form 1 data shows utility ratebase was 48% generation, 32% distribution, 18% transmission, and 2% other. *See* Rocky Mountain Institute, Utility Transition Hub (summarizing FERC Form 1 data); Peter Cappers and Sean Murphy, Lawrence Berkeley National Lab, *Unpacking the Disconnect between Wholesale and Retail Electric Rates*, Aug. 2019, at p. 29 (showing that from 2007 to 2016 for utilities in the MRO and SERC regions, approximately 60% of rate base additions were generation). In 1980, generation similarly accounted for about 50% of IOU gross plant in service and 80% of annual operation and maintenance expenses. PAUL L. JOSKOW AND RICHARD SCHMALENSEE, MARKET FOR POWER: AN ANALYSIS OF UTILITY DEREGULATION 46 (1983) (stating that 50% of utility ratebase was generation) (citing U.S. Department of Energy, Energy Information Administration, Statistics of Privately Owned Electric Utilities in the United States, 1980 Annual). Today, across the industry, transmission accounts for less than 20% of annual IOU capital spending. Edison Electric. Institute, Electric Power Industry Outlook, at 23 (Feb. 5, 2020).
[71] Rocky Mountain Institute, Utility Transition Hub (summarizing FERC Form 1 data).

importance"[72] means that it has value that is not captured in its owner's ratebase, and utilities are therefore loathe to give up their control over that value.[73]

The new industry conditions, combined with transmission-owning Public Utilities' incentives, demand that the Commission review whether practices it had previously considered acceptable are now unduly discriminatory.[74]

When the Commission conducts this review, it should begin with the following premises about transmission-owning Public Utilities:

- "The inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others by refusing"[75] "to expand the grid to permit access to competing sources of supply."[76]
- "Utilities owning or controlling transmission facilities possess substantial market power; that, as profit maximizing firms, they have and will continue to exercise that market power in order to maintain and increase market share"[77] in wholesale generation and transmission development.
- "It is in the economic self-interest of transmission monopolists, particularly those with high-cost generation assets,"[78] to oppose transmission expansion "when doing so stimulates new entry or greater competition . . . or would allow cheaper power to displace [a transmission owner's] higher-cost generation or otherwise make new entry more profitable."[79]
- "A transmission provider has little incentive to upgrade its transmission capacity with its interconnected neighbors if doing so would allow competing suppliers to serve the customers of the transmission provider."[80]
- "It is not in the economic self-interest of incumbent transmission providers to permit new entrants to develop transmission facilities."[81]

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[72] *See* sources cited in note 12.
[73] *See, e.g.,* New York Independent System Operator, *Transmission Expansion in New York State: A New York ISO White Paper*, at pp. 4–7 (Nov. 2008) (filed in FERC Docket No. 0A08-52, Attachment A to Answer of New York Regional Interconnect, Dec. 16, 2008) (stating that "utilities will protect their franchise areas, a valuable and exclusive asset, and are loathe to allow competitors' [transmission] projects through their areas without some control and participation"); Amicus Brief of the American Antitrust Institute in Support of Petitioner, *New York Regional Interconnect v. FERC*, Docket 09-1309, at p. 16 (D.C. Cir. Jul. 29, 2010) (explaining that because the development of one transmission project may foreclose alternatives, a utility may attempt to block a competing project in order to boost its own alternative, and that projects compete "in more subtle ways," such as by alerting regulators that the incumbent may not be the most cost-effective transmission developer).
[74] *See* Order No. 888-A at 12,296 ("[I]t is no longer in the interest of wholesale customers for the Commission to tolerate the types of practices that were previously accepted. We cannot allow what have become unduly discriminatory practices to erect barriers between customers and the rapidly emerging competitive electricity marketplace.").
[75] Order No. 888 at 21,567.
[76] Order No. 890 at P 522.
[77] Order No. 888 NOPR, *supra* note 13, at 17,665.
[78] Order No. 888 at 21,567; Order No. 890 at P 39.
[79] Order No. 890 at P 422.
[80] *Id.* at P 522.
[81] Order No. 1000 at P 256.

- "The fundamentally anti-competitive structure of the transmission industry"[82] "provides opportunities for undue discrimination."[83]
- "Transmission providers retain both the incentive and the ability to discriminate against third parties, particularly in areas where the pro forma OATT leaves the transmission provider with significant discretion."[84]
- "Transmission monopolists . . . will continue to engage in unduly discriminatory practices unless [the Commission] fashion[s] a remedy to eliminate their ability and incentive to do so."[85]

For decades, one of the Commission's "primary goals [has been] to improve the competitive structure of the industries which it regulates."[86] In Orders No. 890 and 1000, the Commission attempted to address that goal by mitigating transmission-owning Public Utilities' incentives and opportunities to unduly discriminate in transmission planning. The Commission should acknowledge that Order No. 1000-compliant regional processes simply have not fulfilled their promise. For example, in its Order No. 1000 compliance filing MISO told the Commission that it its implementation of Order No. 1000 would lead to an increase in regional projects. MISO "anticipate[d] the likelihood that multiple local transmission reliability issues could be addressed through regional solutions that are subject to some level of regional cost allocation, as either a MEP [Market Efficiency Project] or a MVP [Multi-Value Project]."[87] These regional solutions, MISO claimed, "might lead to the displacement of the need for multiple BRPs [Baseline Reliability Projects]"[88] that are developed by individual transmission owners.

In fact, the opposite happened. Following the region's implementation of Order No. 1000, BRPs and other local non-competitive projects have ballooned.[89] Meanwhile, MISO has not planned any additional MVPs and has planned only three MEPs valued at just $305 million.[90] MISO's two most recent regional plans exemplify this long-term trend.[91] Not a single dollar of the $7.5 billion in planned investments will be allocated pursuant to regional cost sharing principles, and no project will be developed through competitive processes. In effect, all projects are local, and no projects have regional benefits. In PJM,

[82] Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 684 (D.C. Cir. 2000).
[83] Order No. 1000 at P 59.
[84] Order No. 890 at P 26.
[85] Order No. 888 at p. 21,568.
[86] *Re Incentive Rate Making for Interstate Natural Gas Pipelines, Oil Pipelines, and Electric Utilities*, 61 FERC ¶ 61,168, at p. 61,595 (1992).
[87] Prepared and Direct Testimony of Jennifer Curran on Behalf of MISO TOs and MISO, FERC Docket No. ER13-187, Oct. 25, 2012.
[88] *Id.*
[89] From 2010 to 2013, the MISO utilities planned forty-seven BRPs per year valued at $340 million annually, and an additional $775 million per year in "Other" projects whose costs are not regionally allocated. Following Order No. 1000 implementation, from 2014 to 2019, utilities planned an average of eighty-five BRPs per year valued at $777 million annually, plus an additional $1.9 billion per year in "Other" projects. In total, local spending increased from $1.1 billion per year to $2.7 billion per year. Complaint of Coalition of MISO Transmission Customers, et al., FERC Docket No. EL20-19, at 31–32 (Jan. 21, 2020).
[90] *Id.*
[91] MTEP 2021 is still a draft. MISO's Board is scheduled to "vote to approve the MTEP21 Executive Report and Appendix A during its December 2021 meeting." https://www.misoenergy.org/planning/planning/mtep21/.

regional projects have fallen by forty percent since it implemented Order No. 1000, while spending on transmission-owner created "Supplemental" projects has tripled.[92]

Then-Commissioner Moeller predicted this outcome. In his partial dissent from Order No. 1000, he expected that tying incumbents' exclusive development rights to local projects would "ultimately discourage [regional] cooperation by encouraging more local projects."[93] On its face, Commissioner Moeller's prescient statement is a "predictive judgment[] about areas that are within the agency's field of discretion and expertise,"[94] based on "reasonable economic propositions."[95] He presumably rooted his prediction in the Commission's well-established presumptions that, as monopolists, transmission-owning Public Utilities' will take advantage of their opportunities to avoid and undermine competition.[96] The data showing declining regional spending confirms his instincts. Commissioner Moeller's prediction ties this data to the Commission's understanding of monopolist transmission owners and their incentives and opportunities to act in their self interest.

Even if the Commission were to reinstate incumbent exclusivity through Rights of First Refusal (ROFRs), utilities would still have incentives and opportunities to overbuild in their local service territories. Public Utilities explicitly control local planning processes. With this control, they can pursue projects that are most attractive to them regardless of their effects on wholesale and transmission competitors and customers. As we discuss in Part II, the Commission does not scrutinize utilities' local spending, allowing utilities to pursue low-risk projects that can obviate the need for regional projects and that earn them at least the same return as regional projects that bring broader benefits. Moreover, under the Commission's planning rules, utilities are free to rebuild the grid of the past without informing regulators, customers, and competitors of their plans or sharing any data or modeling to justify their spending.[97] Recent Commission proceedings about so-called "end-of-life" transmission show that Public Utilities are zealously protecting their exclusive opportunities to rebuild interstate transmission located within their state-provided retail service territories.[98]

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[92] The 2005–2019 data is available from PJM Transmission Expansion Advisory Committee, *Project Statistics* (May 12, 2020). 2020 data is from PJM, 2020 Regional Transmission Expansion Plan, at 259 (2020). Spending on Supplemental projects averaged $1.25 billion from 2005 to 2013, and $3.79 billion from 2014 to 2020. Spending on Baseline regional projects averaged $2.76 billion from 2005 to 2013, and $1.65 billion from 2014 to 2020. Annual spending is in nominal dollars, not adjusted for inflation.
[93] Order No. 1000, Moeller dissenting.
[94] Wisc. Public Power v. FERC, 493 F.3d 239, 260 (D.C. Cir. 2007) (citing Earthlink v. FCC, 462 F.3d 1, 12 (D.C. Cir. 2006)).
[95] *Associated Gas Distributors*, 824 F.2d at 1008.
[96] *See supra* notes 75–85.
[97] *California Public Utilities Commission, et al., v. Pacific Gas and Electric Co.*, 164 FERC ¶ 61,161 at P 66 (2018) (holding that Order No. 890 applies to transmission expansion and not "asset management projects" even though complainants alleged that 80 percent of the utility's spending is done on an internal basis without opportunity for stakeholder input or review).
[98] *See, e.g.*, *Southern California Edison Co.*, 164 FERC ¶ 61,160 (2018) (accepting utility filing on "transmission-related maintenance and compliance activities"), *reh'g denied*, 168 FERC ¶ 61,170 (2019); *California Public Utilities Commission, et al., v. Pacific Gas and Electric Co.*, 164 FERC ¶ 61,161 (2018) (denying complaint alleging that, because 80 percent of utility's capital spending on transmission is not subject to stakeholder review it is unjust and unreasonable, because Order No. 890 aimed to remedy opportunities for undue discrimination in transmission expansion, not replacement), *reh'g denied,* 168 FERC ¶ 61,171 (2019); *PJM*

Revisiting ROFRs will also not address vertically integrated utilities' incentives to protect their own generation assets in transmission planning processes.[99] Take the case of Entergy, corporate parent to Public Utilities that operate across four states in the Southeast. In 2006, the Commission approved the company's proposal for an Independent Coordinator for Transmission (ICT), which was intended to resolve allegations about the company's anti-competitive conduct that limited wholesale market entry.[100] Four years later, "stakeholder comments revealed that the [ICT] was not fully addressing customers' complaints" about Entergy's anti-competitive transmission service.[101] Meanwhile, the U.S. Department of Justice was investigating "whether certain of Entergy's power generation dispatch, transmission planning and power procurement practices constitute exclusionary conduct under Section 2 of the Sherman Act."[102] To stave off any penalties, the company agreed to join an RTO and divest its transmission assets.[103] While the transmission sale fell through due to state regulators' objections,[104] Entergy did join an RTO. Even though Entergy had at least 15 GW of transmission capacity connecting the company to SPP, Entergy joined MISO despite only 1 GW of transfer capability.[105] This decision appears designed to minimize trading opportunities in order to protect Entergy's local wholesale market dominance.[106]

Since joining MISO, Entergy has maintained its local control, in part by subverting MISO transmission planning functions. The Southern Renewable Energy Association (SREA) summarizes that by tagging projects as part of its "Asset Renewal Program," similar to end-of-life in other regions, Entergy avoids MISO's review and "has effectively eliminated MISO's transmission expansion planning function" in Entergy's retail territory (MISO South).[107] Where MISO did identify an economically beneficial project in MISO South, MISO later cancelled it, partially in response to Entergy's decision to construct a new

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Interconnection, 172 FERC ¶ 61,136 (2020) (finding that right to amend procedures for end-of-life projects is within transmission owners' exclusive filing rights and approving amendments), *reh'g denied*, 173 FERC ¶ 61,225 (2020); *PJM Interconnection*, 173 FERC ¶ 61,242 (2020) (rejecting stakeholder-initiated proposal to amend end-of-life planning as beyond the scope of planning responsibilities that transmission owners delegated to PJM).

