UTILITY FILING RIGHTS AND THE GRID'S GOVERNANCE PROBLEM

Joshua C. Macey & Elias Van Emmerick[±]

This Article argues that many of the governance failures of the entities that own, operate, and regulate the electric grid can be traced to an arcane provision of the Federal Power Act (FPA)—Section 205(c)—which gives utilities legal authority to initiate changes to electricity rates, tariffs, and the practices and regulations affecting them. This statutory entitlement—commonly referred to as utilities' "filing rights"—gives utilities agenda-setting power and thus enables incumbent firms to shape wholesale market rules, transmission planning processes, and resource adequacy frameworks in ways that protect their investments and erect barriers to entry for rival generators and merchant transmission developers.

The Article makes three contributions to the literature on grid governance. First, it provides what we believe is the first comprehensive account of how filing rights systematically advantage incumbent firms, tracing governance failures across four dimensions: voting rules in self-regulatory organizations, utilities' unilateral right to propose rules outside those bodies, withdrawal rights that create credible exit threats from regional transmission organizations, and procedural complexity. Second, the Article provides a history of utility filing rights, demonstrating that Section 205 was designed for a world in which rate-regulated monopolists conducted integrated resource planning to meet projected demand in their service territories. Filing rights are thus a historical artifact of cost-of-service regulation and were never intended to entrench incumbent control in competitive wholesale markets. Third, drawing on recent case studies, it illustrates how utilities have leveraged filing rights to resist transmission planning reform, limit state participation in wholesale market governance, and channel investment toward incumbent-controlled projects.

The Article concludes by proposing solutions, including public planning that could complement or replace incumbent-controlled processes; governance reforms to self-regulatory organizations, including limits on affiliate voting and the granting of parallel filing rights to independent entities; and doctrinal reforms requiring more searching FERC review of utility proposals, greater transparency over planning models and data, and amendments to the FPA that would reduce the deference with which electricity regulators review utility proposals.

[±] Professor, Yale Law School; UCLA Emmett/Frankel Fellow in Environmental Law and Policy.

TABLE OF CONTENTS

INTRODUCTION

Many of the problems facing the power sector today, including electric utilities' reluctance to decarbonize, anticompetitive practices that drive up consumer costs, and, increasingly, difficulties keeping pace with booming demand driven by artificial intelligence and data centers, are attributable to governance failures of the entities that own, operate, and regulate the electric grid.[1] A core challenge, as we and others have argued, is that incumbent firms wield

[1] *See, e.g.*, Joshua Macey, Hannah Wiseman & Shelley Welton, *Grid Reliability in the Electric Era*, 41 YALE J. REG. 164, 207-210 (2024); Jonathan Moch & Henry Lee, *The Challenges of Decarbonizing the U.S. Electric Grid by 2035*,

outsized influence over the institutions that design and administer electricity markets, and they use that influence to protect legacy assets and prevent merchant transmission providers from developing new infrastructure.[2]

While the grid's governance challenges are an area of growing academic interest—scholars have described grid governance as a "syndicate" and regional transmission organizations as "private membership clubs in which incumbent industry members make the rules"—there has to date been little examination of the specific reasons modern electricity markets have evolved to structurally advantage incumbent firms.[3] That is the task we take up in this Article.

Our central thesis is that many of the industry's governance problems can be traced to an arcane legal entitlement, known as utilities' "filing rights," created by the Federal Power Act (FPA). 205(c) specifies that "every public utility shall file with the Commission . . . all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, *and the classifications, practices, and regulations affecting such rates and charges*."[4] This provision gives utilities themselves—not FERC, state public utility commissions, or ratepayers—legal authority to initiate changes to electricity rates and services, as well as to the "practices and regulations affecting such rates."[5] FERC's role is therefore reactive. It reviews utility filings and determines whether to accept, reject, or suspend those rates.[6] Filing rights can thus be understood as a statutory property right: utilities have the exclusive right to submit

HARVARD KENNEDY SCHOOL (2022) (describing the power sector's failure to meet needed transmission development needs, hampering its ability to meet growing demand and decarbonize);

[2] *See, e.g.*, Ari Peskoe, *Is the Utility Transmission Syndicate Forever?*, 42 ENERGY L.J. 1 (2021); Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, 109 Cal. L. Rev. 209, 213 (2021); Joshua Macey & Elias van Emmerick, *Towards a National Transmission Planning Authority*, 49 HARVARD ENVT'L. L. REV. 79 (2025); Joshua Macey, *Outsourcing Electricity Market Design*, 91 U. CHI. L. REV. 1243 (2024).

[3] *See* Peskoe, *supra* note 2, at 66; Welton, *supra* note 2, at 213 (2021); Michael H. Dworkin & Rachel Aslin Goldwasser, *Ensuring Consideration of the Public Interest in the Governance and Accountability of Regional Transmission Organization*, 28 ENERGY L.J. 543, 553 (2007), Macey & van Emmerick, *supra* note 2, at 96 (discussing how transmission planning has been captured by incumbent interests); Macey, *supra* note 2; Seth Blumsack, Dmitri Perekhodtsev, and Lester Lave, *Market Power in Deregulated Wholesale Electricity Markets: Issues in Measurement and the Cost of Mitigation*, 15 ELEC. J. 11 (2002); Joel Eisen, *An Open Access Distribution Tariff: Removing Barriers to Innovation on the Smart Grid*, 61 UCLA L. REV. 1712 (2014); Christina E. Simeone, *Reforming FERC's RTO/ISO stakeholder governance principles*, 34 ELEC. J. e106954 (2021); Daniel E. Walters & Andrew Kleit, *Grid Governance in the Energy Trilemma Era: Remedying the Democracy Deficit*, 74 AL. L. REV. 1033 (2022).

[4] *See id*. § 824d(c).

[5] *Id*.

[6] Utilities' filing rights are based on the text of the FPA, which establishes that utility filings are presumptively reasonable. *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 339-40 (1956); *FPC v. Sierra Pac. Power Co*., 350 U.S. 348, 353-54 (1956).

amendments to existing tariffs, while FERC and other stakeholders can challenge existing and proposed rates but cannot propose new rules directly.[7]

To show that filing rights are behind many of the grid's governance problems, we survey recent disputes in which utilities used their filing rights to block—or attempt to block—ambitious electricity market reforms. Examples include attempts by utilities to invoke their filing rights to modify transmission planning processes to give incumbent transmission owners an effective veto over regionally planned competitive projects; amend RTO agreements to oust other RTO members—including generators and consumer advocates—from regional transmission planning; and prevent mid-Atlantic states from participating more actively in the organizations that develop market rules.[8]

Filing rights are also the reason incumbents wield so much influence over the member-owned entities that set grid reliability standards, propose wholesale market rules, and develop regional transmission plans. To make this point, we provide a history of the various grid self-regulatory organizations, including both RTOs and non-RTO transmission planners and grid reliability organizations, that plan administer wholesale markets, plan transmission, and make sure there is enough capacity to meet future peak demand. As we show, when states and FERC pushed utilities to join RTOs, utilities used their filing rights to retain two advantages that largely thwarted ambitious governance reforms. First, filing rights allowed utilities—not FERC—to propose the governance structures of newly created RTOs, as well as of reliability organizations and non-RTO transmission planning entities. Incumbent firms thus controlled the initial design of RTO governance, and they used that control to give themselves effective veto rights over planning decisions and market rules. Although FERC initially resisted early utility proposal about membership requirements and voting rules in regional grid operators—rejecting, for example, proposals that would have given a committee of transmission owners the authority to unilaterally veto RTO rule proposals[9]—the governance arrangements that

---

[7] FERC can only reject rates that are affirmatively unfair and unreasonable under its § 206 powers; *see infra* Section II.a

[8] *See, e.g.*, *Motion for Leave to Answer and Answer of PJM Interconnection in response to Maryland Office of People's Counsel, et al.*, *in* Docket No. ER24-843-000 (Feb. 28, 2024) (pushing back on states' attempts to influence the regional transmission planning process); Brief of the Transmission Owner Petitioners, *Appalachian Voices v. Federal Energy Regulatory Commission*, Case No. 24-1650 (4th Cir. 09/10/2025). *Appalachian Voices v. FERC*, a case challenging aspects of FERC Order Nos. 1920 and 1920-A, is ongoing as of March 2026.

[9] *See, e.g.*, *Order Granting RTO status & accepting supplemental filings re Midwest Independent Transmission System Operator*, 97 FERC ¶ 61,326 (2001) at 12 ("We agree with intervenors that TOs cannot be permitted to have veto privileges regarding filings that affect pricing. Accordingly, we will require the modification of the Midwest ISO Agreement to eliminate the TOs' veto privileges regarding pricing."); *see also* Order 2000-A, 65 Fed. Reg. 12088, 12097 (noting that "nothing in the Final Rule [of Order No. 2000] precludes the transmission owners from

ultimately emerged reflected compromises between FERC and utilities in which the Commission ultimately accepted utility proposals that gave incumbents powerful voting rights and that preserved their right to unilaterally direct investment—specifically, investment local transmission and distribution—away from projects that might threaten their existing investments.[10]

Second, when utilities joined RTOs, they retained filing rights over certain matters such as local transmission planning and cost recovery for transmission.[11] Many challenges facing modern electricity markets—perhaps the most important being overspending on local transmission projects that crowds out more cost-effective regional lines—occur because utilities refused to cede some filing rights to RTOs and therefore have unilateral planning authority in some parts of the market.

We also provide a historical account of why the FPA gave utilities filing rights. As we show, when Congress enacted the FPA, it assumed that all segments of the electricity supply chain—generation, transmission, and distribution—would be provided by regulated monopolists whose rates would be determined in administrative ratemaking proceedings.[12] Utilities were expected to propose investments, and regulators would evaluate those proposals under cost-of-service principles to determine whether the resulting rates were "just and reasonable."[13] When Congress was debating the FPA, it assumed that utilities would plan generation and transmission within a single monopoly service territory to meet forecasted future demand. Filing rights were simply the administrative mechanism that enabled centralized planning by vertically integrated firms. There was no sense that they would be leveraged by incumbent firms to erect barriers to entry for rival generators in competitive wholesale markets.

---

participating in the RTO's designing of rates to transmission customers, as long as they are not given veto authority over, or otherwise control, what the RTO ultimately seeks to file under section 205.")

[10] *See infra* Part III.

[11] *See, e.g.*, PJM, *Consolidated Transmission Owners Agreement* § 7.1 *in* Docket No. ER 12-1095-000 (effective 4/16/2012), available at: https://www.pjm.com/pjmfiles/directory/merged-tariffs/toa42.pdf; MISO, *Transmission Owners Agreement – Appendix K* § II (effective 11/19/2013), https://cdn.misoenergy.org/MISO%20TOA%20(for%20posting)47071.pdf#doc2589.

[12] That is not to say there was no inter-utility trading—power pools wherein utilities traded energy and coordinated operations predate the formation of the Federal Power Act. Nevertheless, the default assumption remained that vertically integrated, monopolistic utilities would generate, transmit, and distribute power to a captive customer base. *See* John C. Scott, *Transmission, Power Pools, and Competition in the Electric Utility Industry*, 28 HASTINGS L. J. 1159, 1169 (1977) (discussing the history of power pools); Joseph Bowring, *Capacity Markets in PJM*, 2 ECON. OF ENERGY & ENVT'L. POL'Y. 47, 48 (2013) (noting PJM began operating as a power pool in 1927).

[13] *See* 16 U.S.C. §§ 824d, 824e.

In much of the country today, however, utilities no longer operate as comprehensive planners of generation and transmission.[14] Independent transmission planners are supposed to develop regional transmission plans, and competitive wholesale markets have largely displaced the vertically integrated model that was assumed when the FPA was passed.[15] Nonetheless, utilities retain statutory authority under Section 205 to propose tariff changes subject to deferential *ex post* review, and they use that authority to impose barriers to entry for rival power producers. The result is that a statutory provision designed for an era of monopoly cost-of-service regulation now allows incumbent utilities to shape market rules, cost-allocation frameworks, and planning processes in ways that were never anticipated when the FPA was passed in 1935.

Our analysis of utility filing rights provides what we believe to be the first comprehensive account of the grid's broader governance challenges that make it difficult for state and federal regulators to fully regulate market rules that drive prices up, undermine reliability, and thwart clean energy policies. While prior scholarship has focused primarily on RTO voting rules,[16] we identify a wider set of governance constraints, including utilities' unilateral right to propose rules, exit RTOs, and control data and other planning inputs.

Although this Article is primarily descriptive—its goal is to paint a more complete picture of why grid governance systematically favors incumbent interests, the mechanisms through which incumbent utilities exert their influence, and how the current system came to look the way it does—it also identifies three categories of reform that federal policymakers could pursue to improve grid governance.

1. *Public Planning and Public Control*. In certain areas, policymakers should consider when and under what circumstances public planning or public control should complement or substitute existing processes. Most notably, public planning could replace or operate alongside planning conducted by private membership organizations.
2. *Governance Reform*. To the extent that some decisions continue to be made by self-regulatory organizations, policymakers should ensure that these entities are independent from incumbent control, represent diverse stakeholder interests, and have the capacity to plan grid expansion and design market rules. This could be done either by reforming governance structures directly or by granting independent boards or planning authorities parallel filing rights that allow them to submit competing proposals.

---

[14] *See infra* Section I.a.
[15] *Id.*
[16] *See, e.g.*, Simeone, *supra* note 3, at 3; Stephanie Lenhart & Dalten Fox, *Participatory democracy in dynamic contexts: A review of regional transmission organization governance in the United States*, 83 ENERGY RES. & SOC. SCI. e102345, 6-7 (2022); Peskoe, *supra* note 2, at 50.

3. *Doctrinal Reform*. FERC and Congress should also reduce the advantages filing rights provide by adopting more searching review of utility proposals, prescribing market reforms that reduce incumbent advantages, and requiring greater transparency over planning models and data so that regulators are able to review utility proposals.

This Article proceeds in six parts. Part I describes the legislative framework surrounding modern electricity markets, as well as the governance problems currently afflicting the grid. Part II defines filing rights and explains the role they play in modern electricity markets. Part III provides a historical account of why the FPA gave utilities filing rights and describes specific doctrines that flow out of utility filing rights and further entrench incumbent advantages. Part IV discusses the residual filing rights held by utilities and explains how they have enabled utilities to thwart substantive energy market reform. Part V examines the formation of RTOs and non-RTO planning entities, highlighting governance disputes that occurred during their founding. Part VI proposes solutions.

I. OVERVIEW OF THE GRID AND GRID GOVERNANCE CHALLENGES

The U.S. electric grid is often described as "the most complex machine ever built."[17] This characterization presumably refers to the technical and operational characteristics that ensure that supply and demand remain perfectly balanced in real time, but it could also refer to the occasionally bewildering regulatory apparatus that governs the power sector. In this Part, we provide an overview of the different state, federal, and private regulators that administer modern electricity markets. We then trace the specific governance challenges that allow incumbent firms to design electricity market rules in ways that protect their interests.

A. Modern Electricity Markets

At a high level, five regulatory bodies exercise authority over different, though often overlapping, parts of the electricity supply chain. FERC regulates transmission planning and wholesale electricity sales—sales from power generators to load serving entities that deliver power to consumers.[18] A member-owned Electric Reliability Organization known as the North American Electric Reliability Corporation (NERC), which operates under FERC jurisdiction, sets technical reliability standards.[19] Grid operators (known as RTOs in organized

[17] *See, e.g.*, Matthew R Christiansen & Joshua Macey, *Long Live the Federal Power Act's Bright Line*, 134 HARV. L. REV. 1360, 1364 (2021).

[18] 16 U.S.C. § 824(b)(1); Christiansen & Macey, *supra* note 17, at 1367; Jim Rossi, *Energy Federalism's Aim*, 134 HARV. L. REV 228, 230-31 (2021).

[19] 16 U.S.C. § 824o; Joshua Macey, Shelley Welton, and Hannah Wiseman, *Grid Reliability in the Electric Era*, 41 YALE J. REG. 164, 182-83 (2024) (discussing the formation of NERC). Note that while NERC sets national

markets) manage regional power grids in real time and balance electricity supply and demand to ensure stable, reliable energy delivery.[20] These entities are also subject to FERC jurisdiction and are often, though not always, responsible for transmission planning and resource adequacy.[21] In non-RTO regions, many of these functions are performed by individual utilities themselves or separate balancing authorities, though the balancing authorities are in many cases the utilities themselves.[22] States also play an important role in regulating electric utilities, as the FPA leaves states with responsibility over a number of areas, including generation facilities, transmission siting, and retail sales, which refer to sales from load serving entities to ratepayers.[23] Finally, the Department of Energy (DOE) has discrete, often program-specific responsibilities that allow the agency to directly intervene in grid planning by, and it oversees Power Market Administrations that directly own grid infrastructure and planning and designating transmission corridors in which FERC can site new transmission lines.[24]

---

standards, sub-regional NERC entities (e.g. the MRO, NPCC, and SERC) that monitor for compliance and enforce penalties. *See* Macey, Welton & Wiseman, *supra* note 19, at 188.

[20] *See* Welton, *supra* note 3, at 222-23; *see also* Peskoe, *supra* note 3, at 38.