[99] *See supra* note 70 (showing that ratebase is approximately half generation).

[100] *Entergy Services, Inc.,* 115 FERC ¶ 61,095 at PP 13–15 (2006); Eileen O'Grady, Reuters, *Entergy, ITC Holdings Seek U.S. OK of $1.78 Billion Grid Transfer*, Sep. 24, 2012 (noting "a decade of complaints from independent power producers" about Entergy's anti-competitive practices).

[101] *MISO et al.,* 139 FERC 61,056 at P 3 (2012).

[102] U.S. Department of Justice, Statement on Entergy Corp.'s Transmission System Commitments and Acquisition of KGen Power Corp.'s Plants in Arkansas and Mississippi, Nov. 14, 2012; Letter from Members of the Entergy Regional State Committee (E-RSC) to Attorney General Eric Holder, Oct. 27, 2010.

[103] DOJ Statement, *supra* note 102.

[104] *In re: Joint Application for the Transfer of Ownership and Control of Entergy Mississippi Inc.'s Transmission Facilities and Assets*, Mississippi Public Service Commission Docket 2012-UA-358, 2013 WL 4741021, Aug. 28, 2013.

[105] *MISO*, 136 FERC ¶ 61,010 at PP 3–4 (2011).

[106] *See, e.g.,* Michael Isaac Stein, "No Place to Go But Up: Entergy Critics Urge a New Look at Abandoned Plan to Sell Transmission Grid, Break Up Vertical Monopoly," THE LENS, Oct. 5, 2021 (quoting former FERC Commissioner John Norris: "My opinion now, having reflected on this and seeing how they've acted since joining MISO in 2013, I think largely it was because there's a bottleneck of where Entergy joined into MISO. As long as they can maintain that bottleneck, they can really restrict power flows in both directions. Joining MISO was more of a strategy by Entergy I think that's consistent with what they've done, which is try and protect themselves from competition.").

[107] Comments of the Southern Renewable Energy Association, Mississippi Public Service Commission Docket No. 2021-AD-52, Jun. 25, 2021.

natural gas fired power plant.[108] Entergy is moving ahead with another power plant that may obviate the only regionally cost-allocated project in MISO South.[109] Meanwhile, MISO has yet to expand North-South transfer capacity. In June, MISO announced that it would not include transmission within MISO South or lines connecting MISO South to other regions in its ongoing Long-Range Transmission Plan (LRTP) process.[110] MISO offered no explanation for this omission, but evidence suggests that Entergy and its allies unduly influenced MISO's decision.[111]

The Commission need not rely on this sort of evidence to conclude that existing planning processes enable Public Utilities' anti-competitive conduct. Entergy is a vertically integrated utility responding to incentives embedded in state and Commission regulations that are common across the country, and it is taking advantages of opportunities in the Commission-approved planning processes to achieve its financial and strategic goals. These incentives and opportunities are sufficient for the Commission to order changes under section 206.

For wires-only utilities, the ISO-NE planning process illustrates how current planning rules facilitate undue discrimination. While more than two-thirds of the region's transmission investment post-Order No. 1000 compliance has been approved through the RTO-administered process, all but one project was exempt from competition based on ISO-NE's carve-out for time-sensitive projects.[112] The Commission recently brushed aside allegations that this "exemption incentivizes transmission owners to do short-term planning and partake in other behavior to avoid competition."[113] That conclusion misses the broader point (not at issue in that proceeding) that planning only for immediate needs demonstrates that the ISO-NE planning process is broken. Avoiding urgently needed transmission should be a hallmark of effective planning. Regardless of whether Public Utilities are intentionally manufacturing immediate needs by withholding information or

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[108] MISO, Waterford-Churchill 230kV Economic Project Withdrawal, Oct. 9, 2020 (listing several factors for the decrease in benefit-cost ratio, including the development of a natural gas plant that has "improved local power supply economics and reliability).

[109] SREA Comment, *supra* note107, at pp. 20–21.

[110] *Id.* at p. 32.

[111] *Id.* at pp. 21–32 (detailing how MISO South stakeholders are obstructing transmission expansion through stakeholder processes); Jeffrey Tomich, "Moment of Truth for Grid Expansion: Who Pays?" E&E News, Oct. 7, 2021 (quoting former FERC Commissioner John Norris discussing MISO transmission planning and accusing Entergy of being behind an "an obvious attempt to throw doubt into the models, to challenge the information, to challenge the process. They have done nothing to indicate that they want to be engaged in trying to find regional transmission solutions.").

[112] Comments of New England State Agencies, FERC Docket No. EL19-90, at p. 8 (Jan. 24, 2020) ("[A]ll 30 projects were built or are being built by incumbent transmission owners rather than being bid competitively. As a consequence, ISO-NE is the last regional transmission operator to conduct a competitive transmission planning and procurement process."); Comments of the Connecticut Public Utilities Regulatory Authority, FERC Docket No. EL19-90, at p. 2 (Jan. 24 2020) ("the extensive, exclusive reliance upon the immediate need exemption has avoided introducing competition into the process of solving transmission needs"); Lon L. Peters, Shareholders v. Ratepayers in New England, 34 ELEC. J. 106904 (2021) ("Two decades of coordinated planning and investments have, implausibly, left the ISO in a situation where almost all grid investments are time-sensitive.").

[113] *ISO New England*, 171 FERC ¶ 61,211 at P 59 (2020).

through some other strategy designed to eliminate competitive development,[114] the Commission should recognize that the status quo benefits incumbents, is unproductive, and must be remedied.

The Commission's planning rules provide transmission providers with "significant discretion"[115] in setting evaluation criteria for potential transmission solutions,[116] which can facilitate unduly discriminatory conduct. This flexibility provides Transmission-owning Public Utilities with opportunities to unduly influence the planning process in order to ensure that projects that harm their parochial interests are not selected.[117] The FPA

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[114] Prior to Order No. 1000 compliance, utility executives claimed that the RTO's planning process relied on a "level of intercompany planning coordination" that "dates back several decades." Prepared Direct Testimony of David Boguslawski and Carol Sedewitz, Addendum to ISO-NE Compliance Filing, Docket No. ER13-193, (Oct. 25, 2012), at 4–5. Mr. Boguslawski was Vice President of Transmission Strategy and Operations for Northeast Utilities. Ms. Sedewitz was Director, Electric Transmission Planning for National Grid. The RTO's apparent dependency on utilities hearkens back to the bygone power pool era, when Public Utilities expanded transmission to meet their needs and without necessarily considering detrimental effects on competition or customers. *See* FERC, Office of Electric Power Regulation, *Power Pooling in the United States*, at 62 (Dec. 1981) ("The likelihood of collusion or parallel behavior is increased when industry participants come together to make joint planning and operating decisions.") (quoting David W. Penn, James B. Delaney, and T. Crawford Honeycutt, Nuclear Regulatory Commission Staff, "Coordination, Competition, and Regulation in the Electric Utility Industry," NUREG-75/061, Jun. 1975).

[115] Order No. 890 at P 26.

[116] *See, e.g.,* Order No. 1000-A at P 267 (declining "to adopt standard procedures in the regional transmission planning process for evaluating backbone transmission facilities or for addressing transmission upgrades that have a short planning and construction cycle and that can be adapted to fill economic or reliability needs as they arise in the ordinary course of system operations"); *id.* at P 271 (declining to require analyses of loop flow in planning processes); *id.* at P 283 (affirming that transmission providers may use "flexible criteria or bright-line metrics" to determine which projects are in the regional plan).

[117] This undue influence may be possible due to a variety of factors, including transmission owners' filing rights, transmission-owners' privileged positions in RTO committees, or the voluntary nature of RTO membership. With regard to filing rights, the Commission has generally approved allocation of filings rights between transmission owners and RTOs but also said that it would monitor to ensure that transmission owners do not "use their filing rights in a way that compromises RTO independence or functions or causes undue discrimination"), *Pennsylvania-New Jersey-Maryland Interconnection,* 105 FERC ¶ 61,294 at P 33 (2003). The Commission generally approved the two-tier governance structures of RTOs after repeated efforts by transmission owners to explicitly control ISO decisionmaking processes. *See, e.g., Atlantic City Elec. Co.*, 77 FERC ¶ 61,148, at p. 61,574 (1996) (rejecting utility-filed PJM governance proposals because they provided utilities with "ultimate control"); *New England Power Pool*, 83 FERC ¶ 61,045, at p. 61,260 (1998) (rejecting utility-filed ISO-NE governance proposal because it provided utilities with "excess influence"); *New England Power Pool*, 86 FERC ¶ 61,262, at p. 61,965 (1999) (rejecting subsequent governance proposal); *Central Hudson Gas & Electric*, 83 FERC ¶ 61,352, at p. 62,409 (1998) (rejecting utility-filed NYISO governance proposal because it provided utilities with "substantial voting power"); *Central Hudson Gas & Electric*, 87 FERC ¶ 61,135, at p. 61,540 (1998) (rejecting subsequent governance proposal for "vesting disproportionate authority in [] Transmission Providers"). The two-tier governance structure was essentially a compromise between transmission owners and the Commission. It provides transmission owners with ostensibly appropriate influence over transmission, but it also provides opportunities for undue discrimination. At least one RTO has a transmission owners-only committee that confidentially shares data and develops analyses with RTO staff to develop section 205 filings. In a dispute about transmission cost allocation, various parties have made representations to the Commission about the arrangement in FERC Docket No. EL21-39. LSP Transmission Holdings II, Comment in Support (Feb. 9, 2021); PJM Interconnection, Motion for Leave to File Answer and Answer (Feb. 25, 2021); Indicated Transmission Owners, Answer (Mar. 4, 2021); Silver Run Electric, Response to Request for Abeyance (Mar 5. 2021); Indicated Transmission Owners, Motion for Leave to File Answer and Answer (Mar. 22, 2021). Such committees may facilitate unduly discriminatory transmission service. Finally, it is an open secret among industry participants that utilities are able to exert pressure on RTO management by threatening to withdraw. The Commission can take notice and act based on such unsubstantiated allegations. *See* Order No. 888 at p. 21,568.

precludes such "subtle forms of discrimination."[118] Because this undue discrimination persists, the Commission has unexercised authority under section 206 to take further remedial actions that aim to neutralize Public Utilities' efforts to undermine regional planning processes.[119]

B. *The Commission Has Expansive Authority to Remedy Transmission Owners' Unduly Discriminatory Conduct, and the ANOPR's Planning Proposals Follow from Prior Remedies that Limit Utilities' 'Wide Discretion' in Implementing the OATT*

The Commission's "authority generally rests on the public interest in constraining exercises of market power."[120] Where the Commission finds evidence of such anti-competitive conduct or even the potential for it, it has repeatedly acknowledged that it has "broad discretion in fashioning remedies to undue discrimination."[121] In this section, we highlight the wide range of remedies the Commission has ordered to unduly discriminatory transmission service. We then argue that the ANOPR's planning reform proposals are within the Commission's section 206 authority.

We begin with Order No. 888, where the Commission first imposed its pro forma OATT on all Public Utilities.[122] By ordering Public Utilities to adopt tariffs that meet its standards, the Commission reversed the "regulatory norm."[123] Prior to Order No. 888, Public Utilities filed their own bespoke transmission tariffs, which were then subject to the Commission's deferential review.[124] In essence, utilities' section 205 filings defined transmission service.

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[118] Order No. 436, 50 Fed. Reg 42,497, at p. 42,425 (1985) (cited by *ANR Pipeline Co.*, 41 FERC ¶ 63,017, at pg. 28 (1987); *Arcadian Corp. v. Southern Natural Gas Co.*, 61 FERC ¶ 61,183, at p. 61,678 (1991)).

[119]*See* South Carolina Pub. Serv. Authority v. FERC, 762 F.3d 41, 57–69 (D.C. Cir. 2014) (upholding Order No. 1000 in part due to the FPA's "broadly stated" authority to remedy anti-competitive practices even where FERC's action is premised on a "theoretical threat" to just and reasonable rates, such as the absence of competition); Transmission Access Policy Study Group. v. FERC, 225 F.3d 667, 687 (D.C. Cir. 2000) (holding that the FPA's "ambiguous antidiscrimination provisions . . . giv[e] [FERC] broad authority to remedy unduly discriminatory behavior").

[120] National Ass'n of Regulatory Utility Comm'rs. v. FERC, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (citing Associated Gas Distributors v. FERC, 824 F.2d 981, 1003 (D.C.Cir.1987)).

[121] Order No. 890 at P 1322; *Consolidated Gas Co. of Florida, Inc. v. Florida Gas Transmission Co.*, 29 FERC ¶ 61,205 at p. 61,416 (1984); *James River Corp. of Nevada v. Northwest Pipeline Corp.,* 42 FERC ¶ 61,344, at pg. 9 (1988); *ANR Pipeline Co. v. Transcontinental Gas Pipe Line Corp.*, 91 FERC ¶ 61,066 at p. 61,233 (1991); *Missouri Gas Energy v. Panhandle Eastern Pipeline Corp.*, 75 FERC ¶ 61,166, at p. 61,549 (1996) ("[T]he Commission has 'broad power to stamp out undue discrimination,' including the authority to impose 'suitable remedies' in an appropriate case. That authority includes the power to order an interstate pipeline to transport gas, to add new delivery points, to file certificate applications, and to construct facilities necessary to make deliveries. The Commission's powers are at their height when it remedies a violation of the statute and its regulations.")(citations omitted); *Pennsylvania-New Jersey-Maryland Interconnection, et al*, 92 FERC ¶ 61,282, at p. 61,955 (2000).

[122] Order No. 888 at n. 514 (allowing utilities to file amendments that "go beyond the minimum elements. . . or [] account for regional, local, or system-specific factors").

[123] The D.C. Circuit explained that Order No. 888 "shifts from a regulatory norm in which a user of transmission services must demonstrate to FERC an individualized need for open access to one in which a provider of transmission services must present to FERC individualized circumstances requiring relief from open access." Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 689 (D.C. Cir. 2000).

[124] City of Winnfield, La. v. FERC, 744 F.2d 871, 876 (D.C. Cir. 1984) (stating that the Commission has an "essentially passive and reactive role" under section 205); Wisc. Pub. Power v. FERC, 493 F.3d 239, 260 (D.C.

Under the Open Access regime, the Commission sets minimum national standards for all transmission service. Through its initial OATT mandate and subsequent amendments, the Commission has displaced Public Utilities' transmission operational and planning practices. For nearly all of its reforms, the Commission's primary justification for updating the OATT is to remedy undue discrimination.

The Commission issued its first major OATT reforms in Orders No. 2003 and 2006. Both orders require Public Utilities to follow detailed procedures for interconnecting generators.[125] Despite its extensive efforts to remedy unduly discriminatory transmission operations in Order No. 888, the Commission found that Public Utilities continued to obstruct competition through interconnection processes.[126] The Commission determined that mandatory, industry-wide standards for interconnection service were necessary to "minimize opportunities for undue discrimination" and were important for facilitating entry of Public Utilities' wholesale market competitors.[127]

Following its generator interconnection orders, the Commission ordered further reforms, finding that the "transmission providers retained both the incentive and the ability to discriminate against third parties, particularly in areas where the pro forma OATT left the transmission provider with significant discretion."[128] The Commission explained that "[t]his wide discretion, when coupled with a transmission provider's incentive to discriminate, creates opportunities for discrimination under the pro forma OATT."[129] The Commission's most significant transmission operations reform demanded "consistency in the data and modeling assumptions used for ATC [Available Transmission Capacity] calculations." By "eliminating discretion and ensuring comparability in the manner in which a transmission provider operates and plans its system," the Commission hoped that its ATC reforms would "remedy the potential for undue discrimination."[130]

In a subsequent order, the Commission required Public Utilities to change their transmission scheduling protocols, "in part to remedy OATT provisions that may allow public utility transmission providers to treat some customers in an unduly discriminatory manner."[131] One year later, the Commission adopted reforms it found "necessary to address the potential for undue discrimination against transmission customers choosing to self-supply" certain ancillary services.[132] "[I]n order to ensure a level of transparency adequate

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Cir. 2007) (summarizing that a party opposing Commission approval under section 205 has "the burden . . . to show that the Commission's choices are unreasonable and its chosen line of demarcation is not within a zone of reasonableness as distinct from the question of whether the line drawn by the Commission is precisely right") (quoting ExxonMobil Gas Mktg. Co v. FERC, 297 F.3d 1071, 1084 (D.C. Cir. 2002)).

[125] Public Utilities may propose amendments to the agreements by making section 205 filings.

[126] Order No. 2003 at PP 10–11.

[127] Order No. 2003, 104 FERC ¶ 61,103 (2003) at PP 4, 11–12, 18–20; Order No. 2006, 70 Fed. Reg. 34,190 at PP 11–12 (2005). National Ass'n of Regulatory Utility Comm'rs. v. FERC, (upholding the Commission's order to a jurisdictional challenge and stating that "FERC's authority generally rests on the public interest in constraining exercises of market power").

[128] Order No. 890 at P 26.

[129] Order No. 890 at P 41; Order No. 890-A at P 7.

[130] Order No. 890 at P 292; *id.* at PP 69, 207 (noting that consistency will also provide greater transparency).

[131] Order No. 764, 139 FERC ¶ 61,246 at P 46 (2012).

[132] Order No. 784, 144 FERC ¶ 61,056 at PP 4, 112–113 (2013).

to support self-supply decision-making by transmission customers," the Commission also added to Public Utilities' information disclosure requirements.[133]

The Commission's Open Access standards go far beyond technical protocols on ATC and scheduling. Order No. 889, released contemporaneously with Order No. 888, reaches into utilities' internal operations. The order prohibits certain communications between Public Utility employees and demands that utilities publish what they had considered to be proprietary information.[134] The standards of conduct governing internal operations and instructions to create open-access communications systems underpin the OATT. Both mandates aimed to prevent a utility from using its control of transmission information to provide preferential treatment to its own power marketing businesses.[135]

These two requirements illustrate the breadth of the Commission's authority to remedy undue discrimination. Codes of conduct restricted Public Utility employee communications, prevented non-employee agents (including outside attorneys) from being "conduits" for improper communications,[136] and even required utilities to restructure their own control room operations.[137] The Commission rejected the notion that utilities themselves should be allowed to implement and self-police codes of conduct,[138] believing instead that imposing "explicit guidelines" would be vital to "help ensure non-discriminatory access to information."[139] The D.C. Circuit upheld similar conduct rules that the Commission imposed on natural gas pipelines, concluding that requiring a company's merchant and transmission employees to "function independently of each other is a useful prophylactic to deter and prevent anticompetitive abuse."[140]

The Commission's information disclosure rules also invaded utilities' internal operations. The Commission ordered utilities to share previously untracked data and create new information-sharing platforms that met Commission standards. Again, the Commission justified its intrusive requirements as remedies to Public Utilities' unduly discriminatory conduct.[141] The Commission found by "open[ing] up the 'black box' of [] transmission system information," and imposing codes of conduct it would "ensure that the utility does not use its access to information about transmission to unfairly benefit its own or its affiliates'

[133] *Id.* at PP 3, 116.
[134] Order No. 889, *Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct*, 61 Fed. Reg. 21,737 (1996).
[135] Order No. 888 at 21,552 (stating that functional unbundling, which included the requirement that utility power marketing operations use only the same transmission information as their transmission customers is "necessary to ensure that public utilities provide non-discriminatory service," adding that codes of conduct are "necessary to protect against market power abuses" and stating that a "strong code of conduct" must "separate employees involved in transmission functions from those involved in wholesale power merchant functions").
[136] Order No. 889-A, 62 Fed. Reg. 12,484, at p. 12,491.
[137] Order No. 889 at 21,743, n. 28.
[138] *Id.* at 21,741.
[139] Proposed Rule, Real-Time Information Networks and Standards of Conduct, 60 Fed Reg. 66,182, 66,197 (Dec. 21, 1995) [Hereinafter RIN NOPR]. The Commission also noted that explicit guidance will provide utilities with an understanding of permissible and impermissible conduct, reduce customer complaints, simplify enforcement, and reduce information disclosure requirements.
[140] Tenneco Gas v. FERC, 969 F.2d 1187, 1209 (D.C. Cir. 1992).
[141] RIN NOPR, *supra* note 139, at 66,185 (stating that the Commission was "considering establishing [Real-Time Information Network] RIN rules to effectuate the non-discrimination goals of the Open Access NOPR").

sales."[142] Again, the D.C. Circuit found similar information sharing rules for pipelines to be a "reasonable means of advancing a permissible objective, eliminating the anti-competitive consequences of pipelines' market power over transportation."[143]

When the Commission acts to remedy anti-competitive utility conduct, courts uphold that action. Commission remedies may be far-reaching and consequential. The ANOPR's planning reforms do not violate any jurisdictional limit, and are well within the Commission's section 206 authority. Both reforms would address "the incentive and the ability to discriminate against third parties, particularly in areas where the pro forma OATT left the transmission provider with significant discretion."[144]

1. <u>The Commission May Require Planning Entities to Consider Anticipated Generation Expansion</u>

In the ANOPR, the Commission seeks comment on whether it should require regional planning entities "to plan for the transmission needs of anticipated future generation to meet a changing resource mix, including generation that is not yet in the interconnection queue."[145] The Commission also requests comment on "what factors shaping the generation mix are appropriate to use for transmission planning" and, with regard to each factor, "the source of the Commission's legal authority to incorporate that factor in the regional transmission and cost allocation processes."[146]

Section 206 provides the Commission with legal authority to require planning entities to consider anticipated future generation. The Commission explained in Order No. 1000 that requiring transmission providers to convene an open planning process that considers transmission needs driven by Public Policy Requirements would "remedy opportunities for undue discrimination" by preventing transmission providers from "planning only for their own needs or the needs of their native load customers."[147] In a forthcoming rulemaking, the Commission could similarly require transmission providers to plan for anticipated future generation, as the Commission suggests in the ANOPR. Forcing Public Utilities to account for factors that affect the transmission market would prevent them from only considering their own needs and otherwise using the planning process to "act in an unduly discriminatory manner against transmission customers."[148]

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[142] Order No. 889 at 21,740.
[143] Tenneco Gas v. FERC, 969 F.2d 1187, 1196 (D.C. Cir. 1992).
[144] Order No. 890 at P 26.
[145] ANOPR at P 44.
[146] ANOPR at P 46.
[147] Order No. 1000 at P 203.
[148] Order No. 1000 at P 83:

> When conducting transmission planning to serve native load customers, a prudent transmission provider will not only plan to maintain reliability and consider whether transmission upgrades or other investments can reduce the overall costs of serving native load, but also consider how to plan for transmission needs driven by Public Policy Requirements. Therefore, we conclude that, to avoid acting in an unduly discriminatory manner against transmission customers that serve other loads, a public utility transmission provider must consider these same transmission needs for all of its transmission customers.

The Commission could further specify which factors transmission planners must consider and how they should integrate those factors. In Order No. 890 the Commission found that transmission providers' "wide discretion" for setting ATC, "coupled with a transmission provider's incentive to discriminate, create[d] opportunities for discrimination under the pro forma OATT."[149] The Commission's remedy was to require "industry-wide consistency of all ATC components,"[150] because it expected that "consistency in the data and modeling assumptions used for ATC calculations [would] remedy the potential for undue discrimination by eliminating discretion and ensuring comparability in the manner in which a transmission provider operates and plans its system."[151]

Here, the Commission could find that the lack of uniform standards in regional planning processes[152] similarly provides transmission providers with "excessive discretion" that creates opportunities for undue discrimination.[153] Because the Commission has not set clear rules on scenario planning, it could find, as it did in Order No. 890, that

> transmission providers retain unnecessarily broad discretion in this area. This resulting discretion is a significant problem because [scenario planning], which varies greatly depending on the criteria and assumptions used, may allow the transmission provider to discriminate in subtle ways against its competitors. . . . This discretion also hampers the detection of undue discrimination and, thereby, undermines the Commission's ability to enforce the general requirement . . . that transmission service be provided on a not unduly discriminatory basis.[154]

Regional planners, and particularly RTOs, may not have the same incentives to unduly discriminate in the regional planning process as their transmission-owning Public Utility members. Nevertheless, the Commission could apply its reforms to all transmission providers. As discussed above, regional planning processes are not actually planning regional projects as the Commission had intended. The Commission could conclude that transmission-owning Public Utilities unduly influence scenario planning in order to obstruct competition with utility-owned assets. That undue influence could take several forms,[155] and the Commission has wide discretion to classify conduct as unduly discriminatory. The Commission could find that the failure of RTOs to plan transmission that facilitates wholesale market entry unduly discriminates against transmission customers waiting in interconnection queues, as well as wholesale customers who are denied low-cost power. Requiring regional planners to consider specific factors in long-term scenario planning could address such undue discrimination.