[21] Regional transmission organizations such as PJM and ISO-NE use forward capacity markets, in which the RTO pays a generator to have a set amount of generation capacity available by a certain date. Other RTO regions, like MISO, simply set capacity requirements and ask RTO members to ensure capacity is available to meet those In both cases, the RTO is responsible for estimating the capacity needed and coordinating with members to ensure that sufficient generation capacity will be available to meet projected need. Based on the projected energy needs of the region, RTOs also plan needed transmission infrastructure. These plans reflect the RTO's best estimate of where need will arise and what additional infrastructure will be required to meet that need. *See* Jay Morrison, *Capacity Markets: A Path Back to Resource Adequacy*, 37 ENERGY L. J. 1, 4-5 (2016); Macey & van Emmerick, *supra* note 2, at 93-94 (describing the requirement that TOs engage in regional transmission planning).

[22] *See* Mareldi Ahumada-Paras, Michael Mastrandrea & Michael Wara, *Grid Regionalization in the West: Reliability Benefits from Increased Cooperation in Electricity Markets and Operations* 1, STANFORD WOODS INST. FOR THE ENV'T., https://woodsinstitute.stanford.edu/system/files/publications/Woods_Grid_Regionalization_White_Paper_v05_WEB.pdf (Aug. 2024). All utilities must participate in regional transmission planning processes required under FERC's transmission planning rules. *See Preventing Undue Discrimination and Preference in Transmission Service*, 72 Fed. Reg. 12266, 12294; *Regional Transmission Organizations*, 65 Fed. Reg. 810, 905. Even in vertically integrated regions, many utilities buy and sell power from neighboring utilities and engage in regional transmission planning. *See* Stephanie Lenhart & Lincoln Davies, *Western Electricity Emerging Markets: State-Level Regulatory Analysis* 3, https://nicholasinstitute.duke.edu/sites/default/files/publications/western-electricity-emerging-markets-state-level-regulatory-analysis.pdf (Mar. 27, 2023) (describing imbalance markets as "designed specifically to allow utilities and state regulators to retain control and authority over transmission assets, resource planning, investments, and reliability obligations").

[23] *See* Christiansen & Macey, *supra* note 17, at 1363-64.

[24] *See generally* Benjamin Rolsma, *The New Reliability* Override, 57 CONN. L. REV. 789 (2025) (discussing the Department of Energy's authority under § 202(c) of the Federal Power Act). WAPA and SWPA, for example, are within the DOE, and the DOE has authority over some parts of the wholesale market. *See* Dep't. of Energy, *National Transmission Needs Study*, https://www.energy.gov/sites/default/files/2023-

It is common for scholars and policymakers to assume that different parts of the country fall squarely into one of two market models. According to that account, in approximately two-thirds of the country, an independent grid operator oversees wholesale markets, balancing supply and demand, coordinating energy flows in real time, and conducting regional, forward-looking transmission planning. These are the RTOs and ISOs that have been the subject of much recent academic commentary.[25] Elsewhere, vertically integrated, rate regulated utilities own generation, transmission, and distribution and are responsible for meeting current and future electricity in their service territories.

The reality is that neither of these models fully captures the realities of the modern electric grid. RTOs remain highly regulated. They engage in forward-looking planning to procure electricity supply and determine where transmission will be constructed and who will build it.[26] They set a ceiling on the price wholesale buyers can pay for electricity.[27] Perhaps most importantly, even in RTO regions, many investor-owned utilities conduct integrated resource planning in which they forecast demand and plan, subject to state regulatory review, how to meet that demand affordably and reliably.[28]

Conversely, rate regulated regions have also incorporated elements of competition. Transmission owners must provide open, nondiscriminatory service to independent power producers, offer interconnection service that allows rival independent power producers to

---

12/National%20Transmission%20Needs%20Study%20-%20Final_2023.12.1.pdf (Oct. 2023); 42 U.S.C. § 18715a (authorizing funding for the Transmission Siting and Economic Development Grants Program); 16 U.S.C. § 824a (authorizing emergency siting of transmission or other energy infrastructure); 42 U.S.C. § 7152(a) (authorizing the Department of Energy to administer various PMAs); 16 U.S.C. § 824p(b)(1)(A)-(C) (authorizing the Department of Energy to site transmission lines in areas experiencing transmission capacity constraints or that are expected to experience such constraints.) This list is underinclusive.

[25] See sources cited at *supra* note 3. Regional Transmission Organizations, or RTOs, are independent non-profit entities charged with managing the transmission grid across their regional footprints. RTOs do not own transmission assets, but instead operate them on behalf of member transmission owners. RTOs have functional control over the grid, balancing supply and demand in real time across their regions. Among other functions, they also coordinate long-term regional transmission planning to identify where additional transmission will be needed. Those plans must not advantage any one member of the RTO, but instead maximize total benefits at the lowest cost.

[26] Macey & van Emmerick, *supra* note 3, at 91; Macey, *supra* note 3, at 1252.

[27] Jeffrey D. Watkiss, Ross Baldick & Richard D. Tabors, *Time to Double Down on Uniform Pricing in U.S. Energy Markets*, 41 YALE J. REG. BULLETIN 47, 51 (2023).

[28] *See Midcontinent Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,215 at ¶ 13 (2020) ("approximately 90% of the load in MISO is served by vertically integrated LSEs, the vast majority of which are subject to state integrated resource planning processes"); Okla. Admin. Code § 165:35-37-4 (requiring integrated resource plan review by the Oklahoma Corporation Commission, in charge of many SPP-member utilities); 20 Mo. Code State Regs § 4240-22.060 (same.

access their transmission systems, and participate in open transmission planning where projects are selected in competitive solicitations.[29]

B. The Grid's Governance Problems

Despite regional variation in electricity market design, incumbent utilities across the country retain disproportionate influence over system planning and grid governance, often, though not always, through self-regulatory organizations that give utilities authority to design and administer wholesale market rules. For the most part, scholarship has focused on voting rules that favor incumbents. This is an important problem, but it is only one reason utilities exercise so much influence regional transmission organizations and other grid planning entities.[30] Altogether, there are four fundamental challenges to grid governance: (1) voting arrangements in the self-regulatory bodies that oversee wholesale markets and reliability standards; (2) utilities' continued authority to unilaterally propose rules outside of these member-owned entities; (3) utilities' right to exit RTOs and other regulatory bodies, and (4) administrative complexity in the bodies that design and administer market rules.[31]

1. Voting rules

RTO voting rules have been subject to much academic scrutiny, though scholars have focused primarily on voting procedures within RTOs.[32] For example, Christina Simeone has explained how PJM's voting structure is structurally biased against upstart energy producers, with a generation owner having just 12% of the voting power a transmission owner has.[33] Ari Peskoe has traced how incumbent, investor-owned utilities exert disproportionate influence on RTO decision-making processes.[34] Kyungjin Yoo and Seth Blumsack have modeled how

---

[29] *See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21540, 21541; *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 810, 829 (describing how RTOs will promote competition)

[30] *See supra* note 3 (citing prior research covering undue incumbent influence over grid governance).

[31] For a discussion on the challenges of administrative complexity in (electricity) market design, *see generally* Todd S. Aagaard & Andrew N. Kleit, *The Complexity Dilemma in Policy Market Design*, 30 DUKE ENVT'L. L. & POL'Y 1 (2019).

[32] *See, e.g.*, Simeone, *supra* note 3;

[33] Christina E. Simeone, *Reforming FERC's RTO/ISO stakeholder governance principles*, 34 ELEC. J. e106954, 4 (2021) (noting that the "Generation Owner" and "Other Supplier" sectors within PJM have the "greatest degree of vote dilution," and that "[t]hese are the sectors where renewable energy, demand response, energy efficiency, financial product providers, and other new market entrants reside."

[34] *See* Ari Peskoe, *Replacing the Utility Transmission Syndicate's Control*, 44 ENERGY L. J. 447, 459 (2023) ("IOUs, which own the networks that RTOs operate, can circumvent and subvert RTO decisionmaking processes. IOUs

(based on PJM's voting structure) RTO voting structures empower supply-side interests such as transmission owners to block regulatory proposals from coming up to a stakeholder vote.[35]

For the most part, high-level voting within RTOs is conducted at the sector level, with each sector given an equal vote.[36] For example, the PJM's Members Committee, which is the RTO's most senior stakeholder committee, has five sectors: transmission owners, generation owners, electric distributors, other suppliers, and end-use customers.[37] PJM describes the Members Committee as "the final stop for any action that the Members take on the governing documents."[38] Under PJM's stakeholder procedures, passage of a "main motion," which refers to formal proposals to introduce a specific action, policy change, or amendment to governing documents, requires two-thirds sector-weighted voting to pass.[39] That means if two sectors do not support a proposal, it will not pass.

While voting power is distributed equally among sectors, heterogeneity in the composition of each sector means that the voting power of any one individual member can vary greatly based on their assigned sector. This results in a disproportionate share of voting power going to transmission-owning entities. Consider the voting sectors recognized in PJM, MISO, and ISO-NE, for example. In the PJM region, proposals created in lower-level committees must pass a vote in the Members Committee before being sent to the PJM board and ultimately be filed with FERC.[40] In PJM, each PJM member may vote in only one of the five sectors.[41] Members that qualify for membership in multiple sectors can choose which sector to vote in. The relative voting power each member holds within its sector is thus determined by the number of other

---

are the only market participants who can bypass regional governance and unilaterally change certain regional market and transmission rules and rates. They use this unique power to insulate themselves from competition and defend their control over transmission rates in order to enrich their shareholders.").

[35] Kyungjin Yoo & Seth Blumsack, *Can capacity markets be designed by democracy*, 53 J. Reg. Econ. 127, 148 (2018).

[36] *See generally* Christoper Parent, Katherine Fisher & William Cotton, *Governance Structure and Practices in the FERC-Jurisdictional ISOs/RTOs*; *see also* Stephanie Lenhart & Dalten Fox, Participatory democracy in dynamic contexts: A review of regional transmission organization governance in the United States, 83 Energy Res. & Social Sci. 102345, 8 (2022) ("In general, RTOs uses sector-weighted voting in the highest-level members committee and allow parent committees to determine the voting mechanisms or other decision-making processes in subcommittees and lower-level venues.")

[37] Other suppliers refer to entities that engage in or participate in PJM markets but do not qualify for one of the other sectors. Examples include power marketers, financial traders, and entities that provide curtailment services. End-use customers include both large retail customers and state consumer advocates.

[38] PJM, *Oversight and Transparency* (Feb. 13, 2025), https://www.pjm.com/-/media/DotCom/about-pjm/newsroom/fact-sheets/oversight-and-transparency-fact-sheet.pdf.

[39] *See* PJM Operating Agreement § 8.4(c).

[40] PJM, *Manual 34: PJM Stakeholder Process* 26, https://www.pjm.com/-/media/DotCom/documents/manuals/m34.pdf.

[41] *Id.* at 26-27.

members in the sector, since a member's vote will carry more weight if there are fewer other members in that sector to dilute its vote. In 2020, PJM's "Transmission Owner" sector had fourteen members, compared to three-hundred-twenty-three in the "Other Supplier" sector. Since both sectors have one vote, a transmission owner's vote is worth twenty-three times as much as that of an "Other Supplier."[42] Members that own transmission infrastructure can choose to vote in the Transmission Owner sector even if they would also qualify for membership in other sectors. Transmission owners can and do choose to vote in a sector where they have relatively more power.[43]

MISO similarly privileges incumbent interests, though through different procedural mechanisms. MISO structures formal stakeholder voting around eleven sectors at the Advisory Committee level, using weighted sector voting.[44] But issues are usually developed lower in the stakeholder process, where main parent entities and subordinate working groups shape proposals before they reach the Advisory Committee.[45]

RTOs differ in how they treat lower-level committee voting, but as a general rule, decision-making is a bottom-up process that gives large firms significant voting rights and control over agenda-setting. Proposals originate in low-level committees that specialize in specific matters such as market design, reliability, or transmission planning.[46] To advance out of low-level committees, proposals typically need to receive fifty percent of eligible votes. Once a proposal receives a sufficient number of votes, it advances to higher-level committees.[47] This bottom-up process allows lower-level committees to set the agenda in RTOs: only proposals raised at the lower levels will come up for a vote at standing committees, which in turn are the only proposals that can ultimately be filed with FERC.

---

[42] Simeone, *supra* note 3, at 4.

[43] *Id.*; *see also* Yoo & Blumsack, *supra* note 35, at 3088 (showing how strategic voting behavior can occur).

[44] MISO, *Stakeholder Governance Guide* 10, available at: https://cdn.misoenergy.org/Stakeholder%20Governance%20Guide105455.pdf.

[45] Christopher A. Parent et al., *Governance Structure and Practices in the FERC-Jurisdictional ISOs/RTOs* 41-42, https://nescoe.com/wp-content/uploads/2021/02/ISO-RTOGovernanceStructureandPractices_19Feb2021.pdf (Feb. 2021)

[46] Macey & van Emmerick, *supra* note 3, at 111.

[47] *See* Macey & van Emmerick, *supra* note 3, at 111; Lenhart & Fox, *supra* note 36, at 8 (noting that "communication about proposed rule changes typically begins in more informal subcommittee, workgroup, or task force discussions …[and] then proceeds to standing committees.")

Participation in RTO decision-making is time-intensive and costly. According to one count, PJM has more than four hundred meetings a year.[48] Those meetings are held across more than forty committees, subcommittees, and task forces.[49] This complexity, too, advantages larger member utilities. Smaller players may not be able to dedicate as much time to voting on the larger items brought to standing committees' attention, let alone be active participants in the myriad subcommittees present in each RTO. This is reflected in low participation rates, especially at lower levels.[50] Large utilities, by contrast, actively participate in all levels of an RTO's decision-making.[51]

Crucially, these low-level committees often allow affiliate voting,[52] meaning if a utility holding company has multiple subsidiaries, it receives a vote for each subsidiary. This gives large firms more voting power. For example, one PJM utility, BP Energy, has twenty-three affiliates voting in PJM's lower-level committees. NRG and Appalachian Power, a subsidiary of American Electric Power, both have twenty-one affiliate members.[53]

In non-RTO regions, voting structures are more heterogeneous and less formalized, but if anything, incumbent firms exercise even more control over regional transmission planning entities and regional reliability organizations in these areas. For example, the Southeastern Regional Transmission Planning process (SERTP) has only one voting group, the Regional Planning Stakeholders Group.[54] That group "serves as stakeholder representatives for the eight

---

[48] Two days a month do not have meetings, and some years have had more hours of meetings than hours of the year *See* EPSA, Governors' Technical Conference on PJM: What You Need To Know (Sept. 18, 2025), https://epsa.org/governors-technical-conference-pjm.

[49] *See* PJM, *Committee Structure*, https://www.pjm.com/-/media/DotCom/committees-groups/committee-structure-diagram.pdf. Note that the number of committees fluctuates over time, as working groups and subcommittees are added and retired in response to current organizational needs. There were more than forty groups as of February 2026.

[50] *See* Simeone, *supra* note 3, at 4-5.

[51] Zachary Teti & Seth Blumsack, *By A Show of (Which) Hands: Empirical Analysis of Regional Transmission Owner Stakeholder Voting*, 4 J. POL. INST. & POL. ECON. 487, **491** (2024) (noting that "[in PJM], the Transmission Owner sector does not seem concerned with issue category. Stakeholders in this sector are very participatory [for every category]," and seeing similar dynamics in NYISO).

[52] As well as SPP, which allows affiliate voting in its Markets and Operations Policy Committee. *See* Parent, *supra* note 45, at 7-5.

[53] Not counting the voting member. Numbers accurate as of February 23, 2026. *See* PJM, *Member List*, https://www.pjm.com/about-pjm/member-services/member-list.

[54] As of 2024, the group was composed of eight members: Two transmission service customers, one municipal utility, one power marketer, two generation owners, and two public interest organizations. *See* SERTP, *2024 SERTP RPSG Sector Members*, https://www.southeasternrtp.com/docs/general/2024/RPSG_Sector_Representatives-2024.pdf

industry sectors" during interactions with the SERTP sponsors.[55] The SERTP sponsors are transmission owners that operate in the SERTP region.[56] The Stakeholder Group's main role is to propose economic planning studies—analyses of hypothetical load scenarios the group members believe could arise—and SERTP sponsors then identify the transmission requirements needed to satisfy that load.[57] Results are published but do not create binding obligations for the SERTP sponsors.[58] SERTP sponsors conduct an annual planning analysis to determine whether extant and planned projects will adequately address these projected transmission needs. If not, the Sponsors identify what projects are required to serve projected needs. They also look into whether there may be more efficient or cost-effective ways to address transmission needs than the projects currently included in the plan.[59] In doing so, the Sponsors take the stakeholder group's analyses as an input, but are not required to perform any specific actions in response to stakeholder concerns.[60] As a result, the Regional Planning Stakeholders Group has minimal control over SERTP's actions, because the project sponsors retain complete

---

[55] Southeastern Regional Transmission Planning, *SERTP – 1st Quarter Meeting*, https://www.southeasternrtp.com/docs/general/2022/2022-SERTP-1st-Qtr-Presentation-FINAL.pdf (Mar. 22, 2022),

[56] *See Order on Rehearing and Compliance Filings*, 153 FERC ¶ 61,247 at ¶2n2 ("The public utility transmission providers that sponsor the SERTP and the non-public utilities that support the SERTP are collectively referred to as the SERTP Sponsors." These non-public utility transmission providers include Associated Electric Cooperative Inc., Dalton Utilities, Georgia Transmission Corporation, the Municipal Electric Authority of Georgia, PowerSouth Energy Cooperative, the South Mississippi Electric Power Association, and the Tennessee Valley Authority.)