In Order No. 890, rather than defining acceptable ATC methodologies, the Commission ordered Public Utilities to develop them through NERC reliability standards and NAESB

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[149] Order No. 890 at P 41; Order No. 890-A at P 7.
[150] Order No. 890 at P 207.
[151] Order No. 890 at P 292.
[152] *Supra* note 116.
[153] Order No. 890 at P 207.
[154] Order No. 890 at P 68.
[155] *See supra* note 117

business practices development processes.[156] For scenario planning, the Commission could work with the Department of Energy to develop industry-wide standards. This partnership could be effectuated through a joint rulemaking. DOE could propose a rule[157] that would commit to facilitating a technical process for developing scenario planning standards. By finalizing that rule pursuant to section 206, the Commission would require transmission providers to use the resulting methods in planning processes. The Commission and DOE have similarly collaborated in at least one rulemaking proceeding. In Order No. 30, proposed by DOE,[158] the Commission authorized transportation of natural gas purchased by certain end-users certified by DOE.[159] In a separate rulemaking, DOE established those certification procedures.[160] When the Commission finalized Order No. 30, it incorporated those DOE rules into its order issued under section 7 of the Natural Gas Act (NGA).

Of course, the Commission need not rely on DOE to initiate a rulemaking. The Commission could invite interested parties to file comments on scenario planning. DOE could independently develop its own recommendations and file them at the Commission in the relevant proceeding. With DOE's recommendations in the record, the Commission could incorporate them into its final rule.

The Commission could also require planners to consider input from state regulators. For RTOs that already recognize a committee of state regulators in tariffs or other jurisdictional documents,[161] the Commission could order those RTOs to include those committees in the scenario development process. State regulators might, for example, verify that the RTO's scenario appropriately accounts for state-approved utility plans, state utility procurement mandates, expected generation retirements, and other state-jurisdictional matters. In other regions, the Commission could require planners to include in regional plans statements from state regulators certifying whether the plan appropriately reflects policies in their states.

2. <u>The Commission May Require Planning Entities to Consider Transmission Expansion to Geographic Areas with Location-Constrained Energy Generating Potential</u>

At the outset, we caution that any new planning mandate must itself not be unduly discriminatory by, for example, explicitly excluding particular resources or market participants. Thus, the Commission should reframe its geographic zone proposal[162] in unambiguously non-discriminatory terms. For instance, the Commission might require that regional planning entities develop processes for connecting geographic zones with energy

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156 Order No. 890 at P 221.
157 42 USC § 7173(a), (b).
158 Department of Energy, Economic Regulatory Administration, Transportation Certificates for Natural Gas, 44 Fed. Reg. 17,644 (Apr. 5, 1979).
159 Order No. 30, 44 Fed. Reg. 30,323 (May 25, 1979).
160 Department of Energy, Economic Regulatory Administration, Natural Gas for Oil Certification Program, Interim-Final Rulemaking Procedures for Certification of the Use of Natural Gas for Fuel Oil Displacement, 44 Fed. Reg. 20,398 (Apr. 5, 1979).
161 *See, e.g.,* SPP Bylaws, sec. 7.2, Regional State Committee; MISO Transmission Owners Agreement, Appendix K – Filing Rights Pursuant to Section 205 of the FPA (recognizing the Organization of MISO States).
162 ANOPR at PP 54–60.

generating potential where building transmission is more economical and feasible than alternative energy transportation means, such as pipelines.

With that clarification, the ANOPR's proposed mandate requiring planners to consider transmission connecting geographic zones with energy-generating potential could be a lawful remedy for undue discrimination. As discussed in the previous section, the Commission could find that transmission-owning Public Utilities' unduly discriminatory conduct is impeding effective regional planning. For instance, because generation-owning utilities have incentives and opportunities to block transmission development connecting untapped or under-developed zones,[163] the Commission could find that a process focused on connecting economic resources, regardless of who develops them, would address utilities' opportunities to plan system expansion for the benefit of their own generation assets.

The geographic zone proposal could also mitigate transmission-owning Public Utilities' opportunities to overbuild locally in order to obviate regional projects. If the Commission finds that Public Utilities are crowding out regional development through local planning processes,[164] the Commission could require that the new geographic-zone process take precedence over existing local and regional processes. Local planning and other aspects of regional planning processes would have to adapt to and support new infrastructure designed to connect zones of energy-generating potential. This prioritization would insulate location-based planning from transmission owners' abilities and incentives to use planning processes to unduly discriminate against customers and competitors.

To identify the zones, the Commission could order planners to conduct a stakeholder process and also consider authoritative NREL and USGS data about energy potential.[165] Interconnection queues would also reveal areas that market participants believe are commercially viable. The planning process should consider the generating potential of these regions, the cost of transmitting that energy to load, and the temporal-locational value of that energy. Should Congress provide the Commission with new siting authority,[166] the Commission should require planners to consider the zones where the Commission's siting authority applies.[167] In those areas, it would have control over the entire transmission

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[163] *See, e.g.*, Order No. 890 at P 422; *supra* part I.A.
[164] In general, Public Utilities' local plans are inputs into the regional planning process and can obviate regional development. *See* Joseph H. Eto, Lawrence Berkeley National Lab, *Planning Electric Transmission Lines: A Review of Recent Regional Transmission Plans*, at 23–28 (Sept. 2016) (summarizing relationship between the regional planning process conducted by each regional planning entity and member utilities' local transmission planning); Joseph H. Eto and Giulia Gallo, Lawrence Berkeley National Lab, *Regional Transmission Planning: A Review of Practices Following FERC Order Nos. 890 and 1000*, at p. 8 ("the regional transmission planning process . . . primarily [] provide[s] an open, transparent means by which stakeholders are allowed to participate in regional transmission planning . . . can have their proposed solutions vetted against those of the incumbents whose projects are already contained in the baseline regional transmission plan").
[165] *See* National Renewable Energy Lab, Geospatial Data Science, https://www.nrel.gov/gis/index.html (providing detailed maps about energy generation potential for various renewable sources); US Geological Service, U.S. Oil and Gas Assessments, https://certmapper.cr.usgs.gov/data/apps/noga-drupal/ (providing "periodic assessments of the oil and natural gas endowment of the United States").
[166] *See, e.g.*, H.R. 3684, Infrastructure Investment and Jobs Act, sec. 40105 (passed by the U.S. Senate on Aug. 10, 2021) (modifying FPA section 216).
[167] *Id.* (modifying the Department of Energy's authority to designate National Interest Electric Transmission Corridors).

development process – planning, paying, and permitting (also known as the three Ps). Texas's CREZ process was a success in part because a single regulator had such control.[168]

That the geographic zone rule would be more prescriptive than the Commission's existing transmission planning rules does not render it outside the scope of Commission authority. The Commission has characterized its transmission planning reforms as "procedural,"[169] but that framing obscures the rules' real-word consequences. Transmission planning rules are supposed to lead to substantive outcomes that counteract Public Utilities' unduly discriminatory preferences. A forthcoming planning rule ought to catalyze transmission development. As long as the Commission ties its remedies to Public Utilities' unduly discriminatory conduct, it will be acting within the scope of its authority.

Opponents of the Commission's forthcoming planning rules might attempt to revive the failed argument that planning rules that amount to "substantive" reforms are beyond the Commission's authority.[170] But this substantive vs. procedural distinction is a red herring. The FPA grants the Commission authority over rates, terms, and conditions of transmission service and matters directly affecting those rates, terms, and conditions. The D.C. Circuit has confirmed that transmission planning reforms are within the scope of the Commission's authority under section 206.

That the FPA does not explicitly grant the Commission authority to order construction does not imply a limit to the Commission's authority that prevents it from finalizing the ANOPR's geographic zone proposal. In the Order No. 888 proceeding, parties argued that FPA sections 211 and 212, which contemplate a case-by-case approach to transmission service, override any authority the Commission might have had to order industry-wide Open Access.[171] The Commission dismissed that reading, concluding that those sections did not "eliminate[] our authority under section 206 to remedy undue discrimination by requiring non-discriminatory open access transmission or demonstrate[] that we never had any such authority."[172] The D.C. Circuit upheld the order, and the Supreme Court affirmed.

Here, the Commission should reject any similar claims that sections that authorize the Commission to order "physical" interconnections or "enlargement of transmission

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168 Julie Cohn and Olivera Jankovska, Rice University' Baker Institute for Public Policy, Center for Energy Studies, *Texas Crez Lines: How Stakeholders Shape Major Energy Infrastructure Projects*, Nov. 2020, at p. 4 (explaining how state law addressed all three Ps and noting that a single agency had oversight of planning and siting).

169 *See, e.g.*, Order No. 890 at P 438 ("establish[ing] a process through which transmission providers must coordinate with customers . . . and other stakeholders in order to ensure that transmission plans are not developed in an unduly discriminatory manner."); Order No. 890-A at P 178 ("Our focus is therefore on the process leading to the transmission plan and not the construction of specific facilities."); Order No. 1000 at P 114 (stating that reforms are "focused on ensuring that there is a fair regional transmission planning process"); *id.* at P 107 (stating that the Commission "is simply requiring that certain processes be instituted."). Where Public Utilities failed to comply with the Commission-approved process, the Commission ordered additional process. *See Monongahela Power Co. et al.*, 162 FERC ¶ 61,129 (2018) (finding that PJM transmission owners practices in planning supplemental projects was inconsistent with Order No. 890 (P 72) and ordering the utilities to provide additional opportunities for potentially meaningful stakeholder engagement (PP 106–116)).

170 *See, e.g.,* South Carolina Public Service Authority v. FERC, 762 F.3d 41, 58 (D.C. Cir. 2014) (quoting Order No. 1000-A at P 188).

171 Order No. 888 at 21,569.

172 *Id.* at 21,570.

facilities"[173] impliedly limit the Commission's section 206 authority. No section of the FPA explicitly prohibits the Commission from imposing the geographic zone rule. The fact that the Commission has never imposed a similar requirement is also irrelevant. In Order No. 436, the Commission found that pipelines' undue discrimination justified remedies that "envisage[d] a complete restructuring of the natural gas industry."[174] Numerous parties petitioned the D.C. Circuit, arguing that the open-access requirement in Order No. 436 was not authorized by the NGA. After rejecting several of petitioners' arguments, the D.C. Circuit observed that the economic and regulatory conditions faced by the Commission in this proceeding were "altogether new," and "thus no inference may be drawn from prior non-use" of the Commission's full authority to remedy undue discrimination.[175]

The same argument would apply here. The Commission could conclude that new trends in the generation sector, as well as reliability and resilience challenges, create transmission needs that are "altogether new."[176] If it also finds that unduly discriminatory conduct is obstructing development that could meet those needs, the Commission has legal authority to remedy that undue discrimination. As discussed in part I.A, the Commission can point to systemic conditions, theoretical threats to just and reasonable rates, subtle anti-competitive conduct, and its established presumptions about transmission-owning Public Utilities.

The "altogether new" transmission conditions relate in part to the dramatic shift in power generation. Today, wind and solar comprise most new capacity additions. 2015 was the first year that new wind and solar exceeded natural gas additions, and wind and solar have combined to top all other new capacity combined every year since, except for 2018.[177] In its 2020 Annual Market Report, Commission staff reported that nearly 80 percent of all capacity additions were wind or solar.[178] In their joint concurrence to the ANOPR, Chair Glick and Commissioner Clements compile numerous sources that, taken together, strongly suggest that the past several years were not an aberration but rather the start of a new long-term trend.