[57] Southeastern Regional Transmission Planning, *SERTP – 1st Quarter Meeting* 17, https://www.southeasternrtp.com/docs/general/2022/2022-SERTP-1st-Qtr-Presentation-FINAL.pdf.

[58] *Id.* ("These studies . . . do not represent an actual transmission need or commitment to build.")

[59] Southeastern Regional Transmission Planning, *2025 Regional Transmission Planning Analyses* 1, https://www.southeasternrtp.com/docs/general/2025/2025%20SERTP%20Regional%20Transmission%20Planning%20Analyses%20Summary.pdf (2025). The SERTP process is typical of non-RTO planning regions generally. *See, e.g.*, NorthernGrid, *2024-2025 Regional Transmission Plan* 9-11, https://www.northerngrid.net/private-media/documents/2024-2025_NorthernGrid_RTP.pdf (describing NorthernGrid's utility-led planning process, which allows for non-binding stakeholder input). WestConnect differs slightly—its Planning Management Committee is composed of five sectors: Transmission Owners, Transmission Customers, Independent Transmission Owners, State Regulatory Commissions, and Key Interest Groups. This Committee is in charge of approving the regional transmission plan. As such, while transmission owners are still given disproportionate weight (controlling 2/5 votes), stakeholder input is given a more formal role in this region. *See* WestConnect, *WestConnect Regional Planning Process Business Process Manual*, https://doc.westconnect.com/Documents.aspx?NID=21542&dl=1.

[60] *Id.*

discretion to accept or reject planning studies.[61] The utilities themselves retain authority to make all binding decisions.

2. Unilateral Right to File Tariff Changes

A second reason utilities control grid governance power is that they retain filing rights over a variety of important areas. This is most obviously the case in vertically integrated regions like the Southeast and Pacific Northwest. Utilities in those regions do not participate in competitive wholesale markets. To the extent they sell or purchase power from other utilities, they file the relevant tariffs with FERC. Because utilities have not ceded filing authority to an RTO, there is no competing entity that can propose alternative transmission investments, cost allocation rules, or resource adequacy decisions that would challenge the utilities' proposed plans. In these regions, utilities retain all their filing rights and propose tariff changes directly to FERC.

But even in RTO regions, utilities retain filing rights over certain investments and market rules. The allocation of filing rights within RTO regions was the result of protracted negotiations in the 1990s between utilities and newly-created RTOs.[62] In RTOs that were formed out of pre-existing power pools, such as PJM, MISO, and ISO-NE, these negotiations often preceded FERC's major restructuring orders, meaning that utilities decided which filing rights to give up (and negotiated RTO voting procedures) before FERC issued rules requiring that RTOs be independent. We examine the allocation of filing rights during this formation period in detail in Part IV. For now, it suffices to point out that utilities joined RTOs voluntarily, typically to comply with FERC and state restructuring orders, and that when they did, they gave some filing rights to the RTO while retaining others for themselves.

The filing rights utilities retained allow them to direct investment in ways that undermine RTO planning. For example, utilities often retain the right to file tariffs for transmission cost recovery, capital structure changes, asset transfers, abandonment requests, and, in some instances, exit or withdrawal provisions from RTOs.[63] One challenge facing the grid is that

---

[61] In addition, planning studies themselves typically aggregate proposals by utilities. CITE. One could technically challenge some projects before FERC or the state commission, but this is difficult given the standard of review and the very limited information disclosed in utility transmission plans. CITE.

[62] *See, e.g.*, *Order Provisionally Granting RTO Status* ("PJM Order"), 96 FERC ¶ 61,061 at 9 *in* Docket No. RT01-2-000 (Jul. 12, 2001) (rejecting PJM's attempt to have load-serving entities retain authority over region-wide capacity reserve requirements); *Order Granting RTO Status and Accepting Supplemental Filings*, 97 FERC ¶ 61, 326 at 12 *in* Docket No. RT01-87-000 (Dec. 20, 2000) (requiring MISO to revise its compliance filing to remove Transmission Owners' veto right over filings that affect pricing.)

[63] *See* PJM, *Consolidated Transmission Owners Agreement* § 7.1 *in* Docket No. ER 12-1095-000 (effective 4/16/2012), available at: https://www.pjm.com/pjmfiles/directory/merged-tariffs/toa42.pdf; MISO, *Transmission Owners Agreement – Appendix K* § II (effective 11/19/2013), available at: https://cdn.misoenergy.org/MISO%20TOA%20(for%20posting)47071.pdf#doc2589 (both showing rights

local transmission upgrades appear to be crowding out the need for potentially more cost-effective regional solutions.[64] Crucially, utilities have an incentive to direct investment to these projects, since they do not need to compete with other transmission providers when they upgrade existing lines or build projects outside the regional transmission plan. The fact that utilities retained filing rights over these projects means that the RTO lacks authority to take control or otherwise regulate local transmission investments. The utility retains unilateral authority to propose these projects, and evidence suggests utilities are using that authority to crowd out regional solutions that would not serve their financial interests.[65]

3. Withdrawal Rights

A third governance challenge is that utilities' ability to exit RTOs gives them an indirect but powerful lever over grid operators: the credible threat of withdrawing from the RTO. Because an RTO's scope and authority depend on the continued participation of its transmission-owning members, the possibility that a major transmission owner will leave can constrain the RTO's willingness to adopt reforms that would reduce that owner's profits or discretion.[66]

Historically, every actual exit from an RTO has been motivated at least in part by financial considerations—especially disputes about regional planning and cost allocation. Duke's decision to leave MISO and join PJM in 2010, for example, was driven in significant measure

---

reserved to Transmission Owners under RTO's governing documents); MISO, *Transmission Owners Agreement – Appendix K* Art. 5. § I (securing Transmission Owners' right to withdraw from the RTO).

[64] *See* infra Part III.

[65] *See* Peter Heller et al., *Proactive, Multi-Value Transmission Planning* 5-6, BRATTLE, https://www.brattle.com/wp-content/uploads/2025/04/Proactive-Multi-Value-Transmission-Planning.pdf (Apr. 9, 2025) (showing that local and regional reliability-driven transmission projects account for > 90% of total domestic transmission investment. None of the projects within that category undergo assessment of economic benefits, nor do they pass through competitive bidding processes); Peskoe, *supra* note 3, at 33 (describing how "an IOU might use its informational advantages and position as the dominant local transmission owner and developer to block projects that harm its interests or to advance projects that benefit it financially but harm others.")

[66] *See* Ari Peskoe, *Replacing the Utility Transmission Syndicate's Control*, 44 ENERGY L. J. 547, 610 (2023) ("RTOs are dependent on their IOU members voluntarily ceding partial control over their transmission assets. Subject to FERC's approval, a utility could remove its assets from RTO control, which would diminish the scope of the RTO's territory and could impair the RTO's operations and planning, and even lead to the RTO's dissolution"). Given that FERC and RTOs have limited authority to require RTO participation, they have historically relied on carrots such as Return on Equity (ROE) adders to give utilities a financial incentive to participate in regional transmission organizations and associated planning processes. *See Promoting Transmission Investment Through Pricing Reform*, 71 Fed. Reg. 43294 (2006)

by concerns about the costs associated with MISO's regional transmission plan.[67] AEP's earlier move, also from MISO to PJM, likewise reflected disagreement about cost allocation for transmission upgrades.[68]

The threat of exit influences RTO decision-making even when utilities do not follow through. This dynamic was evident during a 2024 dispute over proposed amendments to one of PJM's governing documents, discussed in Part IV, that would have significantly expand transmission owners' influence over regional transmission planning. In pressing their proposal, transmission owners argued that PJM had little choice but to accommodate them because an RTO exists only by virtue of the "voluntary (and revocable) transfer of rights" from transmission owners.[69] The fact that the PJM Board agreed to submit the transmission owners' proposal to FERC over the overwhelming objection of other members suggests this threat had teeth.

Utilities' withdrawal rights can undermine the premise of independent regional governance by making major rule changes contingent on the consent of the very entities the RTO is supposed to discipline.[70] Crucially, this leverage derives from utilities' filing rights, since the ability to threaten to exit exists only because transmission owners retain the statutory right to file tariffs with FERC, including filings that would terminate RTO participation.

---

[67] *See Order Addressing RTO Realignment Request*, 133 FERC ¶ 61,058 at ¶ 64 (2010) (discussing Duke's exit from MISO, and its intent to "be vigilant in detecting and challenging cost allocations that are artificially accelerated in order to trap Duke Ohio and Duke Kentucky into paying unfairly for costs for expansions that were not legitimately planned for them").

[68] *See Opinion on Initial Decision and Order on Rehearing*, 107 FERC ¶ 61, 271 (2004) (approving AEP's request to join PJM and move its eastern zone into PJM, driven by concerns about cost allocation for investments in MISO's western region); *see also Order Conditionally Approving Independent Coordinator of Transmission Filing*, 115 FERC ¶ 61,095 at ¶ 22-26 (2006) (approving Entergy's request to forego RTO membership and appoint an independent entity to oversee its transmission planning instead).

[69] Request for Rehearing of the Indicated PJM Transmission Owners 14, in Docket No. ER24-2336-000 (Jan. 06, 2025) (emphasis added); *see also Motion for Leave to Answer and Answer of the PJM Transmission Owners to Protests and Comments* 14, in Docket No. ER24-2336-000 (Aug. 15, 2024) ("any argument that the 205 rights have been permanently transferred from the Transmission Owners to the Members Committee is fatally undermined by the uncontroverted fact that any Transmission Owner can choose to withdraw from the CTOA and immediately regain its planning protocol filing rights");

[70] As laid out by Jonathan Macey and Caroline Novogrod, self-regulating organizations must hold some market power such that exiting the organization would harm the departing member. Absent that market power, members will be indifferent to expulsion and will choose to exit once regulations are imposed that negatively affect them. RTOs lack market power, and therefore are inadequate as self-governing organizations. *See* Jonathan Macey & Caroline Novogrod, *Enforcing Self-Regulatory Organizations' Penalties and the Nature of Self-Regulation*, 40 HOFSTRA L. REV. 963, 966 (2012).

4. *Complexity*

A final challenge is that RTO decision-making is procedurally complex.[71] In most RTOs, reforms must navigate a multilayered committee structure before ever reaching the board, much less FERC.[72] The process typically begins with lower-level working groups or task forces, where a stakeholder identifies a problem and develops an initial proposal. If the proposal receives a simple majority, it advances to a standing committee for further deliberation. There, voting often occurs on a sectoral basis—meaning distinct stakeholder classes (e.g. transmission owners, generators, load-serving entities) vote separately, sometimes with weighted shares. If approved, the proposal moves to a senior committee, where it is again debated and subject to sectoral voting. Only after clearing these successive layers does the proposal reach the RTO's board of directors, which retains discretion over whether to approve the reform, at which point the proposal would be filed with FERC. FERC then evaluates the filing under the applicable standard—typically section 205, if submitted by a public utility, or section 206, if submitted by the Commission or a third party. At any stage in this process, a proposal can die in committee if it fails to gain approval to proceed to the next stage.

Even here, filing rights bear some responsibility for RTOs' procedural complexity. RTOs developed as elaborate, stakeholder-driven self-regulatory organizations in part because FERC's authority is largely reactive. The proliferation of committees, sectoral voting rules, and layered approvals reflects an effort to aggregate the consent of the entities that possess filing rights and whose support is necessary for a proposal to reach the Commission.

In other words, one reason these self-regulatory organizations developed such complex bureaucracies—and, perhaps more importantly, the reason so many different stakeholders must provide input on any given proposal—is that filing rights ensure that FERC is limited to reacting to proposals submitted by utilities and was required to secure consensus from many different stakeholders when it encouraged utilities to join RTOs.

II. THE LEGAL AND HISTORICAL STATUS OF UTILITY FILING RIGHTS

To our knowledge, no work to date has explained *why* the grid developed this pro-incumbent bias. Much of the blame, in our view, lies with Section 205(c) of the FPA, which

[71] We are not the first to make this observation. Scholars have extensively critiqued RTO governance processes, noting that they are "hardly anyone's ideal governance structure" and that substantive changes to their design are needed. *See, e.g.*, Joel B. Eisen & Heather E. Payne, *Rebuilding Grid Governance*, 48 B.Y.U. L. REV. 1057, 1063 (2023); Shelley Welton, *supra* note 3, at 212.

[72] *See, e.g.*, PJM, *PJM Manual 34: PJM Stakeholder Process* 109-110 (laying out the voting process in the PJM region); Parent et al., *supra* note 45, at 1-4 (describing a general RTO governance structure).

grants utilities the right to file "all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates."[73] This Part explains the legal powers filing rights give to utilities and provides a historical account of why the FPA initially gave utilities the right to initiate changes to electricity tariffs.

A. *Filing Rights Give Utilities Agenda-Setting Power*

The phrase public utility can refer to a few things—businesses that control essential infrastructure, to give one example, or that operate monopoly franchises subject to rate regulation, to give another. In the context of the FPA, however, the term has a more legalistic meaning: public utilities are entities that "own or operate facilities subject to the jurisdiction of the commission."[74] Because the FPA gives FERC authority to regulate wholesale electricity sales and interstate transmission, a public utility under the Act is simply any entity that owns or operates generation or transmission facilities that sell or transport electric energy in interstate commerce. Those are the entities charged with initially filing "all rates and charges for any transmission or sale," as well as "the classifications, practices, and regulations affecting such rates."[75]

Section 205 confers two important advantages on public utilities. First, utility filings are afforded substantial deference. The proposed rate must fall into a "zone of reasonableness." Courts do not require the new rate or regulation be "perfect" or even "desirable," and FERC may not reject a filing simply because it prefers an alternative approach.[76]

Second, Section 205 gives utilities exclusive agenda-setting authority over rate and tariff changes. Only public utilities—again, defined as firms that "own or operate facilities subject to the jurisdiction of the Commission"[77]—may initiate filings under Section 205. Neither FERC nor other stakeholders may propose competing tariff language in the first instance. FERC cannot, when reviewing a Section 205 filing, substitute its preferred rate or rule. Instead, it must either accept the utility's proposal or reject it as unjust and unreasonable, in which case

---

[73] 205(c); 824d(c). We are not the first to point to filing rights' role in transmission regulation, but we are (to our knowledge) the first to offer a comprehensive account of their history, influence, and doctrinal underpinnings. *See, e.g.*, Ari Peskoe, *supra* note 3, at 463; Joshua Macey, *Outsourcing Electricity Market Design*, 91 U. CHI. L. REV. 1243, 1258-59 (2024) (connecting filing rights to market incompleteness that undermines clean energy policy).
[74] 201(d)
[75] 16 U.S.C. § 824(d).
[76] *See, e.g.*, *New Eng. Power Co.*, 52 FERC ¶ 61, 090 at ¶ 55; *Bethany, Bushnell, etc. v. Federal Energy Regulatory Com.*, 727 F.2d 1131, 1136 (D.C. Cir. Ct. 1984) (finding that the proposed rate need not be superior to alternative options, but that it only needed to be reasonable.)
[77] 16 U.S.C. § 824(d).

the matter is remanded to the utility, which can then submit a new filing.[78] The burden of proof thus rests with FERC, which must affirmatively demonstrate that the utility's proposal falls outside the zone of reasonableness. Even if FERC thinks that a rate is unjust and unreasonable, it may hesitate to remand a utility filing if the proposal is preferable to the status quo, of if the Commission is skeptical that the utility's next proposal will be an improvement or worries that there is not enough time pressure to adopt or revise an existing practice.

FERC does, of course, possess remedial tools. In addition to being able to reject a utility filing under Section 205, FERC (or a third-party complainant) can also challenge existing rates directly under Section 206, which authorizes the Commission, upon its own initiative or upon complaint from a third party, to modify rates, charges, rules, or practices that it finds to be "unjust, unreasonable, unduly discriminatory or preferential."[79] But Section 206, like Section 205, places a substantial burden on the Commission. To prevail, FERC must affirmatively demonstrate that the existing tariff is "unjust and unreasonable."[80] Here, too, FERC's burden is higher than that of utilities. While utility filings are accepted so long as the tariff falls within a "zone of reasonableness," FERC must establish that the existing tariff is unjust and unreasonable or unduly discriminatory. Courts have held that FERC bears a higher burden under Section 206 than utilities do when proposing tariffs under Section 205.[81] Moreover, FERC and other complainants play a reactive role, as they cannot file tariffs in the first instance but must respond to tariffs initially filed by utilities.[82]

Only after finding that the existing rate or practice is unlawful—which requires substantial evidence—may FERC substitute a new rate or rule. And even then, the Commission bears an additional burden: it must independently justify, again by substantial evidence, that the replacement rate is itself just and reasonable.[83]

---

[78] *See NRG Power Marketing, LLC. V. FERC*, 862 F.3d 108, 115-116 (D.C. Cir. 2017).

[79] 16 U.S.C. § 824e

[80] 16 U.S.C. § 824d(c).

[81] *Emera Maine v. FERC*, 854 F.3d 9, 24 (D.C. Cir. 2017) ("Section 206's procedures are 'entirely different' and 'stricter' than those of section 205") (internal citations omitted); *Fed. Power Comm'n. v. Sierra Pacific Power Co.*, 350 U.S. 348, 372 (1956) (discussing the strict preceding conditions for exercise of § 206 powers); *see also* Commissioner James Danly Dissent Regarding *American Electric Power Service Corp., et al. v. Southwest Power Pool, Inc. in* Docket No. EL23-40-000 (May 3, 2023) (noting the "much higher burden of section 206" as compared to § 205).

[82] *See Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 532 (2008) (finding that because "just and reasonable' is obviously incapable of precise judicial definition," courts should therefore defer to the Commission's judgment about the term's meaning)

[83] *In re CAISO*, 106 FERC ¶ 63, 026 at ¶ 344 (2004).

B. Filing Rights' Doctrinal Protections

Over the nearly century-long history of the FPA, a series of judicial decisions have strengthened the protections filing rights afford. The most important of these prevent FERC from modifying contracts between utilities—even, in some cases, if the contract alters third-party rights-- unless FERC shows that modification meets a high public interest standard[84]; prohibit FERC from ordering utilities to relinquish their filing rights[85]; order an RTO to change the composition of its governing board[86]; or accept a Section 205 filing subject to "substantial" modifications.[87]

1. Mobile-Sierra

In the 1950's, the Supreme Court decided *Mobile Gas v. FPC* and *FPC v. Sierra Pacific Power*, companion cases that limited the FPC's authority to disturb private contracts. In *Mobile*, a pipeline company filed a unilateral rate increase that conflicted with a preexisting contract it had negotiated with a pipeline shipper. The Commission accepted the higher rate, but the Supreme Court reversed, holding that the FPC could not simply override private agreements absent a finding that the contract rate was unlawful or contrary to the public interest.[88]

Sierra clarified the meaning of that "public interest" standard. There, PG&E sought to raise rates under a contract it now deemed unprofitable. The Court rejected the Commission's approval of the proposed rate increase and held that a contract is not unjust or unreasonable merely because it turns out to be financially disadvantageous to a utility.[89] Instead, a rate violates the public interest standard only if it might "impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."[90] Together, these decisions established what has come to be known as the *Mobile-Sierra* doctrine: negotiated rates are presumptively just and reasonable and may be modified only if they "seriously harm the consuming public."[91]

---

[84] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 345 (1956); *Sierra*, 350 U.S. at 355.

[85] *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) ("FERC has no power to force public utilities to file particular rates unless it first finds the existing filed rates unlawful . . . Nor may FERC prohibit public utilities from filing changes in the first instance.)

[86] Cal. Indep. Sys. Op. v. FERC, 372 F.3d 395, 398 (D.C. Cir. 2004).

[87] *NRG Power Marketing, LLC v. FERC*, 862 F.3d 108, 115 (D.C. Cir. 2017).

[88] *United Gas Pipe Line v. Mobile Gas Serv. Corp*. (hereinafter "*Mobile*"), 350 U.S. 332, 340-341, 344 (1956); *see also* Carmen L. Gentile, *The* Mobile-Sierra *Rule: Its Illustrious Past and Uncertain Future*, 21 ENERGY L. J. 353, 354 (2000).

[89] *FPC v. Sierra Pacific Power Co*., 350 U.S. 332, 355 (1956)

[90] *Id.*

[91] *See Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1 of Snohomish County*, 554 U.S. 527, 545-46 (2008).

This standard is notoriously difficult to meet. Where *Mobile-Sierra* protections apply, FERC has little authority to revise the rate or tariff negotiated in the contract even if the Commission believes the contracts are inefficient or inequitable.

In some respect, the *Mobile-Sierra* doctrine limits utilities' influence, as it prevents utilities from trying to escape contractual obligations that turn out to be disadvantageous when market conditions change. Still, utilities have repeatedly sought to *extend Mobile-*Sierra protections so that they prevent third parties from challenging tariffs that affect the rights of those third parties.[92] For example, during the implementation of Order No. 1000, which mandated forward-looking, regional transmission planning, transmission owners argued that FERC lacked authority to reform transmission planning processes because the procedures, as freely negotiated contracts among utilities, should accorded *Mobile-Sierra* protection. FERC resisted this argument, reasoning that multilateral RTO arrangements affecting third parties that did not participate in tariff negotiations did not reflect arms'-length bargaining between parties with competing interests.[93]

Utilities nonetheless frequently invoke the doctrine in tariff filings, seemingly to make it more difficult for FERC to modify or amend the tariff. Recent judicial decisions have, moreover, extended *Mobile-Sierra* protections even to contracts that affect the interests of third parties that did not participate in the agreement. For example, in *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, the Supreme Court held that the Mobile-Sierra presumption applies when the challenger was not a party to the contract, reasoning that the public-interest standard inherently accounts for third-party concerns.[94] According to the Court, allowing third-party challenges to contracts would undermine rate stability and supply arrangements.[95] Thus, once utilities embed a policy in a contract or tariff structure, it is exceedingly difficult for FERC to unwind that arrangement.

2. Atlantic City

While *Mobile-Sierra* shields utilities from administrative attempts to revise utility tariffs, *Atlantic City v. FERC* establishes that FERC lacks authority to relinquish their filing rights. The case arose out from FERC's effort, in the wake of Order No. 888, to facilitate the development

---

[92] *See, e.g.*, *In re PJM*, 142 FERC ¶ 61,214 at ¶ 154 (Mar. 22, 2013); *In re ISO New England, Inc.*, 143 FERC ¶ 61,150 at ¶ 133 (May 17, 2013); *In re MISO*, 142 FERC ¶ 61,215 at ¶ 139 (Mar. 22, 2013).

[93] 142 FERC ¶ 61,214 at ¶ 183, 189.

[94] *NRG Power Marketing, LLC v. Maine Public Utilities Comm'n*, 558 U.S. 165, 169, 175.

[95] *Id.* at 175-76. Recall that ISOs are the entities that preceded RTOs. They were established in the wake of Order No. 888, whereas RTOs were established After Order No. 2000.

of Independent System Operators (ISOs).[96] PJM utilities submitted agreements to create the PJM ISO.[97] FERC conditionally approved the proposed ISO but required modifications that would limit utilities' unilateral section 205 filing rights and restrict withdrawal from the ISO without Commission approval.[98]

The D.C. Circuit rejected both these conditions. It held that section 205 grants utilities a statutory right to file rates, placing FERC in a "passive and reactive" role.[99] The Commission cannot compel utilities to relinquish their filing rights as a condition of ISO participation.[100] Utilities may voluntarily waive their filing rights, but FERC cannot mandate such a waiver. Nor could it require Commission approval before a utility withdrew from the ISO.[101]

Atlantic City thus clarifies that filing rights are statutory entitlements—functionally akin to property rights—that may be relinquished only voluntarily. By foreclosing the Commission from conditioning market participation on the relinquishment of unilateral filing authority, the decision preserves utilities' structural leverage within RTO governance.

3. *NRG Marketing*

The D.C. Circuit's opinion in *NRG Power Marketing, LLC v. FERC* further limited FERC's remedial authority by establishing that FERC must either accept or reject utility filings but cannot accept a filing subject to significant modifications.[102]

In *NRG*, the Court reviewed a PJM proposal to change a market power mitigation rule.[103] FERC concluded that the proposal, as submitted, did not satisfy the just-and-reasonable standard. However, instead of rejecting the proposal, PJM accepted the revision subject to modifications. A group of generators appealed, arguing that FERC had effectively created a new rate. The D.C. Circuit agreed, holding that when FERC reviews a rate under section 205, it occupies a "passive and reactive role."[104] The Commission may accept or reject a filing but cannot "impose a new rate scheme of its own making."[105]

---

[96] *See Atlantic City Elec. Co. v. FERC* (*Atlantic City*), 295 F.3d 1, 5 (D.C. Cir. 2002)
[97] *Id.* at 5-6.
[98] *Id.* at 7; *see* 81 FERC ¶ 61,257 (1997).
[99] *Id.* at 10.
[100] *Id.*
[101] *Id.* at 12-13.
[102] *NRG Power Marketing,* 862 F.3d at 112-13.
[103] *Id.* at 113.
[104] *Id.* at 114 (citing *Advanced Energy Mgmt. Alliance v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017)).
[105] *NRG Power Marketing*, 862 F.3d at 115.

The practical effect of *NRG* is to further constrain FERC's ability to review tariff filings. the Commission must either approve a proposal as filed, reject it outright and hope for a more acceptable refiled version, or initiate a separate process under section 206. This dynamic amplifies the power of those holding § 205 rights, since utilities can file proposals calibrated to test the outer boundary of what FERC will tolerate, knowing the Commission's options are limited.

4. *CAISO v. FERC*

Courts have also limited FERC's authority to regulate RTO governance directly. In *California Independent System Operator Corp. v. FERC*, the D.C. Circuit held that FERC could not use Sections 205 or 206 to order CAISO to replace a board selected under California law. The court treated Section 206's reference to "practices . . .. affecting" rates as limited to rates, charges, classifications, and closely related matters, not the internal corporate governance of a grid operator. It stressed that nothing in Sections 205 and 206 clearly authorizes the agency to remake an ISO's board-selection process, and that Congress's separate, limited grant of authority over director conflicts in FPA Section 305 cut against reading Section 206 as a broad governance power. On that basis, the court vacated FERC's order.

After *CAISO*, FERC cannot assume that courts will defer to Commission's view that RTO board procedures are "practices affecting rates." The consequence of that decision is that grid governance arrangements remain largely in the hands of the incumbent entities that possess filing rights or control the institutions through which filings are made, while FERC's role is largely reactive. Although the Court acknowledged that FERC could reject an RTO filing if board selection procedures or other governance procedures were not sufficiently independent, the Commission must meet a high burden under Section 206 if it wants to directly order a utility or RTO to change its internal governance.[106]

III. THE LEGISLATIVE HISTORY OF UTILITY FILING RIGHTS

[106] The D.C. Circuit determined that board composition and board-selection rules are internal corporate governance matters that are too remote from rates to fall within sections 205 and 206. The court further found that FPA § 305, which gives FERC only a limited express role over certain director conflicts, as implying that FERC lacks authority under sections 205 and 206 to intervene in board composition. Thus, FERC cannot use the generic "practices affecting rates" language in sections 205-206 to restructure internal governance when the link to rates is only indirect. The D.C. Circuit's later Order No. 1000 decision, *South Carolina Public Service Authority v. FERC*, reinforces this reading of *CAISO*. There, the D.C. Circuit distinguished CAISO because rights of first refusal had a direct economic connection to rates.

Filing rights are an awkward fit for modern grid governance. So why did the FPA give private firms a monopoly over the right to propose rules—including rules that bind third parties—for entire regional markets?

As we show in this subpart, Section 205 was designed for a world in which vertically integrated, rate-regulated monopolies planned and built the grid and filed tariffs so that regulators could determine whether the resulting rates were just and reasonable. There was no sense when the FPA was being debated in the early and mid-1930s that filing rights would allow utilities to shape market rules strategically to exclude rivals. They were simply the administrative oversight mechanism for cost-of-service regulation.

A. Rate Regulation in the FPA's Text

The statute itself strongly supports this reading. Rate regulation assumes a bilateral relationship between utilities and their regulators: utilities propose rates and investments; regulators review those proposals for reasonableness.

That is precisely the process Sections 205 and 206 adopt. Section 205 requires that each utility schedules showing its rates, charges, classifications, practices, regulations, and related contracts; forbids changes absent notice and a new filing; authorizes FERC to suspend a proposed change and investigate it; and places on the utility the burden of proving that an increased rate is just and reasonable.[107] Section 206 provides an additional remedial tool: once FERC, acting on complaint or on its own motion, finds an existing rate, rule, practice, or contract unjust, unreasonable, or unduly discriminatory, it may prescribe the replacement rate or practice to govern going forward.[108] Read together, these two provisions assume the familiar bilateral ratemaking model in which utilities file tariffs subject to regulatory review.

Moreover, where the FPA did contemplate coordination across multiple utility systems, it made clear that this was an exception to default rule of monopoly service. The FPA instructed FERC (then known as the Federal Power Commission[109]) to encourage voluntary interconnections between utilities.[110] Section 202(a) directs FERC to divide the country into regional districts and promote "voluntary interconnection and coordination." Section 202(b) adds only a limited compulsory authority, allowing FERC in some circumstances to order

---

[107] 16 U.S.C. § 824d(c).

[108] 16 U.S.C. § 824d.

[109] 16 U.S.C. § 792

[110] 16 U.S.C. § 824a(a) ("[T]he Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy").

physical interconnection or sales or exchanges, but not to compel enlargement of generating facilities or sales that would impair service to existing customers. The statute therefore did contemplate broader coordination, but as a qualified exception layered onto a world of discrete utility systems. The assumption was that utilities would own and operate islanded monopoly systems, and that integration was to be encouraged but not required.[111] There was simply no expectation that multiple rival firms would compete with each other to sell electric power, and no conception of independent regional grid-governance organizations.

The assumption that rates would be filed by regulated monopolists becomes even more apparent when Section 205 is situated in the broader New Deal approach to regulating electric utilities. The modern FPA was passed on the same day and as part of the same legislation as the Public Utility Holding Company Act of 1935 (PUHCA), a statute aimed directly at a central perceived cause of utility abuse: sprawling, opaque holding-company structures that evaded meaningful supervision by state commissions and exposed captive ratepayers to risks undertaken for speculative ventures.[112]

As the Supreme Court has explained, when Congress enacted PUHCA and the FPA, it "hoped to rejuvenate local utility management and to restore effective state regulation, both of which had been seriously impaired by the existence and practices of nationwide holding company systems."[113] Moreover, while debating PUHCA and the FPA, legislators repeatedly described the proposed legislation as designed "to create conditions under which effective Federal and State regulation will be possible."[114] In the same spirit, President Roosevelt defended PUHCA and the FPA on the ground that "realistic regulation requires the readjustment of holding companies to a size and power . . . which will give regulation a chance to be effective."[115] Again, Roosevelt does not appear to have been interested in dismantling the regulated monopoly model, but rather in simplifying complex corporate structures had become too large and unwieldy for effective state and local regulation.

In fact, throughout congressional debate on the FPA, both Congress and the President assumed that the regulated utility model would persist. President Roosevelt, for example, emphasized that "private utilities with their legalized monopolies are chartered to serve public ends," but warned that a "far-flung disjointed system" could not be "regulated by the

---

[111] 16 U.S.C. § 824a(a).

[112] Public Utility Holding Company Act of 1935, ch. 687, 49 Stat. 803 (1935) (codified as amended at 15 U.S.C. §§ 79–79z-6 (repealed by Energy Policy Act of 2005, Pub. L. No. 109-58, § 1263, 119 Stat. 594).

[113] North American Co. v. SEC, 327 U.S. 686, 705 (1946).

[114] S. Rep. No. 621, 74th Cong., 1st Sess. 11 (1935).

[115] Franklin D. Roosevelt, Message to Congress on Holding Companies, Apr. 29, 1935, in 4 The Public Papers and Addresses of Franklin D. Roosevelt 134–35 (Samuel I. Rosenman ed., 1938).

community it serves."[116] By contrast, he argued that "an operating system whose management is confined . . . to the needs . . . of one regional community is likely to serve that community better" and be "amenable to local regulation."[117] Congress likewise felt that geographic integration and transparency were preconditions for effective rate regulation, worrying that competition among utilities, which one report referred to as "territorial raids at fantastic prices," had contributed to abusive practices.[118] And congressional debate frequently invoked classic ratemaking concepts, with one report clarifying that the rate base should be "no higher than actual legitimate cost of the property," with "accrued depreciation" deducted.[119] This, of course, assumes that rates would be determined in ratemaking proceedings—not through competition or voluntary contracts. Policymakers' core concern was thus not with the monopoly approach to public utility regulation, but that the growth of complex corporate structures had made that approach practically impossible to implement.

So why did Congress give federal energy regulators authority to regulate wholesale rates in the first place? Again and again, federal policymakers emphasized the need to make sure that some regulator—either the FPCC or state utility commissions—could supervise utility tariffs. To that end, PUHCA was enacted to simplify utility corporate structures and thus facilitate regulation by state commissions, and the FPA was enacted in large part to bring transactions that were outside the jurisdiction of state utility commissions under federal authority.[120]

B. *The FPA Was Modeled on State Utility Regulation*

In addition to evidence from the FPA's text and legislative history, it is worth noting that the statutory language—the requirement that rates be "just and reasonable," the prohibition on "undue" preferences, and the requirement that utilities submit filings to FERC—was modeled on state public utility laws.

---

[116] *Id*.

[117] *Id*.