Two recent RTO studies reach the same result. MISO's Futures Scenarios "establish different ranges of economic, policy, and technological possibilities – such as load growth, electrification, carbon policy, generator retirements, renewable energy levels, natural gas price, and generation capital cost – over a twenty-year period."[179] As shown in the chart below, wind and solar comprise the majority of capacity additions across all three scenarios through 2040. ISO-NE's forecast shows all generation growth coming from new wind and solar resources through 2029.[180]

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[173] 16 USC §§ 824a, 824i, 824k.
[174] Associated Gas Distributors v. FERC, 824 F.2d 981, 993 (D.C. Cir. 1987).
[175] *Id.* at 1001.
[176] *Id.* at 993.
[177] Amol Phakde, Umed Paliwal, Nikit Abhyankar, Taylor McNair, Ben Paulos, David Wooley, Ric O'Connell, Goldman School of Public Policy, 2035: The Report, Addendum: Operating Year of US Power Generation Capacity, Jun. 2, 2021.
[178] FERC Office of Energy Policy and Innovation, 2020 State of the Market Report, Mar. 18, 2021.
[179] MISO, Futures Summary Presentation, Apr. 2, 2021.
[180] ISO-NE, Resource Mix, https://www.iso-ne.com/about/key-stats/resource-mix/ (accessed Aug. 18, 2021). The chart also shows dwindling coal and oil resources and nuclear capacity staying at 2019 levels.

MISO Futures Study (to 2040)

	Capacity Additions (GW)		
	Natural Gas	Wind+Solar	Other
Future 1	51.2	68.9	9.5
Future 2	62	95.3	11.3
Future 3	89	212	42.2

Note: Wind+Solar includes hybrid resources and distributed generation (DG). Across all 3 scenarios, DG is no more than 5% of total Wind+Solar.

ISO-NE Analysis (to 2029)

	Capacity Additions (GW)		
	Natural Gas	Wind+Solar	Batteries
2029 Forecast	0	21.7	2.4

In addition, load-serving entities in CAISO and NYISO must meet 100% state-mandated clean energy targets before mid-century. It therefore seems exceedingly likely that wind and solar will dominate capacity additions in those regions for the next couple of decades. We are not aware of whether similar long-term analyses have been conducted by other regional planning entities.

Wind and solar deployment will be driven by policy and economics. For purely market-driven deployment, the cost-competitiveness of wind and solar is contingent in part on market and transmission rules within the Commission's jurisdiction. While the Commission does not have a responsibility to facilitate deployment of any particular generation source, its duty to ensure just and reasonable rates compels it to "to break down regulatory and economic barriers that hinder a free market in wholesale electricity."[181] With regard to wind and solar, those barriers include the transmission planning, cost allocation, and interconnection issues discussed in the ANOPR. Because wind and solar are the cheapest sources of electricity,[182] accelerating deployment by removing regulatory barriers is necessary to ensure that wholesale rates are just and reasonable.

The scale of policy-driven deployment is less likely to hinge on Commission action. In all four regions just mentioned, integrated resource planning, vertical integration, and utility procurement mandates are major drivers of anticipated generation trends. Presumably, utilities will comply with their state-mandated legal obligations regardless of Commission policies, but the Commission does have a role to play in implementation. Reformed market designs, updated planning and cost allocation rules, and new generator interconnection standards can drive market-based compliance. Facilitating such market-based compliance will ensure that wholesale rates are just and reasonable.

Remedying undue discrimination is a pre-condition for such cost-effective deployment. The MISO study presumes that sufficient transmission is built and does not consider that Public Utilities have incentives and opportunities constrain network expansion in order to meet their parochial goals. Failing to remedy that undue discrimination would be costly. Undue discrimination will make state-driven clean energy deployment more expensive and

[181] Morgan Stanley Capital Group v. Public Util. Dist. No. 1 of Snohomish Cty., 554 U.S. 527, 536 (2008).
[182] *See, e.g.,* Lazard, Levelized Cost of Energy Analysis, Ver. 14, Oct. 19, 2020 (showing that unsubsidized wind and solar are the cheapest sources of new generation and their costs are commensurate with the costs of energy from fully depreciated existing legacy assets, including combined-cycle gas).

fail to unlock the full market-driven potential of wind and solar. Consumers will overpay and utilities will pay higher wholesale prices to fulfill their legal obligations.

Consumers will also miss out on the reliability, resilience, and other benefits of additional transmission. The Department of Energy explained that transmission expansion can "strengthen and increase the flexibility of the overall transmission network," which can "create real options to use the transmission system in ways that were not originally envisioned."[183] Unexpected benefits can eclipse the original purposes the transmission expansion was intended to serve by enabling the network to adjust to unanticipated fuel price changes, economic volatility, new regulatory requirements, outages, and natural disasters.[184] Given the dramatic turnover in the generation sector, benefits of new transmission investments may be particularly challenging to assess today. Overwhelming evidence shows that large-scale transmission investment will cost-effectively and reliably integrate new wind and solar and is economically justifiable without considering its unanticipated reliability and resilience benefits.[185]

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[183] U.S. DEP'T OF ENERGY, NATIONAL ELECTRIC TRANSMISSION CONGESTION STUDY, at 11 (Sept. 2015), Vikram S. Budhraja et al., *Improving Electricity Resource Planning Processes by Considering the Strategic Benefits of Transmission*, 22 ELEC. J. 54 (Mar. 2009) (finding that analytical methods used in planning processes "do not capture the many strategic benefits of high-voltage electricity transmission projects, such as those resulting from the long life of projects, dynamic changes to the system, access to diverse fuels, mitigation of risks as a form of insurance against extreme events, and advancement of public policy goals").

[184] DOE Congestion Study, *supra* note 183, at 11; FEDERAL POWER COMMISSION, 1964 NATIONAL POWER SURVEY, at p. 211 (1964) ("The value of a strong transmission network lies in the flexibility it offers for meeting large variations in loads . . . and the ability to share diversities and reserves. . . . An adequate network will facilitate the adjustment that invariably is required for miscalculations of load growth, emergencies, or sudden changes in major loads . . . .").

[185] *See, e.g.*, Jesse D. Jenkins, Max Luke, and Samuel Thernstrom, *Getting to Zero Carbon Emissions in the Electric Power Sector*, 2 JOULE (Issue 12) 2487, 2506, 2508 (Dec. 19, 2018) (reviewing forty deep decarbonization scenarios, noting that several scenarios "envision tens of thousands of miles of new high-voltage direct-current transmission linking all regions in the United States," and summarizing that "all scenarios benefit from cost-effective demand flexibility and transmission expansion"); Patrick R. Brown & Audun Botterud, *The Value of Inter-Regional Coordination and Transmission in Decarbonizing the US Electricity System*, 5 JOULE (Issue 1) 115 (Jan. 20, 2020) ("using a co-optimized capacity-planning and dispatch model over seven years of hourly operation [and] show[ing] that inter-state coordination and transmission expansion reduce[s] the system cost of electricity in a 100%-renewable US power system by 46% compared with a state-by-state approach"); Armando L. Figueroa-Acevedo, Jordan Bakke, Harvey Scribner, Ali Ardakani, Hussam Nosair, Abhinav Venkatraman, James McCalley, Aaron Bloom, Dale Osborn, P. Caspary, and James Okullo, *Design and Valuation of High-Capacity HVDC Macrogrid Transmission for the Continental US*, IEEE TRANSACTIONS ON POWER SYSTEMS (2020) (evaluating three transmission expansion scenarios for 50% and 40% renewable — wind, solar, hydro — penetration and finding that economic savings over a 35-year period exceed investment costs, and noting that certain reliability and resilience benefits were not quantified and therefore not included); Paul L. Joskow, "Facilitating Transmission Expansion to Support Efficient Decarbonization of the Electricity Sector," ECONOMICS OF ENERGY & ENVIRONMENTAL POLICY, Vol 2., Iss. 10 (Sep. 1, 2021) (summarizing voluminous research and generally concluding that more transmission is needed to cost-effectively and reliably integrate economic wind and solar resources); Lauren Azar, Aaron Bloom, Jay Caspary, Debra Lew, Nicholas Miller, Alison Silverstein, John Simonelli, Robert Zavadil, Energy Systems Integration Group (ESIG), Systems Planning Working Group, "Transmission Planning for 100% Clean Electricity," Feb. 2021 (summarizing that based on several "leading energy-sector transformation studies," Without the addition of significant multi-regional transmission, system planners will need to significantly overbuild local renewable resources in order to manage weather patterns and meet demand" and finding that the "general consensus in the literature and among the experts preparing this paper is that interregional transmission dramatically lowers the cost of achieving 100 percent clean electricity" because "transmission allows grid owners and operators to optimize

One final note about costs. Clearly, the Commission has legal authority to consider costs associated with new infrastructure planned through a jurisdictional process, and protecting consumers from excessive prices is fundamental to its mission.[186] But it would be arbitrary and capricious for the Commission to consider those costs in isolation, either by ignoring benefits of new transmission or by failing to consider the status quo alternative. Currently, Public Utilities are splurging on local transmission projects, with little oversight or accountability. Regional planning entities claim that they are powerless to interfere, and the Commission does not review utilities' capital spending.[187] Many projects do not even need state siting permission, leaving billions of dollars of capital expenditures essentially unregulated.[188] If the Commission is in fact concerned about escalating transmission costs, it should consider a new prudence policy, as we discuss in Part II, and it should not shut down efforts to expand broadly beneficial regional infrastructure.

While the power sector's history includes a long list of generation boondoggles, there are far fewer economically regrettable transmission projects. Given the dearth of recent regional and interregional transmission investment, it seems exceedingly unlikely that the industry will overbuild large-scale infrastructure. Rather, it seems far more likely that Public Utilities pursuing their local interests will stifle regional development. It is critical that the Commission address their incentives and opportunities to do so.

II. The Commission Should Encourage Further Regionalization Through a Supplemental Policy on Transmission Investment Prudence

Section 202(a) requires the Commission to encourage regional coordination among industry participants. The Commission fulfills this duty by promoting RTO membership. Regional governance through RTOs can mitigate Public Utilities' opportunities for undue discrimination and unlock efficiencies associated with regional management of power flows, transactions, and transmission expansion.[189] As the industry increasingly invests in renewable generation and faces new climate and cybersecurity-related challenges, shifting transmission service from locally focused Public Utilities to regional organizations is more important than ever for ensuring just and reasonable rates and maintaining reliability.

A supplemental prudence policy could further the Commission's efforts to encourage regionalization. By narrowing its presumption that transmission expenditures are prudent based on substantive criteria — such as which entity planned the project and whether the

high-quality generation resources without overbuilding, or to exploit highest-quality resource areas without building in lower-quality resource areas").

[186] *See, e.g.,* Pa. Water & Power Co. v. Fed. Power Comm'n, 343 U.S. 414, 418 (1952) ("A major purpose of the [FPA] is to protect power consumers against excessive prices.").

[187] *See infra* Part II.

[188] Liza Reed, Michael Dworkin, Parth Vaishnav, M. Granger Morgan, *Expanding Transmission Capacity: Examples of Regulatory Paths for Five Alternative Strategies*, 33 THE ELECTRICITY JOURNAL 106770 (Jul. 2020) (finding that a utility typically does not need state permits to reconductor an existing line and noting that some state siting laws explicitly exempt reconductoring projects).

[189] Order No. 2000 at pp. 89–90 (listing expected benefits of RTOs and adding that "we expect that RTOs can reduce opportunities for unduly discriminatory conduct by cleanly separating the control of transmission from power market participants").

project was evaluated at the regional level — the Commission could encourage investment in regional infrastructure and enhance regional planning. In part II.A, we suggest criteria that would encourage utilities to delegate planning responsibilities to independent entities, facilitate new entry into wholesale markets, and ensure that local needs are evaluated by a regional planner. In part II.B, we show that this supplemental policy is modelled after other Commission policies that apply just and reasonable presumptions to wholesale power rates. In part II.C, we suggest that the Commission involve state regulators and Independent Transmission Monitors in transmission rate proceedings.

A supplemental prudence policy could enhance the Commission's long-standing efforts to liberate transmission information from utility control. Transparency is at the heart of the Commission's Open-Access regime,[190] including its transmission planning orders.[191] To limit Public Utilities' opportunities to unduly discriminate and ensure just and reasonable rates, the Commission has compelled utilities to share operational and planning data and models. Requiring transmission-owning Public Utilities to demonstrate that certain capital expenditures are prudent will effectively force them to provide additional information about those projects. The prospect for additional sunshine on their spending may prompt utilities to make different investment decisions, and any disclosures will help the Commission ensure rates are just and reasonable.

A supplemental prudence policy could also protect consumers. The Commission adopted its current policy that all transmission expenditures are presumptively prudent as a matter of administrative convenience.[192] This policy effectively results in a presumption that all transmission rate increases are just reasonable and outsources the Commission's section 205 duties to interested parties protesting Public Utilities' proposed transmission rate increases.[193] Rather than relying on intervenors to establish "serious doubt" about whether a rate increase is just and reasonable, the Commission should adopt a new approach that aligns with the statute and protect consumers from excessive transmission rates.

A supplemental policy is necessary in part because the Commission has not followed through on its pledges to monitor jurisdictional planning processes. In Order No. 890, the Commission said it would "remain actively involved in the review ***and implementation*** of

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[190] *See, e.g.,* Order No. 888-A, at 12,281 (summarizing that market participants must have "comparable access to information about the transmission system"); *id.* at 12,311 ("in order to remedy undue discrimination in the provision of transmission services it is necessary to have non-discriminatory access to transmission information"); Order No. 889 at 21,740; Order No. 890 at P 51 (concluding that "inadequate transparency requirements, combined with inadequate compliance with existing OASIS regulations, increases opportunities for undue discrimination"); *id.* at P 68 (finding "the lack of a consistent and transparent methodology for calculating ATC gives transmission providers the ability and opportunity to unduly discriminate").

[191] *See, e.g.,* Order No. 890 at P 52 (summarizing finding that "lack of transparency surrounding system planning generally" necessitates reforms); PP 471–73 (finding that transparency requirements will reduce opportunities for undue discrimination and requiring disclosure of "basic criteria, assumptions, and data that underlie [ ] transmission system plans" and requiring that transmission providers "reduce to writing and make available the basic methodology, criteria, and processes they use to develop their transmission plans"); *id*. at P 486 (finding that the information exchange planning principle is needed to ensure planning is "as open and transparent as possible"); Order No. 1000 at PP 149–52.

[192] See, e.g., *BP Pipelines (Alaska) Inc.*, 153 FERC ¶ 61,233 at P 13 (2015) (citing *Iroquois Gas Transmission Sys.*, 87 FERC ¶ 61,295, at 62,168 (1999)).

[193] *Minnesota Power & Light Company*, 11 FERC ¶ 61,312, at pp. 61,644–45 (1980).

the transmission planning processes required in Order No. 890, during and beyond the initial compliance phase, to ensure that the potential for undue discrimination in planning activities is adequately addressed."[194] In 2016, the Commission did review PJM members' planning processes,[195] but we are not aware of other formal reviews. Similarly, the Commission anticipated that "Order No. 1000 will provide the Commission and interested parties with a record that we believe will be able to highlight whether public utility transmission providers are engaging in undue discrimination."[196] In 2019, the Commission reviewed immediate-needs exemptions from competitive development.[197] We are not aware of the Commission initiating other reviews, prior to this proceeding.

A. A Supplementary Prudence Policy Will Ensure Just and Reasonable Transmission Rates

The Commission has said that administrative convenience justifies its current policy of presuming that all transmission expenditures are prudent,[198] but that goal has no connection to the FPA's mandate that all rates be just and reasonable. In other contexts, the Commission only presumes rates are just and reasonable when there is a substantive basis for doing so. The Commission should follow this well-established approach by issuing a supplemental prudence policy that delineates criteria for applying a default prudence presumption to capital expenditures.

Section 205(e) establishes that "the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility."[199] Based on the plain text of the statute, courts have repeatedly stated that the FPA imposes on the filing utility the burden of proof to show that its proposed rate increase is just and reasonable.[200] The Commission has further explained that section 205 filers have "the burden of proof to demonstrate that the rate is just and reasonable, and must ensure that there is a sufficient evidentiary record for the Commission to make a reasoned decision."[201]

From this straightforward policy, the Commission carves out an exception for prudence. The Commission has explained that "in order to ensure that rate cases are manageable, the Commission presumes that all expenditures are prudent so the utility need not justify in its

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194 Order No. 890-A at P 180 (emphasis added).
195 *See Monongahela Power, et al.*, 156 FERC ¶ 61,134 (2016).
196 Order No. 1000-A at P 267.
197 *ISO-New England*, 171 FERC ¶ 61,211 (2020); *PJM Interconnection*, 171 FERC ¶ 61,212 (2020); *Southwest Power Pool*, 171 FERC ¶ 61,213 (2020).
198 *Iroquois Gas Transmission System,* 87 FERC ¶ 61,295, at p. 62,168 (1999) (quoting *Minnesota Power & Light Co.*, 11 FERC ¶ 61,312, at pp. 61,644–45 (1980) (stating that FERC adopted this policy as "a matter of procedural practice to ensure that rate cases are manageable").
199 16 U.S.C. 824d(e).
200 *Supra* note 9.
201 *Indicated SPP Transmission Owners v. SPP*, 165 FERC ¶ 61,005 at P 10 (2018); 18 CFR § 35.13(e)(3):

> Burden of proof. Any utility that files a rate increase shall be prepared to go forward at a hearing on reasonable notice on the data submitted under this section, to sustain the burden of proof under the Federal Power Act of establishing that the rate increase is just and reasonable and not unduly discriminatory or preferential or otherwise unlawful within the meaning of the Act.

case-in-chief the prudence of all of its costs."[202] Only when a party has raised "serious doubt" about prudence does the burden shift to the utility to show by preponderance of the evidence that its expenditures were prudently incurred.[203] In announcing this policy forty-one years ago, the Commission specified that in general "utilities seeking a rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent *unless the Commission's filing requirements, policy or precedent otherwise require*."[204] Contemporaneous Commission orders illustrate that Commission policies or precedents did indeed require utilities to demonstrate prudence in particular circumstances.[205]

A supplemental prudence policy would not reverse the Commission's general approach to prudence. Rather, a new policy would be a "filing requirement[], policy, or precedent [that] otherwise require[s]" the utility to demonstrate prudence.[206] This supplementary policy could begin by distinguishing between operational expenses and capital investments. The Commission would continue to presume that operational expenses are prudent, but subject some capital expenses to additional scrutiny.

Reviewing the prudence of capital expenses, which fuel utility profits and have competitive implications for wholesale markets, is consistent with the Commission's well-established understanding of transmission monopolists.[207] Capital spending on transmission can be a means of blocking wholesale market competition or reinforcing utility dominance in power marketing.[208] The Commission has repeatedly recognized that higher consumer prices are an inevitable consequence of such self-interested transmission expansion and other types of anti-competitive conduct.[209] Put differently, utilities prioritize their profits and monopoly control over low prices. It is by no means a stretch to note their self-interest in investing imprudently, particularly where those investments are designed to thwart wholesale

[202] *Potomac-Appalachian Transmission Highline, LLC*, 158 FERC ¶ 61,050 at P 100 (2017) (citing *Iroquois Gas Transmission System,* 87 FERC ¶ 61,295, at p. 62,168 (1999)).
[203] *Potomac-Appalachian Transmission Highline, LLC*, 158 FERC ¶ 61,050 at PP 100–01 (2017) (citations omitted).
[204] *Minnesota Power & Light Co.*, 11 FERC ¶ 61,312, at pp. 61,644–45 (1980) (emphasis added).
[205] *See, e.g., Re Southern California Edison Co.*, 8 FERC 61,198, at p. 61,679 (1979) (stating that "the company must prove that the abandonment was prudent"); *Louisiana Power and Light Co.*, 9 FERC 63,054, at p. 65,183 (1979) (ALJ observing that "the Commission requires that a company requesting the inclusion of CWIP in rate base demonstrate that the construction which resulted in severe financial difficulty was, in fact, a prudent investment prudently managed") (citing Order No. 555, *Amendments to the Uniform System of Accounts*, 56 FPC 2939, at p. 2946 (1976)).
[206] *Iroquois Gas Transmission System*, 87 FERC 61,295, at p. 62,169 (1999) (noting that under *Minnesota Power & Light Co.* "the Commission itself has the option of requiring the utility to demonstrate the prudence of an expenditure in the order setting the matter for hearing or in a later order").
[207] *Supra* notes 78–85.
[208] *See, e.g.,* Order No. 890 at P 422; *supra* Part I.A.
[209] *See, e.g., Boston Edison Co. Re: Edgar Elec. Energy Co.*, 55 FERC ¶ 61,382, at p. 62,168 (1991) (explaining that "where a traditional utility is buying from an affiliate not subject to cost-of-service regulation, the buyer has an incentive to favor its affiliate even if the affiliate is not the least-cost supplier, because the higher profits can accrue to the [buyer's] shareholders"); Order No. 888 NOPR, *supra* note 13, at 17,665 ("as profit maximizing firms, [utilities] . . . will deny consumers the substantial benefits of lower electricity prices"); Order No. 1000 at P 256 ("it is not in the economic self-interest of incumbent transmission providers to permit new entrants to develop transmission facilities, even if proposals submitted by new entrants would result in a more efficient or cost-effective solution to the region's needs").

market entry. The Commission ought to ensure that utilities do not use their control over transmission planning processes to profit from imprudent expenses.

A supplementary prudence policy can be administrable. Below, we suggest criteria that the Commission could apply to narrow the scope of its prudence review. Clear criteria are necessary for reducing any administrative burden associated with the supplementary policy. In part C, we provide further suggestions on how the Commission could efficiently implement the policy.

The first criterion for capital expenses is about the planning entity. When capital investments are incurred pursuant to transmission-owner controlled planning process, that transmission owner ought to have the burden of demonstrating the project's prudence in a rate case. As discussed below, there is currently no oversight and little transparency for TO-planned capital expenses. Because the utility may be indifferent to a project's cost-effectiveness, particularly if the project benefits its own generation, the Commission should not automatically presume prudence. The Commission could continue to presume that capital expenses planned by an independent entity are prudent.

The second criterion is the dollar amount. For a TO-administered process, the Commission could continue to presume that capital expenses below a threshold amount are prudent. We do not suggest a specific dollar figure. In setting the amount, the Commission should analyze previous transmission rate filings and choose a number that allows the Commission to continue to presume that routine replacement and maintenance projects are prudent. That said, the Commission should not choose a number that is so high that it would allow utilities to rebuild last century's grid without any oversight. The Commission should also adopt a policy on segmentation to ensure that Public Utilities do not evade the policy by classifying a single project as multiple smaller projects, each valued at below the threshold amount.

The third criterion is about whether the project might further a utility's vertical market power. For projects that connect non-utility generation, the Commission could presume the project mitigates vertical market power and that therefore the expenses are prudent. For projects that connect to utility-owned or utility-affiliated generation, the Commission could evaluate either the generation or transmission procurement processes (or both) based on its guidelines on affiliate transactions. In section 203 (corporate mergers) and 205 (wholesale rates) proceedings involving affiliate transactions, the Commission uses four principles to evaluate whether it can presume the transactions meet the FPA's standards: transparency, definition, evaluation, and oversight.[210] These four factors could also provide a basis for determining whether TO-planned transmission capital expenditures are a result of "self-dealing abuse."[211]

For other TO-planned transmission capital expenditures that exceed the threshold, the Commission could consider whether the project was evaluated at the regional level by an independent entity. Regional planning processes are supposed to "evaluate alternatives [to

[210] *Allegheny Power Supply Company*, 108 FERC ¶ 61,082 at P 22 (2004); *Ameren Generating Company and Union Electric Company*, 108 FERC ¶ 61,081 at P 69 (2004).
[211] *Boston Edison Co. Re: Edgar Elec. Energy Co.*, 55 FERC ¶ 61,382, at p. 62,165 (1991).

TO-planned projects] that may meet the needs of the region more efficiently or cost-effectively."[212] As part of its supplementary prudence policy, when the transmission owner presents evidence that the project was evaluated at the regional level and no regional solution was found,[213] the Commission could presume that the capital expenditures are prudently incurred.[214]

For all other capital expenditures, the Public Utility proposing a rate increase would have the burden of demonstrating that its capital expenditures were prudently incurred.