[118] S. Rep. No. 621, 74th Cong., 1st Sess. 8–9 (1935)

[119] S. Rep. No. 621, 74th Cong., 1st Sess. 19–20 (1935); *see also* Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603–05 (1944).

[120] Specifically, the House report language describing Part II of the 1935 Public Utility Act makes clear that the federal role was largely about closing the jurisdictional "gap" created by the Supreme Court's Attleboro decision, which placed certain interstate wholesale transactions beyond state regulatory reach. The report describes the FPA as "the first assertion of federal jurisdiction over this major interstate utility," which it justified because interstate utility business was "immune from State control either legally or practically."

Consider Wisconsin, the state that passed the first modern public utility statute.[121] Like the FPA, Wisconsin required utilities to "file with the commission schedules showing all rates, tolls and charges."[122] Wisconsin utilities could not change rates without first securing commission approval.[123] And rates must be just and reasonable. Finally, the Wisconsin Commission, on its own motion or that of a third party, could find rates unjust and unreasonable, at which point it has authority to determine the just and reasonable rate.[124] Thus like the FPA, Wisconsin also prohibited "any undue or unreasonable preference."[125]

New York, the other early pioneer of public utility regulation, adopted a nearly identical regulatory framework. Like Wisconsin, New York's 1907 Commission Law required utilities to file schedules of rates and charges with the Public Service Commission, prohibited changes without advance notice, and subjected all rates to a "just and reasonable" standard.[126] Section 66 of the statute required utilities to provide notice not only of rate changes, but also of "changes in any form of contract or agreement or any rule affecting any rate," though New York only required thirty days' notice, whereas the Section 205 of the FPA requires sixty.[127] The statute further empowered the Commission to suspend proposed changes and required the utility to demonstrate that any new rate satisfied the just and reasonable standard. The New York statute thus reflects the same administrative ratemaking procedures that Congress later adopted in Section 205: utilities could not charge customers for electricity without first filing a tariff with the state Commission; the filed schedule controlled until a utility provides proper notice through a new tariff filing; tariffs were only effective if the regulator has determined that the rates are "just and reasonable"; and the Commission had the power to determine in an administrative proceeding that the rate was unjust and unreasonable, at which point it could

---

121 Public Utilities Law, 499 Wis. Stats. (1907); *see also* William L. Crow, *Legislative Control of Public Utilities in Wisconsin*, 18 MARQUETTE L. REV. 80, 80-81 (1934).

122 Wisconsin Session Laws (1929), Act amending Wis. Stat. § 196.19.

123 All public utilities to which the order applies shall make such changes in their schedules on file as may be necessary to make the same conform to said order, and no change shall thereafter be made by any public utility in such rates, tolls or charges, or joint rates, without the approval of the commission.

124 196.37 ("Whenever upon an investigation the commission shall find rates, tolls, charges, schedules or joint rates to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential or otherwise unreasonable or unlawful, the commission shall determine and by order fix reasonable rates, tolls, charges, schedules or joint rates to be imposed, observed and followed in the future in lieu of those found to be unreasonable or unlawful."); *see id*. ("All public utilities to which the order applies shall make such changes in their schedules on file as may be necessary to make the same conform to said order, and no change shall thereafter be made by any public utility in such rates, tolls or charges, or joint rates, without the approval of the commission.").

125 *Id. see also* 195.12.

126 Public Service Law 65, 66, 97 (enacted as "Laws 1910, Chapter 480") ("No such . . . schedule, rate or charge shall be lawful unless . . . filed with and approved by the commission.").

127 N.Y. Pub. Serv. Law § 66.

substitute a just and reasonable rate. The other states that turned to public utility regulation in the early twentieth century all followed the same approach.[128]

These similarities suggest that Congress modeled Section 205 on early twentieth century commission regulation, where public utilities filed rate schedules and tariffs and constrain changes through notice and Commission review. Early state public utility statutes all used the same process the FPA adopted in 1935: utilities must publicly file schedules of rates and charges; changes could only be made through notice and another filing; commissions would review rates under a "just and reasonable" standard; and utilities were prohibited from rates that "unduly" or "unjustly" discriminated against some customers.

***

The FPA thus appears to have given utilities filing rights because Congress expected vertically integrated utilities to plan investments to meet their service obligations. Filing rights were simply the procedural mechanism that enabled regulators to scrutinize those monopoly proposals in a transparent, standardized way. However, as the industry has evolved—toward regionalized dispatch, bilateral and auction-based wholesale markets, independent power production, and RTO-administered tariffs—the statutory allocation of filing authority remained largely intact.

The result is that a procedural tool built for integrated monopoly planning now operates in a multilateral, partially competitive system where incumbent utilities can sometimes use filing rights to shape market rules and investment pathways in ways that protect incumbent advantages. In other words, Section 205's filing-rights regime is best understood as a historical artifact of the rate-regulated monopoly model. This may have made administrative sense in 1935, but it is not well-suited to modern grid governance.

IV. UTILITIES' RESIDUAL FILING RIGHTS

The fact that filing rights create asymmetrical agenda-setting authority does not, of course, mean that federal regulators are unable to adopt ambitious policy reforms. Over the past three

---

[128] Maine, for example, used language nearly identical to the FPA, requiring that "[e]very public utility shall file with the Commission within a time to be fixed by the Commission, schedules which shall be open to public inspection, showing all rates, tolls and charges." Section 19 Maine Rev. L. (1911); *see also id. section 20* ("Every public utility shall file with and as a part of such schedules all rules and regulations that in any manner affect the rates charged or to be charged for any service."); Pa. Act of July 26, 1913, P.L. 1374 (prohibiting utilities from making any "change in its filed and posted rates, except after thirty days' notice"); Mass. Gen. Laws ch. 164, § 94 (requiring electric and gas companies to file schedules showing all rates, prices, charges and governs changes via filing of revised schedules").

decades, FERC has relied on Section 206 to mandate open and nondiscriminatory transmission access,[129] require regional transmission planning,[130] and standardize interconnection procedures.[131] Although each of these reforms has been significant, they have all required the Commission to first satisfy a demanding statutory burden of demonstrating, on the basis of substantial evidence, that existing rates or practices are unjust, unreasonable, or unduly discriminatory. Section 206 thus permits ambitious intervention only after the Commission has overcome substantial procedural and substantive hurdles.[132]

Two persistent challenges FERC has faced, however, are that (a) utilities have retained filing rights over certain types of investments and use those filing rights to direct investment in ways that thwart ambitious market reform, and (b) they used their filing rights when RTOs were being formed to establish favorable membership and voting rules. Three recent examples demonstrate how filing rights allow utilities to block governance reform and undermine FERC's open access and transmission planning rules.

A. Lack of State Influence

One difficulty is that filing rights allow utilities to effectively determine which market participants or political bodies can participate proposing tariff reforms or voting on market changes. This dynamic has become increasingly apparent as states have begun to pressure RTOs into becoming more representative and accountable to more a broader set of interests. Time and again, these efforts have been stymied by arguments about who has filing rights and who does not.

In one example in late 2025, utilities invoked their filing rights to stymie a bipartisan attempt by a group of governors to reform PJM's voting and decision-making procedures.[133] This challenge came in response to a dramatic increase in PJM's capacity market clearing

---

[129] 888

[130] *See, e.g.*, *Order No. 1000*, 76 Fed. Reg. 155, 49853, 49860 (describing why Order No. 1000 reforms are required to ensure the energy market is just and reasonable; describing how § 206 grants FERC statutory authority to require regional planning entity membership); *Order No. 1920*, 89 Fed. Reg. 49280, 49323 (2024).

[131] *Order No. 2003*, 68 Fed. Reg. 49846, 49847; *Order No. 2023*, 88 Fed. Reg. 61014.

[132] *See, e.g.*, *Order No. 1000*, 76 Fed. Reg. 155, 49853, 49860 (describing why Order No. 1000 reforms are required to ensure the energy market is just and reasonable; describing how § 206 grants FERC statutory authority to require regional planning entity membership).

[133] https://www.pjm.com//-/media/DotCom/about-pjm/who-we-are/public-disclosures/2025/20250911-govs-of-pjm-member-states-letter-to-pjm-board-related-to-nc-decision-regarding-open-seats-on-bom.pdf

price—a sevenfold spike that threatened to impose roughly $74 billion in additional costs across the region.[134]

Two governors in PJM states—Josh Shapiro of Pennsylvania and Glen Youngkin of Virginia—even threatened to withdraw if the RTO did not address rising costs.[135] The governors specifically requested that the states be granted Section 205 filing rights so that they could initiate proposals at FERC alongside PJM. In their view, PJM was no longer sufficiently independent of its members, and meaningful reform required that the states, alongside PJM, have authority to propose market rules directly to the Commission.

The transmission owners responded by pointing out that they—not states—possess filing rights and thus have sole authority to initiate tariff changes.[136] They emphasized that although states are responsible for protecting retail ratepayers, they lack any formal right to initiate wholesale market reforms directly to FERC. Many PJM members—particularly those who currently own generation in PJM—are positioned to benefit from the projected $74 billion increase in capacity market revenues, since the revenues will go to generators that clear the capacity market.

We do not mean to suggest that PJM's capacity market reflect a coordinated effort to extract such sums from customers. But the political economy is obviously relevant: it is institutionally significant that the actors who stand to gain from rising capacity prices possess affirmative agenda-setting authority, while the states—whose political incentives more directly align with controlling electricity rates—must rely on reactive challenges or threats of exit.

B. Proposed CTOA Amendments (PJM)

Filing rights may also empower utilities to amend RTO governing documents directly. Although much of the doctrine in this area remains unsettled, the question of whether utilities can reclaim filing rights they previously ceded to RTOs is becoming increasingly consequential as utilities argue that they retain authority to amend utility tariffs, including over those filing rights they previously delegated to the RTO.

---

[134] $20 billion in PA according to complaint; a state official told me $74 billion. Need to find source

[135] Ethan Howland, *States threaten to leave PJM without expanded role in grid operator*, UTILITYDIVE, https://perma.cc/392N-P9TK (Sep. 23, 2025).

[136] *See* David E. Mills, Chair, PJM Board of Managers, Letter in Response to PJM States (Jul. 18, 2025), https://www.pjm.com/-/media/DotCom/about-pjm/who-we-are/public-disclosures/2025/20250718-pjm-board-response-to-nine-govs-letter-re-board-vacancies.pdf?utm_source=chatgpt.com ("The Section 205 FERC filing rights for such a modification are conditioned upon approval by the PJM Members Committee.").

This became evident in February 2024, when five transmission owners in PJM proposed amendments to PJM's Consolidated Transmission Owners Agreement ("CTOA").[137] The CTOA, which is the agreement among PJM transmission Owners and the PJM Interconnection establishing rights, duties, and operational relationships, is one of four governing documents of PJM.[138]

The proposed amendment would have made three changes to PJM governance and planning protocols. First, the transmission owners sought to relocate authority over PJM's regional transmission planning rules from the Operating Agreement to the PJM Tariff. This reform would have given the PJM Board—rather than the Members Committee—exclusive responsibility to prepare a Regional Transmission Expansion Plan.[139] In practical terms, this would have meant that the Members Committee, which is supposed to represent a wide array of stakeholders in the PJM region, would not have been responsible for regional transmission planning.[140]

Second, the proposed amendments would have required PJM to consult with transmission owners before including in the RTEP any regional project that could conflict with a local project that transmission owner might already be planning.[141] That amendment would have codified utility control over local planning and established that local plans effectively preempt regional ones.

Third, the amendments would have allowed transmission owners to communicate with PJM officials, including the PJM Board, with attorney-client privilege.[142] This amendment would have authorized transmission owners to protest proposed tariff changes before the proposals reached a public FERC docket. In effect, incumbent utilities would have enjoyed privileged access to RTO decision-making and the ability to shape outcomes outside the formal, transparent stakeholder processes.

---

[137] American Electric Power Service Corporation et al., *Re: Request to convene a meeting of the TOA-AC to consider amendments to the Consolidated Transmission Owners Agreement* 1, https://www.pjm.com/-/media/DotCom/committees-groups/committees/toa-ac/2024/20240220/20240220-proposed-amendments-to-the-ctoa.ashx (Feb. 6, 2024).

[138] The others are the Operating Agreement, the Open Access Transmission Tariff, and the Reliability Assurance Agreement.

[139] *See* PJM, *Consolidated Transmission Owners Agreement – Proposed Revisions* § 4.1, available at: https://www.pjm.com/-/media/DotCom/committees-groups/committees/toa-ac/2024/20240514/20240514-final-ctoa-amendments-proposal-redlined-vs-filed-ctoa.pdf (Apr. 12, 2024)

[140] *Id.*

[141] *Id.* at § 4.1.4(b)(ii).

[142] *Id.* at § 7.3.1.

Taken together, these changes would have further consolidated the authority transmission owners exercise over PJM's core planning decisions and reduced the influence of the Members Committee, which, though it has biases of its own, was established to represent diverse interests in the PJM region. There was thus reason to think the reforms were designed to "create levers of control" that would have enabled utilities to "preempt PJM decisions or trigger secret negotiations with the Board."[143]

Surprisingly, after the PJM Members Committee overwhelmingly voted against the proposed changes, the RTO nevertheless filed revisions to the CTOA at FERC under Section 206 of the FPA, asserting that existing governance arrangements were "unjust and unreasonable." PJM took the position that ultimate filing rights over regional transmission planning must reside with transmission-owning utilities, not with the RTO's broader membership. According to the PJM Board, the proposed CTOA amendments were necessary to ensure that the utilities retained their Section 205 filing rights.

Ultimately, FERC rejected PJM's proposal, though the case is currently pending in the D.C. Circuit.[144] The Commission concluded that the amendments would have given transmission owners an effective veto over regional planning and was thus inconsistent with the independence principles FERC articulated in Order No. 2000.[145]

Controversy involving the PJM Consolidated Transmission Owners' Agreement is about as wonky as it gets. Still, the dispute highlights the extent to which filing rights determine how grid planning decisions are made. The core of the transmission owners' argument was that the PJM Members Committee—the Committee designed to be broadly representative of stakeholders[146]—could not possess authority to propose changes to the Planning Protocol because it is not a "public utility" and therefore lacks Section 205 rights.[147] Even if the transmission owners lose their appeal and the court finds that filing rights are allocated in nominally independent RTO regions, the dispute highlights the extent to which utility filing

---

[143] *Protest of Harvard Electricity Law Initiative to PJM Interconnection L.L.C.'s filings under Section 205 of the Federal Power Act 3-4*, *in* Docket No. ER24-2336 (Jul. 22, 2024).

[144] *PJM Transmission Owners v. FERC*, Case No. 25-1064 (D.C. Cir.)

[145] *See Order rejecting amendments to Consolidated Transmission Owners Agreement, and denying complaint concerning location of PJM's Regional Transmission Expansion Planning Protocol in the Operating Agreement*, 189 FERC ¶ 61,181 (2024).

[146] Though we have just argued that the Members Committee is not sufficiently representative of the interests of states and ratepayers, it is still more representative than a group composed solely of transmission owners.

[147] *Request for Rehearing of the Indicated PJM Transmission Owners* 57, in Docket No. ER24-2336 (Jan. 6, 2025) ("The power to initiate rate changes under FPA section 205 rests exclusively with the public utilities. The PJM Members Committee is not a public utility. Therefore, it does not have any legal rights under section 205 of the FPA to make rate filings with the Commission.")

rights allow them to make decisions about what grid investments will be made and to influence regional decision-making processes. It also suggests that the threat of exit, which the transmission owners explicitly wielded here, can motivate the PJM Board to act despite overwhelming opposition from the other Member sectors.

C. Review of Asset Condition Projects (ISO-NE)

Another reason filing rights contribute to dysfunctional governance arrangements is that they empower utilities to bypass regional planning processes that are designed to incorporate various stakeholder interests, with the overwhelming majority of transmission investment now going toward local and supplemental transmission projects that do not undergo competitive procurements.

Today, transmission owners in the Northeast prioritize transmission investments that can be categorized as "asset condition projects," which are upgrades to maintain system reliability, meet safety standards, and harden the grid against extreme weather.[148] Transmission owners justify these projects as necessary to repair, replace, or modernize aging infrastructure to maintain system reliability. By classifying projects as asset condition upgrades, they bypass the RTO's regional reliability planning process, since asset condition projects are categorized separately from regional reliability upgrades that are evaluated through ISO-NE's regional planning protocol. They technically fall within transmission owners' local planning authority.[149]

One reason Transmission Owners have so much discretion to propose asset condition projects is that the Transmission Operating Agreement (ISO-NE's equivalent of PJM's CTOA) explicitly stipulates that transmission owners retain authority over local system plans and asset condition projects.[150] Because asset condition classification allows the owner to avoid competitive solicitations while guaranteeing cost recovery and a regulated return on invested capital, utilities have strong financial structures to favor asset condition projects over projects selected through ISO-NE's regional planning protocol. Once a project is designated as an asset condition project, ISO-NE does not independently assess whether the project is needed, nor does it evaluate potentially lower-cost regional solutions or non-wires alternatives.[151]

---

[148] ISO-NE, *Joint New England Transmission Owner Asset Condition Process Guide* 2-3, https://www.iso-ne.com/static-assets/documents/100010/2024_04_25_pac_asset_condition_process_guide_draft.pdf (2024).