Below we illustrate our proposed supplementary prudence policy. We propose these criteria for discussion. Other criteria might further Commission duties under sections 205 and 202(a).

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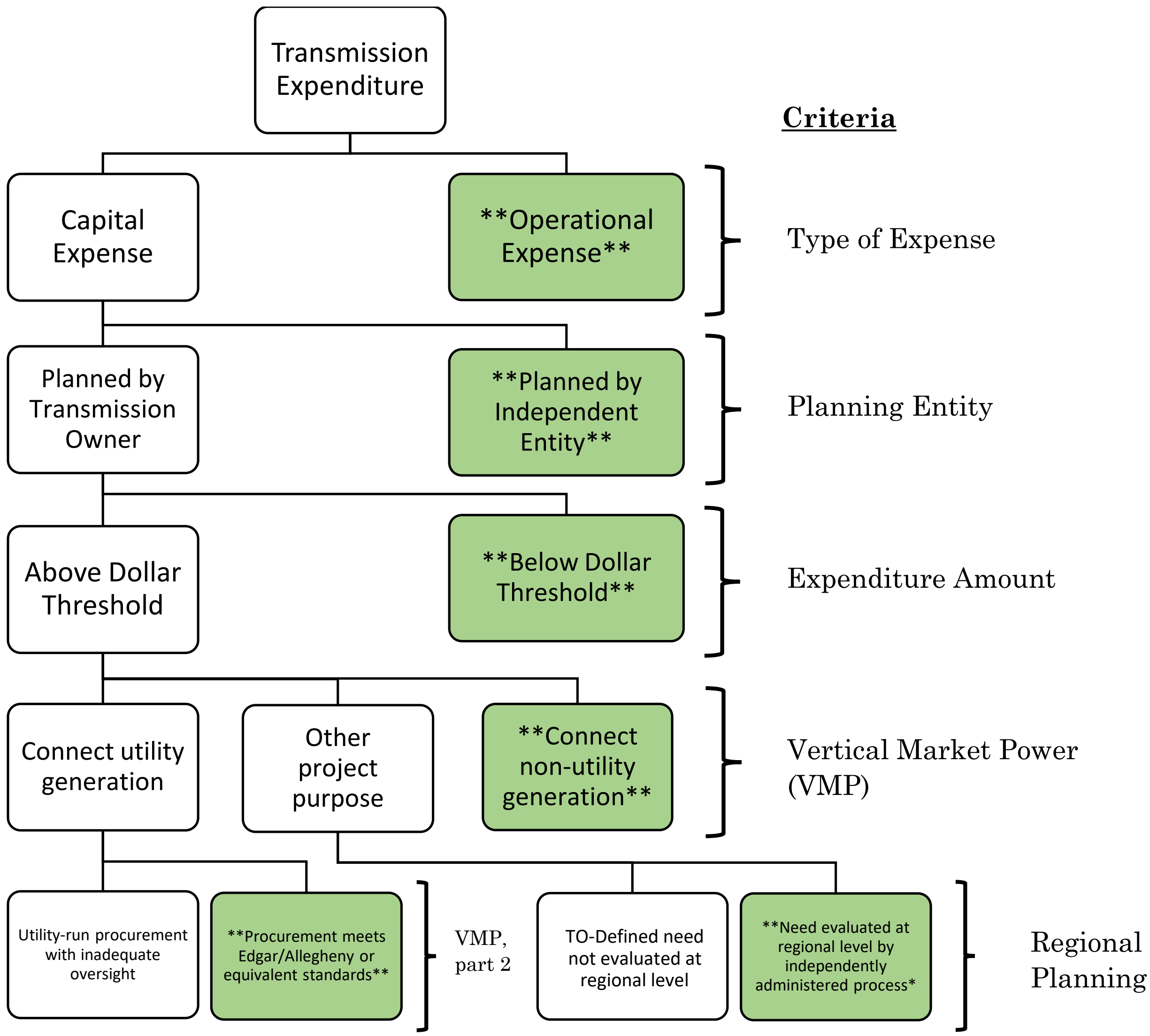
[212] Order No. 1000 at P 80; *id.* at P 148. Regional planners pledged to the Commission that they would do so. *Supra* note 87.

[213] Order No. 1000 at P 81 ("In the absence of the reforms implemented below, we are concerned that public utility transmission providers may not adequately assess the potential benefits of alternative transmission solutions at the regional level that may meet the needs of a transmission planning region more efficiently or cost-effectively than solutions identified by individual public utility transmission providers in their local transmission planning process.").

[214] *See BP Pipelines (Alaska), et al.*, 146 FERC ¶ 63,019 at P 130 (2014) (Administrative Law Judge initial decision requiring proponents of a rate increase to demonstrate that they adequately considered alternatives and noting that it "would be unreasonable, for example, to simply not address studies indicating that an alternative is more cost effective that the option chosen").

Illustrative Supplementary Prudence Policy

** Denotes** that the Commission would presume the expense is prudent.



B. The Commission Has Authority to Establish a Supplementary Prudence Policy

Unquestionably, the Commission has authority to establish criteria that determine when it presumes a rate is just and reasonable. The Commission's three-decade old market-based rate regime is built on this authority. If a seller passes a market-power screening test, the Commission presumes that the seller does not have market power and allows the seller to charge market-based rates. The Commission further presumes that those market-based rates will be just and reasonable.[215] These presumptions are related to the *Mobile-Sierra* doctrine, under which the Commission "must presume that the electricity rate set out in a freely negotiated wholesale-energy contract meets the just and reasonable requirement."[216] These presumptions about rates that are untainted by market power free the Commission from reviewing the rate itself and allow it to focus instead on the seller's bargaining power.

The Commission's rules on affiliate sales similarly focus on bargaining power. When the Commission was developing its market-based rate regime, it was concerned that "a utility with a monopoly franchise may have an economic incentive to exercise market power through its affiliate dealings."[217] The Commission explained that "where a traditional utility is buying from an affiliate not subject to cost-of-service regulation, the buyer has an incentive to favor its affiliate even if the affiliate is not the least-cost supplier, because the higher profits can accrue to the [buyer's] shareholders."[218] To guard against this "inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility,"[219] Commission rules require sellers to obtain permission before transacting with an affiliated utility.[220] The Commission will presume that the rate in a wholesale contract between affiliates is just and reasonable when there is evidence that "the proposed sale was a result of direct head-to-head competition between affiliated and competing unaffiliated suppliers."[221] The competitive process, "designed and implemented without undue preference for the affiliate,"[222] mitigates the advantages that the affiliated seller has over other market participants.

The Commission should be similarly concerned that its oversight of transmission rates "present[s] the potential for the inappropriate transfer of benefits from captive customers to [utility] shareholders."[223] Transmission-owning Public Utilities are collectively spending billions of ratepayer dollars on projects planned without any transparency or oversight and

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[215] Montana Consumer Counsel v. FERC, 659 F.3d 910, 914–17 (9th Cir. 2011). The Commission has also adopted a rebuttable presumption that RTO/ISO monitoring and mitigation is sufficient to address market power concerns. Order No. 697-A, 123 FERC ¶ 61,055 at P 111.

[216] Morgan Stanley Capital Group v. Public Util. Dist. No. 1 of Snohomish County, 554 U.S. 527, 530 (2008).

[217] *Boston Edison Company Re: Edgar Electric Company*, 55 FERC ¶ 61,382, at p. 61,167 n. 56 (1991) (citing *Teco Power Services Corporation et al.*, 52 FERC ¶ 61,191, at p. 61,697 (1990)

[218] *Boston Edison Company Re: Edgar Electric Company*, 55 FERC ¶ 61,382, at p. 61,168 (1991).

[219] Order No. 697-A at P 198.

[220] 18 C.F.R. § 35.39(b).

[221] *Allegheny Power Supply Company*, 108 FERC ¶ 61,082 at P 18 (2004) (citations omitted).

[222] *Boston Edison Company Re: Edgar Electric Company*, 55 FERC ¶ 61,382, at p. 61,168 (1991).

[223] *Electric Power Supply Ass'n., et al. v. First Energy Solutions Corp., et al.,* 155 FERC ¶ 61,101 at P 64 (2016).

collecting rates that the Commission has no basis for finding just and reasonable. It is exceedingly rare that the Commission finds any transmission expenditure imprudent.[224]

Recent proceedings involving the California Public Utilities Commission (CPUC) illustrate how the Commission's planning rules block effective oversight and can prevent intervenors from meaningfully challenging utility expenses. As the grid ages, utilities are directing their transmission budgets to replacing last century's transmission network, rather than expanding it to meet today's needs.[225] When the CPUC challenged a utility's closed-door process for planning replacement projects as inconsistent with Commission rules, the Commission dismissed the complaint, finding that its planning rules only apply to grid expansion projects.[226] The Commission explained that its planning rules aim to counteract monopolists' incentives to provide discriminatory transmission access to wholesale customers and competitors and do not address "concern[s] about self-interest as a cause of imprudent investment, which is subject to review in the ratemaking process."[227] But when the CPUC challenged the utility's replacement projects as imprudent in a separate ratemaking proceeding, the Commission dismissed that claim too, finding that regulators' detailed evidence[228] amounted to nothing more than "general, sweeping allegations of imprudence."[229]

In effect, these two orders create a "gap for private interests to subvert the public welfare."[230] Because the Commission allows utilities to plan these projects behind closed doors, stakeholders are left in the dark until the utility reveals its plans in a rate case. When the utility files for a rate increase, it benefits from the Commission's presumption that its previously undisclosed investments are prudent. Intervenors in Commission jurisdictional rate cases must conjure up discovery requests that aim to force utilities to provide the "specific evidence" needed to shift the evidentiary burden to the utility.[231] Naturally, utilities will not easily expose their imprudence.

The Commission's approach magnifies the importance of indirect state oversight of Commission-jurisdictional rates. In the California proceedings, the state gathered much of its evidence about the utility's spending through its own audits and investigations.[232] States could force utilities to divulge information about replacement projects through siting proceedings, but some states do not require utilities to obtain permission for replacement

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[224] In a 2018 filing at this Commission, the California Public Utilities Commission found that because "rate cases usually settle . . . the risk of prudency review is limited, and while serious doubt has been established in a handful of electric transmission cases that have proceeded to hearing, the CPUC could find only one such case in the past 20 years that resulted in findings of imprudence." The CPUC notes that in *Potomac-Appalachian Transmission Highline*, 152 FERC ¶ 63,025 at P 86 (2015), the Commission partially disallowed certain legal expenses due to lack of documentation. CPUC, Brief on Exceptions, Docket ER16-2320-002, Oct. 31, 2018.
[225] *See, e.g., California Public Utilities Comm'n. v. Pacific Gas and Electric Co.*, 168 FERC ¶ 61,171 at P 1 (2019) (alleging that 80 percent of the utility's spending is on asset replacement projects).
[226] *California Public Utilities Comm'n. v. Pacific Gas and Electric Co.*, 168 FERC ¶ 61,171 at P 33 (2019).
[227] *Id.* at P 34.
[228] CPUC, Brief on Exceptions, Docket ER16-2320-002, Oct. 31, 2018, at pg. 13–45.
[229] *Pacific Gas and Electric Co.*, 173 FERC ¶ 61,045 at P 181 (2020).
[230] FERC v. Electric Power Supply Ass'n., 577 U.S. 260, 289 (2016) (quoting FPC v. Louisiana Power & Light Co., 406 U.S. 621, 631 (1972)).
[231] *Pacific Gas and Electric Co.*, 173 FERC ¶ 61,045 at P 181 (2020).
[232] CPUC, Brief on Exceptions, Docket ER16-2320-002, Oct. 31, 2018, at pg. 13–45.

projects.[233] Regardless, the Commission may not abdicate its ratemaking duties, and it should not rely on states to investigate the prudence of expenditures recovered through Commission-jurisdictional rates.