[149] Though they are confusingly technically categorized as regional projects for purposes of ISO-NE's regional transmission plan. *See also* Wayner, Rebane & Teplin, *supra* note 158, at 28.

[150] ISO-NE, *Transmission Operating Agreement* § 3.09, https://www.iso-ne.com/static-assets/documents/regulatory/toa/v1_er07_1289_000_toa_composite.pdf (June 23, 2025).

[151] *See* ISO-NE, *Post-Technical Conference Comments of ISO New England Inc.* 4, *in* Docket No. AD22-8-000 (2023) ("unlike regional and local transmission facilities, Asset Condition Projects are not subject to Order No. 890's

Approximately seventy-three percent of annual transmission spending in New England goes toward asset condition projects, meaning that the vast majority of transmission spending is not selected in competitive solicitations or scrutinized through the regional planning process.[152]

When states and consumer advocates urged ISO-NE to play a more active role in reviewing asset condition projects, the RTO declined, citing the allocation of filing rights as the reason it cannot exercise greater scrutiny of these projects. ISO-NE's position is that filing rights that have not been voluntarily ceded by the transmission owner—including filing rights over local transmission investment—remain with the transmission owners. As a result, the transmission owners retain exclusive authority to make Section 205 filings to recover costs associated with asset condition projects. ISO-NE's own Section 205 authority, it has argued, is "limited to those delegated to it by agreement by each PTO [Participating Transmission Owner]."[153] In practice, this means the RTO plays only an advisory role with respect to projects that now account for the majority of transmission spending in New England.[154] Thus, the fact that transmission owners retained filing rights over local transmission means they can bypass the regional process and make sure that most transmission investment does not need to be selected through competitive procurements.[155]

The problem of utility overspending on local transmission is widespread and not unique to New England. Across the country, spending has shifted toward local and supplemental projects that fall outside competitive regional planning frameworks.[156] In the PJM

---

transmission planning requirements. Instead, the PTOs identify the asset conditions, develop solutions to address the identified conditions (i.e., the Asset Condition Projects), and present at the Planning Advisory Committee ("PAC") those Asset Condition Projects with an estimated cost of $5 million or greater.")

[152] *See* Richard Blumenthal, *Comments on Complaint Filed by the Industrial Energy Consumers of America*, Docket No. EL25-44, https://www.blumenthal.senate.gov/imo/media/doc/2025-08-08_letter_to_ferc_re_asset_condition_projects.pdf (Aug. 8, 2025) ("In fact, spending on asset condition projects represents 73 percent of the annual amount that transmission owners spend on all projects in New England") (citing ISO-NE, *RSP Project List and Asset Condition List: March 2025 Update*, https://www.iso-ne.com/static-assets/documents/100022/final_project_list_presentation-mar_2025_clean.pdf)

[153] *Motion to Dismiss Complaint as to ISO New England, Inc.* 11 in Docket No. EL25-44-000 (Mar. 20, 2025)

[154] *Id.*

[155] *Id.* at 12 (citing PJM Interconnection, L.L.C., 172 FERC ¶ 61,136, at PP 12, 89; PJM Interconnection, L.L.C., 173 FERC ¶ 61,242, at P 54).

[156] Nathan Schreve, Zachary Zimmerman & Rob Gramlich, *Fewer New Miles: The US Transmission Grid in the 2020s* 6, AMERCIANS FOR A CLEAN ENERGY GRID, https://cleanenergygrid.org/wp-content/uploads/2024/07/GS_ACEG-Fewer-New-Miles-Report-July-2024.pdf (Jul. 2024) (noting that more than 90% of transmission spend is driven by lower-voltage reliability upgrades, and about 50% is solely based on "local" utility criteria that are unrelated to the regional transmission planning process).

Interconnection, for example, transmission investment over the past decade has been dominated by "supplemental" projects planned solely by incumbent utilities, while competitively bid regional transmission lines account for only a small fraction of total capital expenditures.[157] Nationally, data reported to FERC indicate that local transmission spending has grown far more rapidly than regionally planned projects subject to competition.[158] In some regions, more than two-thirds of annual transmission capital expenditures are now categorized as local or supplemental rather than regional.[159] Meanwhile, competitively solicited regional lines—precisely the projects that FERC envisioned would harness competition to discipline costs—represent only a sliver of total transmission investment.[160] The result is a system in which the overwhelming share of grid expansion occurs through processes controlled by incumbent utilities rather than through open regional planning mechanisms.

***

These examples highlight two points. First, Section 205 rights allow certain market participants to unilaterally plan investments while limiting other stakeholders to a reactive position. Even when RTO members, consumer advocates, or state regulators object to incumbent-driven proposals, the FPA offers them no direct path to modifying market rules: reforms must either originate with the utilities themselves or survive the heavier procedural burdens that Section 206 places on FERC and third-party complainants.

Second, regional transmission organizations and FERC are both constrained—albeit in different ways—by utilities' control over Section 205 filings. This occurs both because utilities retain voting power within stakeholder processes and because they can credibly threaten to withdraw from the RTO. As a result, even when reforms command broad stakeholder support, the credible threat of utility exit can make it impossible for RTOs to adopt reforms that are opposed by transmission owners.

---

157 *See* Claire Wayner, *Increased Spending on Transmission in PJM — Is It the Right Type of Line?*, ROCKY MT. INST., https://rmi.org/increased-spending-on-transmission-in-pjm-is-it-the-right-type-of-line/ (Mar. 20, 2023).

158 Johannes Pfeifenberger, *Annual U.S. Transmission Investments 1996-2024*, BRATTLE, https://www.brattle.com/insights-events/publications/annual-us-transmission-investments-1996-2024/ (Jun. 11, 2025); Claire Wayner, Kaja Rebane & Chaz Teplin, *Mind the Regulatory Gap: How to Enhance Local Transmission Oversight* 30, ROCKY MT. INST., https://rmi.org/wp-content/uploads/dlm_uploads/2024/11/rmi_mind_the_regulatory_gap.pdf (Nov. 2024).

159 *Comments of the Organization of PJM States, Inc.* 5n16 *in* Docket No. RM21-17-000, https://opsi.us/wp-content/uploads/2022/08/OPSI-Comments-Docket-RM21-17.pdf ("OPSI notes that since 2018, TOs have proposed over $21B in Supplemental Projects compared to $5B in Baseline Projects.")

160 Pfeifenberger, *supra* note 158, at 2.

V. THE FORMATION OF GRID GOVERNANCE ENTITIES

Prior to FERC's major open-access reforms, utility interconnections were largely voluntary and occurred because individual utilities—often with significant prodding from state regulators[161]—recognized the economic and reliability benefits of regional coordination. To the extent Congress acknowledged the benefits of coordinated transmission, it did so cautiously, instructing FERC merely to encourage "voluntary interconnection" rather than mandating regional integration.[162]

Decades later, when utilities formed power pools and, eventually, RTOs, they did so against this statutory backdrop. Because utilities possessed filing rights under Section 205, they were the entities that proposed the initial tariffs, governance structures, and stakeholder processes through which these regional institutions would operate. RTO governance—including voting structures, planning procedures, and stakeholder processes—thus came into existence through utility-initiated filings. This Part provides a historical overview of these filings, emphasizing how hard utilities worked to preserve their agenda-setting authority and governance prerogatives as regional institutions evolved to support competitive wholesale markets.

A. FERC's Restructuring Orders

Restructuring is typically traced to the late twentieth century, when FERC began opening generation and transmission markets to non-incumbent service providers. Congress's first major electricity sector policy since the New Deal—Public Regulatory Policies Act of 1978 (PURPA)—created a new class of "qualifying facilities" (QFs) and gave them the right to sell energy and capacity to utilities, generally at the utilities' "avoided costs."[163]

The next major statutory reform, the Energy Policy Act of 1992 ("EPAct of 1992"), concerned transmission access. Congress enacted sections 211 and 212 of the FPA, authorizing FERC to order utilities to "wheel" power on behalf of any entity generating electricity for resale, while requiring that transmission providers be allowed to recover their costs through filed tariffs. The EPAct's major shortcoming was that FERC's authority operated on a case-by-case basis. Because it was onerous for FERC to separately adjudicate wheeling requests, the Commission quickly abandoned that approach and turned to structural reforms.

161

162 16 U.S.C. § 824a.

163 *See* 106 Stat. 2776, 2916 (codified at 16 U.S.C. § 824k); Jeffrey D. Watkiss & Douglas W. Smith, *The Energy Policy Act of 1992: A Watershed for Competition in the Wholesale Power Market*, 10 YALE J. ON REG. 447, 449 (1993).

The result was Order No. 888, which required public utilities that own, control, or operate interstate transmission facilities to file open-access, nondiscriminatory transmission tariffs containing minimum terms and conditions of service, with the stated goal of removing impediments to wholesale competition.[164] Order No. 888 also encouraged utilities to consider independent system operators, which FERC insisted should be "independent of any individual market participant or any one class of participants, " membership and voting procedures "should prevent control, and appearance of control, of decision-making by any class of participants."[165]

Recognizing that transmission operators continued to exclude independent power producers, FERC intervened again four years later in Order No. 2000, which called for the "voluntary formation" of regional transmission organizations. RTOs would assume sole responsibility for operating and expanding the transmission system in their regions. FERC did not prescribe any specific organizational form, requiring only that RTOs be independent, have a regional footprint, exercise functional operational authority over the grid, and assume responsibility for short-term reliability. Within those parameters, regions were free to determine their own governance structures.[166]

Over the following two decades, FERC issued a series of Orders aimed at further reducing barriers to entry to the wholesale energy market. Order No. 2003 standardized large-generator interconnection procedures on the ground that interconnection delays and lack of standardization were discouraging merchant generation and conferring an unfair advantage on vertically integrated utilities. Order No. 890 required all transmission providers to open their planning processes to stakeholder participation—including local planning.[167] FERC worried that, if the Order did not encompass local planning, transmission-owning utilities would be able to control the regional process by forcing it to "incorporate and rely on information prepared by underlying transmission owners" who did not engage in open and

---

[164] *See* Order No. 888 *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21540, 21567 (1996); *see also* John S. Moot, *Whither Order No. 888?* 26 ENERGY L. J. 327, 330 (2005).

[165] 61 Fed. Reg. at 21596.

[166] For example, the Commission declined to prohibit stakeholders from holding seats on an RTO's board even though that seemed as if it would inherently compromise the independence principle. Similarly, the Commission decided to allow passive equity ownership in the RTO by market participants, again with potential consequences for RTOs' independence.

[167] The nine principles were "coordination, openness, transparency, information exchange, comparability, dispute resolution, regional participation, and congestion studies." 72 Fed. Reg. 50, 12319.

transparent planning.[168] And Order No. 1000 went further still, requiring utilities to participate in forward-looking, regional transmission planning and to file regional and interregional cost allocation methods with FERC.[169]

Scholarship on restructuring typically focuses on these restructuring orders, claiming, reductively, that restructuring replaced the prior model in which vertically integrated utilities provided electricity in exclusive service territories. What that account neglects to mention is that by the time FERC sought to facilitate competitive wholesale markets, vertically integrated utilities had already spent decades buying and selling power through regional power pools they had created themselves. Those pools, as the next subpart shows, were voluntary coordination agreements among incumbent utilities, negotiated and filed under Section 205.[170] To understand contemporary grid governance—and the persistent influence of incumbent firms—it is therefore necessary to step back and examine how these early power pools were formed and governed.

B. Early Power Pools

Long before FERC moved to facilitate competitive wholesale markets, vertically integrated utilities were already buying and selling power through regional power pools they had created decades earlier. Utilities and regulators recognized early on the economic and reliability advantages of regionally coordinated transmission. For instance, in 1964, the FPC encouraged utilities to "look far beyond [their] own service areas in [the planning] of new capacity and of interconnections for capacity savings."[171] A major blackout in the northeastern United States

---

[168] *Id.* at 12321 (affirming that an "RTO's or ISO's planning processes will be insufficient if its underlying transmission owners are not also obligated to engage in transmission planning that complies with Final Rule."). FERC also required regional coordination. *See* 76 Fed. Reg. 155, 49853-54 (requiring "each public utility transmission provider to participate in a regional transmission planning process that produces a regional transmission plan").

[169] At the time, however, the Commission did not require such organizations to follow specific steps in evaluating or developing their transmission plans, instead providing flexibility on the ground that "there are many ways potential upgrades to the transmission system can be studied in a regional transmission planning process." 76 Fed. Reg. 155, 49868. Most recently, in Order No. 1920, FERC adopted more prescriptive rules about regional transmission planning, requiring long-term regional transmission planning and ex ante cost-allocation methods for long-term regional facilities. Under No. 1920, transmission providers must develop at least three distinct long-term scenarios using a planning horizon of no less than 20 years, reassess those scenarios at least every five years, and provide greater transparency around local planning inputs through publicly noticed stakeholder meetings and feedback periods.

[170] *See infra* Section V.b.

[171] Federal Power Commission, *Nat'l Power Survey* (1964); *see also* James F. Fairman & John C. Scott, *Transmission, Power Pools, and Competition in the Electric Utility Industry*, 28 HASTINGS L. J. 1159, 1160 (1977).

the following year hastened the move towards regional coordination.[172] In the decades the followed, utilities across the country formed power pools, which are associations of two or more utility systems that coordinate operations, planning, and dispatch to improve grid stability, reduce costs, and achieve other efficiencies that would be impossible to realize if each utility operated its system as an island.

The early power pools took various forms, ranging from loosely coordinated trading arrangements to highly integrated systems. PJM, for example, originated in 1927 when the Philadelphia Electric Company, the Pennsylvania Power & Light Company, and the Public Service Gas & Electric Company of New Jersey joined their transmission systems to operate as a single entity. The pool was soon expanded to include Maryland utilities and officially became known as PJM thirty years later.[173] In New England, utilities formed the New England Power Pool (NEPOOL) in the 1970s after the New York blackout led to pressure for greater regional integration.[174] In New York, the New York Power Pool was formed around the same time and for similar reasons

When forming these power pools, utilities negotiated the terms and conditions of participation, proposed governance arrangements, and filed the resulting agreements with the FPC under Section 205 of the FPA. The Commission reviewed these filings and could reject unduly discriminatory provisions under Section 206, but its leverage was limited because it could not compel interconnections, and because it was evaluating proposals utilities had already negotiated among themselves. The result, across multiple regions, was governance structures designed by and for incumbent utilities, particularly large, vertically integrated, investor-owned systems.

NEPOOL provides one example of how governance structures of twentieth century power pools reflected the interests of its largest members. Each NEPOOL participant could appoint one member of NEPOOL's decision-making body, the Management Committee.[175] But participants whose annual peak load exceeded twenty percent of the sum of all participants' peaks received additional members, one for each ten percent by which their peak exceeded tern percent of the total. In other words, the larger the utility, the more representation it

[172] *See* George C. Loehr, *The "Good" Blackout: The Northeast Power Failure of 9 November 1965*, 15 IEEE POWER & ENERGY MAG. 84, 95 (2017).

[173] *Background on the Electric Network, PJM, and PJM Members* 16, DAVID GARDINER & ASSOC., https://www.dgardiner.com/wp-content/uploads/2024/03/CAPS-DGA_PJM-Transmission-Handbook_Volume-II.pdf (Feb. 2024).

[174] Federal Energy Regulatory Commission, *Power Pooling in the Northeast Region* 22, https://www.osti.gov/servlets/purl/6804252 (Feb. 1981).

[175] *See, e.g.*, *Municipalities of Groton v. FERC*, 587 F.2d 1296, 1298-99 (D.C. Cir. 1978).

received. NEPOOL also permitted a full veto of any Management Committee decision if fifteen percent of total votes outstanding opposed the decision, a threshold that effectively empowered the largest members to block any proposal they opposed.[176] Municipalities that owned electric systems in New England challenged this arrangement as anticompetitive, arguing that the governance structure systematically favored large, investor-owned utilities.[177]

The NEPOOL proceedings are notable, moreover, because the Commission explicitly treated governance as falling within the scope of its Section 206 authority.[178] At the same time, the Commission demonstrated a willingness to tolerate potentially anticompetitive governance processes in order to achieve coordination benefits from greater interconnections. Specifically, in the NEPOOL filings, the FPC accepted that the pool "might narrow the basis for wholesale competition" but nevertheless justified the arrangement on the ground that it would lead to a "reduction in cost of service resulting from . . . coordination."[179]

PJM followed a similar path. When it was first formed in 1927, the original Pennsylvania–New Jersey-Maryland Interconnection was basically a coordination agreement among three vertically integrated utilities: PSE&G, PECO, and PP&L.[180] Each utility still financed and controlled its own part of the transmission build-out, each named one representative to a three-member operating committee, and that committee worked by unanimous consent.[181] There was also a permanent load scheduling and operating group with representatives from all member companies that handled things like reserve-sharing, load forecasting, maintenance coordination, and capacity-deficiency accounting. In other words, governance was small, utility-to-utility, and consensus-based.

By the late 1950s, governance became more formalized, but it was still controlled by the member utilities, not by an independent board. PJM's September 1956 agreement created a Management Committee, an Operating Committee, a Maintenance Committee, a Planning and Engineering Committee, and an Office of the Interconnection.[182] Each member utility had one representative on the Management Committee; some actions required unanimity, while others were decided by weighted voting tied to member peak load.

Still, these governance provisions appear to have had little practical effect, since a single utility effectively controlled all PJM decisions: specifically, while the Office of the

---

[176] NEPOOL, *NEPOOL Power Agreement* § 5.4 (Sep. 1, 1971).
[177] *Municipalities of Groton*, 587 F.2d at 1299.
[178] *Id.*
[179] *Municipalities of Groton*, 587 F.2d at 1299.
[180] *See* Jeremiah Lambert, *Creating Competitive Power Markets: The PJM Model* (2002).
[181] *See id*.
[182] *See id*.

Interconnection nominally ran pool operations, its regular staff consisted entirely of PECO employees, meaning one member utility had full operational control of the pool in its first few decades.[183]

Another problem was that PJM continued to follow a bottom-up planning approach. Utilities planned investment for their service territories and traded power primarily to reduce operating costs and improve reliability.[184]

In the Midwest, the Mid-Continent Area Power Pool (MAPP) similarly favored incumbent utilities. MAPP's original filing proposed a two-tier membership scheme: "Participants," entitled to full representation on all pool committees, and "associate participants," who could sit on only a limited selection of committees.[185] Only entities that owned or controlled facilities operating at 115 kV or higher qualified as full participants.[186] The FPC struck down this two-tiered system as unduly discriminatory under Section 206. But the Commission stopped short of requiring open governance, refusing to require MAPP to admit non-generating distribution systems as participants and leaving smaller entities entirely without representation in the pool.[187]

In response to Order No. 888, MAPP had to revise its membership and governance structure. The restructured MAPP included a management committee on which all MAPP members were entitled to have a representative. The responsibilities of committee members were limited mainly to voting on an Executive Committee and hearing appeals from the Executive Committee. Decision-making was not vested in the Management Committee, but instead in "the MAPP Reliability Council, the Regional Transmission Committee, and the Power and Energy Market Committee."[188] Notably, these committees did not have

---

[183] *See id*. Another big operational shift occurred in 1956, when PJM became a "tight" power pool. A tight power pool is a single control area with free-flowing transmission ties, and the members agreed to place generation under a central system dispatcher, though it remained utility-governed until it was certified as an ISO in 1997. *See id*.

[184] *See* Alexandra Klass, Joshua Macey, Shelley Welton, & Hannah Wiseman, *Grid Reliability Through Clean Energy*, 74 STAN. L. REV. 969, 993-98 (2023).

[185] *Central Iowa Power Co-op. v. FERC*, 606 F.2d 1156, 1170 (D.C. Cir. 1979).

[186] *Id.* ("To become a participant, a party is required to meet certain requirements. It must be a party: (a) Whose system is normally operated directly interconnected with two or more electric systems; and (b) Which owns or controls transmission facilities operated at 115 kilovolts or higher forming an integral part of the regional transmission network; and (c) Whose system contributes significantly as determined by the Management Committee to the reliability of the interconnected systems operation; and (d) Which operates or participates in the operation of a 24-hour dispatch center with a terminal on the communication network connecting the Participants.").

[187] *Id.* at 1171.

[188] *Mid-Continent Area Power Pool*, Docket No. ER96-1447-000 (Dec. 24, 1996).

representatives from each participant. A further provision noted that "approval or adoption by the Management Committee of any measure 'materially affecting access to or use of transmission facilities' must . . . be approved by two-thirds of the votes of the representatives of the Transmission Owning Members and two-thirds of the votes of the representatives of the Transmission Using Members."[189] As such, the transmission owners had an effective veto over most measures that would impact them.

The Southwest Power Pool (SPP) followed a slightly different path, but nevertheless still produced a governance arrangement heavily favoring incumbents. SPP was formed in 1941 to supply power to an Arkansas aluminum plant critical to the war effort, after Arkansas Power & Light proved unable to meet the factory's demand on its own.[190] In some ways, SPP's original governance structure appeared democratic: each participant had an equal say in the Operating Committee, which made all substantive decisions for the pool.[191] In reality, SPP's structure was not as inclusive as it seemed. Since the pool was made up entirely of vertically integrated utilities whose interests were largely aligned, there simply was no reason to weight governance in favor of any particular members.

However, as independent power producers entered the market and became SPP members, that alignment began to fray. Incumbent, investor-owned utilities responded by creating a parallel organization, the South Central Electric Companies (SCEC), to pursue large-scale projects, including a 1,500 MW interchange with the Tennessee Valley Authority, without involving the full Southeastern Area Power Pool membership.[192]

The decision to create additional, overlapping power pools is especially notable in light of the fact that SPP provided SCEC with technical and accounting support. Thus, even though SCEC was largely an outgrowth of SPP (and, by extension, Arkansas Power & Light), the benefits of the partnership flowed to the investor-owned utilities alone. In fact, SPP itself operated with minimal formal structure, meaning utilities could create separate, overlapping pools when it suited their interests.[193] As a result, for the first decades of its existence, SPP was

---

[189] *Id.*

[190] SPP 1941 Agreement 2; Kyle Massey, *Born in Wartime, Southwest Power Pool Marks 75 Years*, AR. BUSINESS, https://www.arkansasbusiness.com/article/born-in-wartime-southwest-power-pool-marks-75-years/ (Dec. 16, 2016).

[191] *Id.* at 4

[192] *Id.* at 8-9.

[193] The pool was not legally incorporated until 1994, and all of its employees were on Arkansas Power & Light's payroll until 1995. *See* Nathania Sawyer & Les Dillahunty, *The Power of Relationships: 75 Years of Southwest Power Pool* 62-64, https://www.spp.org/documents/46282/spp-75th-anniversary-online.pdf ("The Arkansas Secretary of State's office issued SPP's incorporation certificate on January 3, 1994 [. . .]. Until 1995—when SPP set up

essentially a set of agreements that large investor-owned utilities could modify or bypass as their interests required.

The power pools described above, NEPOOL, MAPP, PJM, NYPP, and SCEC, would later become the foundations upon which utilities and FERC built modern RTOs. The PJM Interconnection grew out of the PJM Power Pool; ISO-NE developed out of NEPOOL; MISO formed out of MAPP; SPP grew out of SCEC and eventually transitioned from a power pool to an RTO; and NYISO assumed NYPP's functions.

Throughout this period, the FPC reviewed power pool agreement and could intervene if a provision was plainly discriminatory. But the Commission was reluctant to do so—even when it acknowledged membership requirements and voting rules were potentially anticompetitive—largely out of concern that it lacked authority to compel coordination and worried utilities would not voluntarily join pools they did not control. Again, the Commission's treatment of NEPOOL is instructive. When the FPC approved NEPOOL, it pointed to the fact that the agreement "represents the consensus of opinion of systems providing approximately 95% of all the capacity and energy furnished and consumed [in the NEPOOL service area]" as evidence of the pool's legitimacy.[194] But this consensus was, of course, the consensus of the region's largest utilities. It is equally plausible that the agreement simply reflected the preferences of the incumbents who drafted it.

C. ISO and RTO Formation

Prior to Order No. 2000, FERC had encouraged the creation of Independent System Operators, or ISOs, in Orders 888 and 889. ISOs, like the RTOs that would follow them, had to be independently governed and be given operational control over transmission. PJM and NEPOOL both converted to an ISO structure in 1997, and the New York Power Pool filed to form the NYISO that year. These ISOs all arose out of existing power pools, whose member utilities attempted to engineer governance structures that would continue to favor them. FERC had to reject PJM's initial filing, for example, because its initial structure would have allowed for unilateral withdrawal from or modification of PJM's founding agreements by utilities.[195] Stakeholders also vociferously protested the ISO-NE structure proposed by NEPOOL. Its voting structure was seen as weighted in favor of transmission owners,[196] and in response,

---

independent financial administration with its own separate payroll and benefits program — SPP employees technically were employees of AP&L").

[194] Federal Power Commission, *NEPOOL Power Agreement*, 48 F.P.C. 538, 550 (1972).

[195] *Order Conditionally Accepting Open Access Transmission Tariff and Power Pool Agreements, Conditionally Authorizing Establishment of an Independent System Operator and Disposition of Control over Jurisdictional Facilities, and Denying Rehearings*, 81 FERC ¶ 61,257 at 66.

[196] *See Order on Rehearing*, 85 FERC ¶ 61, 242 at 2.

FERC asked NEPOOL to change its governance procedures and remove excess influence held by large utilities.[197] But even as it directed utilities to change their initial ISO filings, FERC stopped short of prescribing a model governance structure. Instead, it was content to let utilities retain the initiative and operate in a reactive role.

When RTOs were created as a result of Order No. 2000, they inherited membership structures and governance arrangements from the power pools that preceded them, including the procedures incumbent utilities had embedded to protect their own interests. Perhaps because the Commission in Order No. 2000 was acting under Section 206, it did not mandate RTO membership or prescribe a single institutional form.[198] Instead, it called for the voluntary formation of regional transmission organizations and directed utilities to submit proposals to participate in an RTO, it recognizing that independent regional institutions had to be created through utility-initiated filings.[199]

RTOs were required to have four minimum characteristics—independence, regional scope, operational authority, and short-term reliability.[200] FERC further determined that RTOs could be independent from market participants only if they possessed the exclusive right to make Section 205 filings over regional matters.[201] However, in response to utility objections and legal challenges, the Commission conceded that transmission owners would retain "certain independent Section 205 filing rights with respect to the level of the revenue requirement that the transmission owners receive from the RTO."[202] A question was thus which filing rights utilities would cede to the new RTO and which they would keep for themselves.

---

[197] *Id.* at 3.

[198] FERC has, in another instance, attempted to be more prescriptive in its guidance. In 2002, the Commission issued a Notice of Proposed Rulemaking indicating its intent to issue a "Standard Market Design" (SMD). The SMD would have proposed a single, unified transmission tariff for all service, mandatory transfer of operational control over transmission facilities to an independent operator, a forward-looking resource adequacy market requirement, and so on. The NOPR would have had each public utility join an independent transmission operator and take transmission service under a unified tariff structure. State regulators and utilities—particularly in the Southeast and Northwest— were vocal in their opposition to the proposed rule. It was portrayed as a form of federal overreach into areas traditionally reserved for state regulation, and came on the heels of a public failure by FERC to control the California electricity crisis in 2000-2001. As a result, FERC largely withdrew its proposal in 2003, and has not proposed a similarly ambitious project since. *See generally* Mary Anne Sullivan, Joseph C. Bell, and John R. Lilyestrom, *Standard Market Design: What Went Wrong? What Next?*, 16 ELECTRICITY J. 11 (2003); *see also Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design*, 67 Fed. Reg. 55452 (2002) (notice of proposed rulemaking).

[199] 65 Fed. Reg. 943 (2000).

[200] Order No. 2000.

[201] 65 Fed. Reg. 858.

[202] 65 Fed. Reg. 858.

Utilities understood the stakes immediately.[203] Puget Sound Energy, for example, warned that Order No. 2000 "would have the effect of reducing the transmission-owning utility to little more than a 'bystander' and could constitute an illegal 'taking' under the Fifth Amendment."[204] Other utilities expressed similar concerns.[205]

The initial compliance filings highlight how utilities used their agenda-setting authority to embed pro-incumbent processes in the governance structures of the newly created RTOs. Three examples are illustrative. First, in MISO's initial compliance filing, the transmission owners gave themselves a right to veto any filings "that affect pricing."[206] That provision would have given transmission owners direct control over wholesale market rules. FERC rejected this proposal and ordered MISO to amend its filing. Second, ISO-NE's early compliance filings sought to group alternative energy providers together with all other parties in the RTO's stakeholder advisory process, diluting their voting power. ISO-NE also included a provision allowing transmission owners, when acting jointly, to "submit Section 205 filings to establish and revise the rates and charges for transmission service under the [ISO-NE open-access transmission tariff] and the rates, terms and conditions relating to incentive or performance-based rates."[207] The filing further required the RTO to consult with all transmission owners before making any Section 205 filing to determine whether the filing would adversely affect their revenue requirements. [208] Because FERC did not challenge this allocation of filing rights, ISO-NE developed a governance structure that was biased towards transmission-owning interests from the start. Third, SPP's initial filing proposed a Members Committee as the RTO's highest stakeholder body, composed of seven transmission-owning members, and seven transmission-using members.[209] Because transmission-using members vastly outnumber transmission owners in the region, this structure effectively diluted the voting power for all non-incumbent stakeholders. FERC again pushed back on this proposal, requesting an

---

[203] 65 Fed. Reg. 858 (noting that the proposal to grant RTOs § 205 filing rights "triggered hundreds of pages of comments.")

[204] 65 Fed. Reg. 849.

[205] *See, e.g.*, Order No. 2000, 65 Fed. Reg. at 839 ("Florida Power Corp. further argues that requiring RTO participation would be a 'taking" of utility property for which just compensation would be owed, and that the 'taking' problem is exacerbated by
utilities being liable for facilities no longer under their control."

[206] *Order Granting RTO Status and Accepting Supplemental Filings* 97 FERC ¶ 61, 326 at ¶ 35.

[207] *Order Granting RTO Status Subject to Fulfillment of Requirements and Establishing Hearing and Settlement Judge Procedures*, 106 FERC ¶ 61,280 at ¶ 60.

[208] *Id.* at ¶ 63.

[209] *Order Granting RTO Status Subject to Fulfillment of Requirements*, 106 FERC ¶ 61,110 at ¶ 24

amended filing that would allow for "balanced stakeholder representation," though the resulting structure still afforded transmission owners disproportionate influence.[210]

These examples illustrate the extent to which the allocation of filing rights shaped RTO governance from the start. Utilities filed governance proposals calibrated to preserve incumbent control. FERC could accept or reject each filing, and it could explain what a future filing would need to look like in order to satisfy the just and reasonable requirement, but it could not draft governance rules itself. When FERC rejected a proposal, the utility simply refiled, sometimes with meaningful concessions, sometimes with only cosmetic changes. The burden fell on the Commission to demonstrate, under Section 206, that each successive proposal was unjust and unreasonable. Utilities, by contrast, needed only to show that their proposals fell within the zone of reasonableness under Section 205. This asymmetry meant that the governance structures FERC ultimately accepted did not reflect FERC's ideal governance arrangement, but rather whatever membership and voting rules utilities could persuade the Commission to accept.

FERC defended its voluntary approach as helping incumbents "focus [their] efforts on the potential benefits of RTO formation and how best to achieve them, rather than on a non-productive challenge to [FERC's] legal authority to mandate RTO participation."[211] In other words, FERC wanted to avoid a head-on confrontation about the limits of its Section 206 authority. For that reason, the Commission decided simply to encourage "transmission owners . . . participate in good faith in the collaborative process" established in Order No. 2000.[212]

D. Order No. 1000 Filings

Order No. 1000 arguably marked FERC's most ambitious effort to address governance flaws since it mandated open access transmission service in Order No. 888. Order No. 1000 adopted two important governance reforms. First, it required utilities to participate in forward-looking regional transmission planning processes to identify transmission needs driven by reliability, economic, and public policy considerations. Second, it required the removal of federal rights of first refusal—tariff provisions that gave incumbent transmission owner the automatic right to build, own, and recover costs for projects before competing developers were allowed to propose or construct it—for regionally selected transmission projects reasoning that

---

[210] *Id.* at ¶ 39, 42-43.

[211] 65 Fed. Reg. 834; *see also id*. At 831 (explaining that "[the Commission believes] that the voluntary process adopted in this rule, in conjunction with the innovative transmission pricing reforms that [FERC] will permit RTOs to seek, will be successful in achieving widespread formation of RTOs in a timely manner.").

[212] *Id.*

tariffs that favored incumbent projects were discriminatory and incompatible with open access.

1. *The Controversy Over ROFRs*

The controversy over the Commission's power to remove ROFRs illustrates how filing rights both limit FERC's remedial authority and allow utilities to weaken governance and planning reforms adopted in FERC rulemakings. In response to FERC's Notice of Proposed Rulemaking, utilities initially argued that FERC simply lacks authority to regulate discrimination between incumbent and nonincumbent developers.[213] The Commission, however, determined that ROFRs contribute to unjust and unreasonable rates and therefore fall within its Section 206 authority.[214]

Once FERC issued Order No. 1000, utilities and RTOs shifted their strategy, arguing that because ROFRs were filed in the tariffs transmission owners filed with FERC, they should receive protection under the *Mobile-Sierra* doctrine. Multiple RTOs argued that ROFRs should be understood as a freely negotiated contract between utilities and RTOs, meaning FERC could only remove ROFRs if it satisfied *Mobile-Sierra's* heightened public interest standard. MISO, for example, argued that the Commission cannot compel a change to the Transmission Owners Agreement unless it can show that the existing provision 'seriously harms the public interest' and that the proposed modification is of 'unequivocal public necessity,'"[215] ISO-NE similarly claimed that FERC "cannot make the finding required to force the PTOs and ISO-NE to involuntarily amend the TOA to remove the right to build provisions that are protected by *Mobile-Sierra* and that are essential to the current process."[216] Similarly, SPP argued that "the Commission should correctly find that it lacks the authority under the *Mobile-Sierra* doctrine

---

[213] 76 Fed. Reg. 155, 49889-90 (summarizing comments on the notice of proposed rulemaking challenging FERC's statutory authority to require removal of ROFRs).