We are not aware of any direct legal challenge to the Commission's prudence policy. As an initial matter, the Commission clearly has authority to disallow imprudent expenditures in rates.[234] At least one utility has attempted to justify the Commission's prudence policy by pointing to a 1923 joint concurrence by Justices Brandeis and Holmes. In the seminal ratemaking case *Southwestern Bell Telephone*, the concurring Justices found that a presumption of prudence can fairly apply to "[e]very utility investment [because it] may be assumed to have been made in the exercise of reasonable judgment."[235] In general, dicta from a concurring opinion in a case that pre-dates enactment of the FPA cannot supersede the Act's plain text. Dicta also cuts both ways. The D.C. Circuit has observed that

> It is a familiar rule of evidence that a party having control of information bearing upon a disputed issue may be given the burden of bringing it forward and suffering an adverse inference from failure to do so. In regulatory proceedings, placing such a burden on the regulated firm, where the relevant information concerns its operations and management, has become part of the 'common lore' of regulations.[236]

Here, where capital investments are incurred pursuant to a transmission-owner controlled process, that transmission owner ought to have the "burden of bringing [ ] forward" information demonstrating prudence. Where the transmission owner fails to do so, and there is a reasonable concern that the expense may further its own interests rather than benefit ratepayers, it should "suffer[] an adverse inference."

C. State Regulators and Independent Transmission Monitors Could Assist the Commission in Transmission Rate Cases

We suggest that the Commission create Joint Boards under section 209(a) to assess transmission rate filings. To assist the Joint Boards, the Commission could engage Independent Transmission Monitors to evaluate Public Utilities' compliance with the Commission's transmission planning rules, collect feedback from participants in those planning processes, verify that presumptively prudent capital expenses are consistent with

[233] *See supra* note 188.

[234] National Ass'n of Regulatory Utility Comm'rs. v. FERC, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (noting the Commission's "indisputable authority to disallow recovery of costs imprudently incurred by jurisdictional firms").

[235] Anaheim, et al. v. FERC, 669 F.2d 799, 809 (D.C. Cir. 1981) (noting that Southern California Edison made this argument in its brief and citing to State of Missouri ex rel. Southwestern Bell Telephone Co., v. Public Service Comm'n of Missouri, 262 U.S. 276, 289 n.1 (1923)).

[236] Alabama Power Co. v. FERC, 511 F.2d 383, 391 n. 13 (D.C. Cir. 1974) (citing McCormick, Evidence s 337 at 787 (2d ed. 1972), Commonwealth of Puerto Rico v. FMC, 468 F.2d 872, 880 (D.C. Cir. 1972)); *Iroquois Gas Transmission System*, 87 FERC ¶ 61,295, at p. 62,168 ("the evidence regarding any expenditure is in the hands of the utility and not the parties challenging the expenditure") (citing *Minnesota Power & Light*, 11 FERC ¶ 61,312, at p. 61,645).

the Commission's supplementary prudence policy, and review utility evidence on prudence of other capital expenditures.

Because most transmission-owner planned projects are paid for solely by captive ratepayers, it is reasonable for the Commission to at least consult with state regulators on transmission rate cases. We suggest that rather than merely conferring with state regulators, the Commission task Joint Boards with applying the Commission's supplementary prudence policy and fully adjudicating whether associated transmission rate increases are just and reasonable. This approach is permissible under long-standing rules that provide the Commission may "define the 'force and effect'" of a Joint Board's action.[237] Here, the Commission would empower Joint Boards, consisting of the Commission and state regulators, to issue section 205 orders. The Commission could convene separate Joint Boards for each utility filing, or designate one Joint Board to adjudicate rate cases filed by all utilities in that state.

State regulators are well-positioned to assist the Commission in determining the prudence of transmission expenditures that are not presumptively prudent under the supplementary policy. It seems likely that most of the reviewable capital expenditures will be for projects within the utility's local service territory. Many of those projects are grounded in each utility's bespoke local "planning criteria,"[238] which are presumably aimed at reliably serving captive retail load. The Commission has no particular expertise in evaluating such projects. State regulators may already be familiar with relevant projects through siting proceedings. To the extent that prudence is contingent on a procurement process (*see* Illustrative Supplementary Policy: Vertical Market Power), state regulators may have been directly involved and can help assess whether the procurement meets Commission standards.

To simplify the hearing process, the Commission could conduct hearings virtually. If the policy successfully encourages utilities to delegate planning to independent entities, the volume of expenses subject to prudence review may be minimal, and a paper hearing process may be sufficient.

To further reduce the Commission's administrative burden and enhance the quality of information in transmission rate proceedings, the Commission could require Public Utilities to retain Independent Transmission Monitors (ITMs). An ITM's fundamental task would be ensuring that utility-administered planning processes meet Commission standards. Currently, the Commission does not routinely assess compliance with its planning principles, and we are aware of only one Commission investigation into utility-controlled

[237] 18 CFR § 385.1304(b). The Commission should disclaim its erroneous understanding that Congress intended the Commission to invoke Joint Boards only in "unusual cases," 18 CFR § 385.1304(a) as "not supported by the statute or the legislative history." Frank P. Darr, "A Critical Analysis of Joint Board Policy at the Federal Energy Regulatory Commission," 30 SAN DIEGO L. REV. 485, 496 (1991). The Senate Report explains that FPA section 209(a) "is designed to permit decentralized administration under the general supervision of the Commission by individuals who are acquainted with the situation and the problems of the locality affected by the particular proceeding." *Id.* at 492 (quoting S. Rep. No. 621, 74th Cong., 1st Sess. 52 (1935)).
[238] *See Monongahela Power, et al.*, 156 FERC ¶ 61,134 at PP 5–6, n. 10, 14 (2016) (defining "Supplemental Projects"); MISO, MTEP 2021 (draft) (noting that the majority of transmission projects in the region "address localized reliability issues that are due to aging transmission infrastructure, line rebuild due to hurricane damage, or local non-baseline reliability needs that are not dictated by NERC and regional reliability standards").

planning processes.[239] The ITM would ensure that local and regional planning processes run by transmission owners are open and transparent, and that TO-run regional processes actually develop a regional plan based on an "evaluat[ion], in consultation with stakeholders, [of] alternative transmission solutions that might meet the needs of the transmission planning region more efficiently or cost-effectively than solutions identified by individual public utility transmission providers in their local transmission planning process."[240]

The Commission could require ITMs to file annual or biannual reports with the Commission and might task ITMs with incorporating stakeholder feedback in those reports. The Commission might take action under section 206 based on ITM reports, but the reports would in no way limit any party's ability to independently file a complaint at the Commission about any planning process. Of course, in acting on any complaint, the Commission could consider the ITM's report.

ITMs could also monitor compliance with the Commission's supplementary prudence policy. To implement the policy, the Commission could require Public Utilities to certify that presumptively prudent capital expenditures meet the policy's criteria. The Commission could task ITMs with confirming compliance. The ITM's assessment would inform the Commission's just and reasonable determination and in no way limit the Commission's authority to independently assess any utility rate filing.

For capital expenditures not deemed presumptively prudent, ITM fact-finding could assist the Commission in making prudence determinations. Under the supplementary policy, a utility would have the burden of demonstrating that capital expenditures not deemed presumptively prudent are prudent. The Commission's current approach to prudence evaluations begins with the premise that utility managers "have broad discretion in conducting their business affairs and in incurring costs necessary to provide services to their customers."[241] In considering whether a particular expense was prudently incurred, the Commission attempts to divine whether "a reasonable utility management" would have incurred those costs "in good faith, under the same circumstances, and at the relevant point in time."[242]

In a few orders, the Commission has put bounds on this deferential standard. Most importantly, "[o]ne aspect of the Commission's prudence inquiry focuses on whether the costs in question were reasonably incurred to provide service for the ratepayers."[243] As the Commission elsewhere explained:

> Managements of unregulated business subject to the free interplay of competitive forces have no alternative to efficiency. If they are to remain competitive, they must constantly be on the lookout for cost economies and cost savings. Public utility management, on the other hand, does not have

[239] *See Monongahela Power, et al.*, 156 FERC ¶ 61,134 (2016).
[240] Order No. 1000 at P 148.
[241] *New England Power Co.*, 31 FERC ¶ 61,047, at p. 61,084 (1985).
[242] *Id.*
[243] *Iroquois Gas Transmission System*, 87 FERC ¶ 61,295, at p. 62,170 (1999).

> quite the same incentive. Regulation must make sure that the costs incurred in the rendition of the service requested are necessary and prudent. Basically, unless an abuse of discretion is shown, expenses incurred in the rendition of the service are primarily a matter of managerial judgment. This does not mean, however, that extravagant and unnecessary costs can be imposed on the ratepayers, no matter how convinced management may have been that those costs were necessary in its own interest.[244]

In that order, the Commission elaborated that while "regulation must not engage in a reconsideration of every *operating decision* made by management . . . regulation is reduced to an exercise in futility if it is barred or bars itself from a review of management claims for the recovery of costs running into millions of dollars solely because management has exercised its judgment."[245] As discussed, we do not propose that the Commission automatically review the prudence of any operating expense. Rather, our proposed supplementary prudence policy is designed to result in Commission review of only capital expenditures "running into [the] millions."

In 2014, a Commission Administrative Law Judge (ALJ) proposed a three-part test for prudence, tailored to the facts of that case: "a reasonable manager should ensure that expenditures are prudently incurred at sanction by: (1) adequately researching the project before sanctioning it; (2) estimating project costs with reasonable accuracy and weighing them against project benefits to the ratepayers; and (3) adequately considering alternatives to the project."[246] Reviewing the decision, the Commission stated that a prudent utility must "conduct[] reasonable evaluation of the costs and benefits prior to incurring a financial commitment."[247] Because the Commission's finding of imprudence rested on the developer's failure to accurately estimate project costs, the order is silent on the third component of the ALJ's three-part test.

Based on the foregoing, we suggest that the Commission require Public Utilities to prove prudence with cost-benefit analyses and/or evaluations of project alternatives. If a quantitative cost-benefit is infeasible for certain projects, the Commission could consider qualitative assessments. In the absence of such analyses, the Commission cannot determine whether capital expenditures are "extravagant and unnecessary"[248] or "reasonably incurred to provide service for the ratepayers."[249] Based on its detailed knowledge of the Public Utility's transmission network and capital expenditures, the ITM could assist the Commission's review of the utility's filing with its own independent analysis.

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[244] *Re Midwestern Gas Transmission*, 36 FPC 61, at p. 71 (1966) (citing Acker v. U.S., 298 U.S. 426, 430–31 (1935)); *see also* Cities Services Gas Co. v. FPC, 242 F.2d 411, 417 (10th Cir. 1969) ("A regulated utility may not impose unnecessary costs upon its consumers.") (citations omitted); D.C. Transit System, Inc., v. Washington Metropolitan Area Transit Comm'n., 466 F.2d 394, 408 (D.C. Cir. 1972) (noting a "well-settled principle that ratemaking appropriately encompasses an examination and evaluation of the economy and efficiency of a public utility's operations").
[245] *Id.* (emphasis added).
[246] *BP Pipelines (Alaska), et al.* 146 FERC ¶ 63,019 at P 122 (2014).
[247] *BP Pipelines (Alaska), et al.* 153 FERC ¶ 61,233 at P 12 (2015).
[248] *Re Midwestern Gas Transmission*, 36 FPC 61, at p. 71 (1966).
[249] *Iroquois Gas Transmission System*, 87 FERC ¶ 61,295, at p. 62,170 (1999).

Finally, we suggest that the Commission find ITMs necessary to ensure just and reasonable transmission rates and therefore amend the pro-forma OATT to require transmission-owning Public Utilities to contract with an ITM. Like RTO market monitors, ITMs will "assist[] the Commission" in ensuring just and reasonable rates.[250] The Commission could follow the model it established in Order No. 2003 and append to the pro-forma OATT a standard-form agreement. In this case, the agreement would provide terms for soliciting and contracting with an ITM. Any agreement between a Public Utility and an ITM would jurisdictional. An ITM would have to disclose any potential conflicts and prior work that could jeopardize its independence from the Public Utility, and the Commission could reject any proposed ITM agreement due to perceived or actual conflicts or other reasons.

Conclusion

The ANOPR marks a monumental step in the Commission's ongoing and obligatory efforts to address transmission-owning Public Utilities' incentives and opportunities to unduly discriminate against their customers and competitors. By limiting Public Utilities' discretion in implementing the OATT, the ANOPR's planning reforms would remedy undue discrimination. Creating a supplementary prudence policy could enhance the Commission's long-standing efforts to facilitate regional coordination and would protect consumers from excessive transmission rates.

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[250] Order No. 719, 73 Fed. Reg. 64,100 at P 354 (2008) (quoting *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,267 at Appendix A (2005)).