[214] 76 Fed. Reg. 155, 49891 (summarizing transmission owners' argument that "the FPA does not give the Commission the authority to address discrimination between incumbent and nonincumbent transmission developers."). FERC did, in response to utility complaints, loosen the prohibition on ROFRs to a degree in its final rule. It clarified that that it did not "require removal from Commission-jurisdictional tariffs and agreements of a federal right of first refusal as applicable to a local transmission facility" *Id.* at ¶ 318. FERC also clarified that the final rule would not "affect the right of an incumbent transmission provider to build, own and recover costs for upgrades to its own transmission facilities . . . regardless of whether or not an upgrade has been selected in the regional transmission plan for purposes of cost allocation." *Id.* at ¶ 319.

[215] MISO, *MISO and MISO Transmission Owners' Compliance Filing for Order No. 1000* 32, Docket No. ER13-___-000.

[216] ISO-NE, *Order No. 1000 Compliance Filing of ISO New England Inc. and the Participating Transmission Owners Administrative Committee* 3, Docket No. ER13-___-000.

to order SPP to modify its Membership Agreement to remove existing transmission construction rights and obligations."[217]

FERC rejected these arguments, concluding that only "negotiated rate provisions" between two parties negotiated at arm's length are entitled to *Mobile-Sierra* protection.[218] Because ROFRs are "[prescriptions] of general applicability" that affect all members of a regional organization, the Commission refused to apply the *Mobile-Sierra* presumption.[219]

In subsequent compliance filings, however, utilities managed to effectively recreate ROFRs by proposing something called an "immediate need" process, which held that projects deemed necessary to maintain grid reliability did not need to undergo competitive solicitations or participate in regional planning. FERC accepted immediate-needs exemptions in three regions: ISO-NE, PJM and SPP.[220] The Commission determined that "it was just and reasonable for the Responding RTOs to create a class of transmission projects that are exempt from competition."[221] In its response, the Commission did attempt to place some guardrails on this exemption, the most important of which being that projects must be needed in three years or less to solve reliability criteria violations. But those guardrails have not proven to be effective: utilities designate most projects as immediate-needs and are thus able to avoid the competitive procurements envisioned by Order No. 1000.[222] ISO-NE, for example, designated all thirty of its projects as immediate-need between the implementation of Order No. 1000 and 2019, yet 80% of these projects (24 out of 30) were not in service within three years.[223]

The immediate needs exemption illustrates how Section 205 can, over time, erode the effectiveness of formal procedural reforms adopted by FERC. In their Order No. 1000 compliance filings, RTOs and transmission owners proposed a series of carve-outs to the rules' regional planning and competition requirements. FERC rejected many of these proposals but ultimately accepted the immediate-needs exemption, which was framed as a narrow carve-out for pressing reliability upgrades. It is unclear if the Commission acted out of time pressure, because it agreed with the exemption, or because it worried it could not establish that the

---

[217] SPP, *Compliance Filing of Southwest Power Pool, Inc.* 5, Docket No. ER13-000.

[218] *See, e.g.*, FERC, *Order on Compliance Filings and Tariff Revisions*, 142 FERC ¶ 61, 215 at ¶ 175 (Mar. 22, 2013)

[219] *Id.*

[220] FERC, *Order Instituting Section 206 Proceedings*, 169 FERC ¶ 61,054 at ¶ 3 (Oct. 17, 2019).

[221] *Id*.

[222] *See generally* Philip Killeen, *Swallowing the Rule: Why FERC's "Immediate Need Exemption" Frustrates Competitive and Climate-Smart Electricity Sector Transmission Planning Under Order No. 1000*, 21 SUST. DEV. L. & POL'Y. 9, 10 (2022),

[223] *Id.* at 10; *see also Response of ISO New England Inc. to October 17, 2019 Order Instituting Section 206 Proceedings Under EL19-90 – Attachment C & D*, 1-4, Docket No. EL19-90-000 (Dec. 27, 2019) (showing a list of projects with their need-by date and projected in-service date).

exemption was unjust and unreasonable under Section 206. Nonetheless, it is an example of how utilities, by serially submitting 205 filings, can dilute FERC rules and use the procedural advantages they hold under Section 205 to enact rules that structurally favor their financial interests.

2. *Compliance Filings in Order No. 1000*

Compliance filings submitted in FERC's Order No. 1000 also illustrate the degree to which Section 205 filing rights allow utilities to shape transmission planning processes. In several regions, transmission owners retained authority over local planning and cost recovery even as they nominally complied with regional planning requirements. For example, PJM's planning process allowed for supplemental projects—projects not needed for reliability and that are locally funded—to be included in its regional plan without any review or approval process from the PJM board.[224] Local transmission planning processes were also retained in ISO-NE, where the ISO's Planning Advisory Committee was limited to periodically providing "input and feedback" to transmission owners, who were otherwise free to develop local projects according to their own needs.[225] NYISO instituted slightly more robust procedural safeguards, requiring transmission owners to post all planning criteria and assumptions used in developing their local plans. Transmission owners would also have to consider any comments received by stakeholders, and ensure that their criteria meet or exceed applicable reliability criteria. Nevertheless, NYISO's process proposed in its Order No. 1000 filing also gave transmission owners broad discretion to choose which projects to develop, what assumptions to include, and how to model benefits.[226] In another salient example, transmission owners in the SERTP region proposed limiting eligibility for regional cost allocation to transmission projects that were more than a hundred miles long, and operated at 300 kV or greater.[227] Any project below those thresholds would be a local project and therefore be exempt from Order No. 1000's requirements. FERC asked SERTP to lower the length requirement to fifty miles or greater, and allowed the voltage requirement to remain.[228] Thus, SERTP utilities were offered an easy way to exempt projects from onerous Order No. 1000 requirements.

---

[224] *Compliance Filing of PJM Interconnection, L.L.C.* 46, *in* Docket No. RM10-23-000 (Oct. 25, 2012)

[225] *Order on Compliance Filings*, 143 FERC ¶ 61,150 at ¶ 122 (May 17, 2013)

[226] *New York Independent System Operator, Inc and New York Transmission Owners, Compliance Filing* 10-11, *in* Docket No. RM10-23-000 (Oct. 11, 2012).

[227] SERT at 35.

[228] *Order on rehearing and compliance re Duke Energy Carolinas, LLC et al*, 151 FERC ¶ 61,021 at ¶ 55.

VI. Solutions

Utilities have proven adept at using the agenda-setting power they enjoy under Section 205 to erode FERC reforms through successive compliance filings that either amend or create carve-outs to FERC stakeholder processes. Meaningful reform therefore requires structural reforms that address filing rights directly. To that end, we propose reforms along three dimensions: expanding the role of public planning so that incumbent-controlled private processes are no longer the only game in town; restructuring the governance of self-regulatory organizations so that they are genuinely independent and broadly representative; and updating the doctrinal framework so that FERC has the tools to scrutinize, and where necessary override, utility proposals that serve incumbent interests at the expense of consumers and the public.

A. Public Planning and Public Control

The most direct way to reform governance would be to consider which functions should be managed directly by public entities rather than delegated to self-regulatory organizations. Academics have shown that to be successful, self-regulation requires that regulated entities share aligned interests, cannot credibly threaten to exit the regulatory arrangement, and possess clear lines of accountability such that regulators and the public are able to identify who is responsible when things go wrong.

Unfortunately, those conditions do not hold across much of the modern grid. In practice, utilities have strong incentives to direct transmission investment toward projects that avoid competition and protect their generators' market power. And when things go wrong, the diffusion of authority across RTOs, state commissions, FERC, and the utilities themselves allows each actor to deflect blame to the others. Given these circumstances, it is worth considering whether the government to assume some planning functions directly.

That need not necessarily imply public ownership of grid assets or the end of competition. As an alternative, the government could plan some essential infrastructure or enter into public-private partnerships to provide financial support for some investments. In fact, DOE already has authorities that could support a more active public role in transmission planning. The Transmission Facilitation Program, for example, authorizes DOE to enter into capacity contracts and provide other forms of financial support to accelerate transmission development. The Power Marketing Administrations already own and operate significant transmission infrastructure across large regions of the country. And FERC's authority to designate National Interest Electric Transmission Corridors could be used to identify areas where transmission is critically needed and to facilitate siting over the objection of incumbent utilities. Taken together, these authorities suggest a model in which DOE identifies transmission needs, facilitates permitting, and provides financial assurances or direct financial support to transmission developers—effectively creating a public planning process that could operate alongside, and competes with, incumbent-controlled private planning processes.

This approach would not eliminate section 205 or even prevent utilities and grid operators from planning grid investments. It would instead reduce the extent to which filing rights give utilities a monopoly in initiating infrastructure decisions. Doing so would both allow DOE to identify high-priority projects and hopefully create pressure for utilities and RTOs to improve their own planning processes, as would now face the real threat that infrastructure needs will be met through other planning processes.

B. Governance Reform

To the extent that self-regulatory organizations continue to make consequential decisions about market design and grid investment, they must be genuinely independent of incumbent control, have sufficient institutional capacity to supervise and regulate utilities, and be broadly representative of the diverse interests affected by electricity policy. To achieve this, policymakers should empower other actors to participate in grid decision-making while simultaneously simplifying decision-making processes to eliminate the veto points and bureaucratic complexity that currently allow incumbents to block reform.

1. Direct Governance Reforms

Perhaps the most direct path to improve the governance of existing self-regulatory organizations is for FERC to take responsibility away from these actors by pursuing substantive market design reform under its existing Section 206 authority. Despite *CAISO v. FERC*, FERC has long regulated governance rules and opined on what voting structures are acceptable under Section 206.[229] An aggressive Commission should require grid planning organizations should be required to treat corporate affiliates as a single entity for voting purposes at every level of the stakeholder process. FERC could also mandate minimum quorum requirements for subcommittees and working groups, where low participation rates currently allow well-resourced incumbents to set the agenda by virtue of being the only parties at the table. And the Commission should revisit sectoral voting structures that give transmission owners disproportionate influence—for example, by requiring RTOs to recognize a greater number of stakeholder sectors, as MISO's eleven-sector model does compared to PJM's five.

---

[229] *Compare CAISO v. FERC*, 372 F.3d at 404 *with Public Utility District No. 1 of Snohomish County*, 272 F.3d at 614-615 (upholding FERC's authority to prescribe RTO characteristics); *Maine Pub. Util. Comm'n v. FERC*, 454 F.3d 278, 285 (upholding FERC's authority to require a specific level of review for withdrawal from RTOs).

2. Parallel Filing Rights

A particularly promising reform would be to grant parallel Section 205 filing authority to independent RTO boards, coalitions of states, or designated public-interest representatives. Parallel filing rights would allow independent entities to submit competing proposals to FERC rather than forcing all reforms through consensus-driven stakeholder processes. Precedent for this approach already exists. NEPOOL's Participants Committee, for example, can file alternative proposals alongside ISO-NE's own filings, placing both on equal footing before the Commission.[230] Similar authority exists in the SPP[231] and MISO[232] regions. And in Order No. 1920-A, FERC required transmission providers to include relevant state entities' proposed cost allocation methods alongside their own filings.[233]

Extending parallel filing rights more broadly—to independent RTO boards, coalitions of states coalitions, or consumer advocates—could provide three benefits. First, it would increase the options FERC can review when determining whether to accept or reject a market reform proposal. Second, it would create pressure for market participants to compete to present better ideas to FERC, since incumbents would face the possibility that FERC will accept an alternative tariff filing submitted by one of the other stakeholder groups. And third, it would allow more diverse stakeholder input without increasing administrative bloat and complexity.

3. Administrative Capacity

Another important governance reform—and here, one that likely requires new legislation—is to improve administrative capacity so that regulators can effectively supervise and regulate the grid. Utilities employ large teams of engineers, modelers, and attorneys who develop transmission proposals, prepare cost-benefit analyses, and advocate for those proposals through every stage of the stakeholder and regulatory process.[234] The planning entities charged with evaluating those proposals—and, in theory, with developing alternatives—often lack comparable technical staff. This problem is especially acute in non-RTO regions, where

---

[230] *See* ISO-NE, *Participants Agreement* § 11.1.5.

[231] Southwest Power Pool, *Bylaws* § 7.2, available at: https://www.spp.org/documents/13272/current%20bylaws%20and%20membership%20agreement%20tariff.pdf (Apr. 15, 2025).

[232] MISO, *Transmission Owners Agreement – Appendix* § II.E.3, available at: https://cdn.misoenergy.org/MISO%20TOA%20(for%20posting)47071.pdf#doc2589 (Mar. 2, 2018).

[233] *Order 1920-A*, 189 FERC ¶ 61,126 at ¶ 651.

[234] *See* Peskoe, *supra* note 2, at 27 (discussing utilities' control over technical information); Jennifer Chen & Devin Hartman, *Transmission Reform Strategy from a Customer Perspective: Optimizing Net Benefits and Procedural Vehicles* 2, R St. Policy Study No. 257, https://www.rstreet.org/wp-content/uploads/2022/05/RSTREET257.pdf (May 2022) ("There will always be information asymmetry in favor of utilities, and thus most regulators and stakeholders are ill-equipped to hold them accountable").

transmission planning is conducted by organizations that are funded by and effectively controlled by the very utilities whose proposals they are supposed to scrutinize.[235] But even well-resourced RTOs face capacity constraints. Independent planning staff must evaluate utility proposals across dozens of simultaneous proceedings, often relying on data and models that the utilities themselves control.

Policymakers should consider dedicated funding mechanisms—whether through FERC assessments, congressional appropriations, or surcharges on transmission revenues—to ensure that grid planning entities can hire and retain the technical staff necessary to conduct genuinely independent planning. Without that investment, planning will remain independent in name only.

C. Doctrinal Reform

As we have shown, judicial decisions such as *Atlantic City*, *Mobile-Sierra*, and *NRG Power Marketing* have progressively narrowed the Commission's remedial authority, making it difficult for FERC to reject suboptimal utility proposals, mandate governance changes, or substitute more efficient alternatives.[236] Courts and legislators should revisit doctrines that constrain FERC's ability to enact meaningful reform.

i. More Searching Review of Utility Proposals

Some doctrinal reforms do not require congressional or judicial action. For example, while FERC could adopt different approaches to reviewing utility filings depending on the process the utility underwent before proposing the filing. Right now, FERC applies a presumption of prudence to nearly all transmission projects, and all transmission investment is entitled to cost-plus pricing, meaning utilities have little incentive to prioritize projects that yield greater benefits. FERC could, however, reverse the presumption of prudence for lines that did not undergo competition, thus requiring the utility to make an affirmative case that the line provided an efficient solution to an infrastructure need. In addition, FERC could authorize higher returns for projects that yield greater system benefits.

ii. More Aggressive Use of Section 206

More aggressive use of Section 206 could also address specific market design failures. Capacity market rules, for instance, have in several regions been designed in ways that

---

[235] Macey & van Emmerick, *supra* note 2, at 112-113 (discussing incumbent influence in non-RTO regions).
[236] *See supra* Section II.a

overcompensate underperforming legacy resources while erecting barriers to entry for newer, cleaner generation.[237] These rules emerged through the stakeholder processes described in this Article, where incumbent generators wielded outsized influence over market design. FERC has the authority under Section 206 to find that such rules produce unjust and unreasonable rates and to prescribe replacement rates, but it has often been reluctant to exercise that authority aggressively, perhaps because of the procedural burdens Section 206 imposes and because of the deference courts have shown to utility-initiated filings. A more assertive posture would allow the Commission to identify and correct market design flaws that the stakeholder process is structurally incapable of fixing on its own.

iii. Data and Modeling Transparency

Public planning, governance reform, and more searching FERC review all depend on regulators and competing stakeholders having access to the data and modeling assumptions that underlie utility proposals. Currently, utilities often closely guard this information, which limits regulators' ability to evaluate whether proposals are genuinely cost-effective. Even where data is reported, metrics used may not be consistent across utilities, hampering comparisons.[238]

To allow FERC to exercise greater scrutiny over utility filings, utilities should be required to give regulators access to the models and underlying data they use to estimate costs and benefits of given proposals. Models used to estimate costs and benefits should similarly be harmonized across utilities and be founded on transparent assumptions reviewable by regulators.

Conclusion

As electricity markets became more integrated and competitive, private membership organizations assumed quasi-legislative authority over grid planning and market design. As that occurred, utilities' filing rights transformed from a procedural mechanism for regulating monopoly utilities into a durable form of agenda-setting authority that largely determines which market participants can propose rules, what infrastructure investments will be made, and which reforms are politically feasible. Over time, filing rights have contributed to a

[237] *See generally* Rob Gramlich & Michael Goggin, *Too Much of the Wrong Thing: The Need for Capacity Market Replacement or Reform*, Grid Strategies, https://gridstrategiesllc.com/wp-content/uploads/2024/05/too-much-of-the-wrong-thing-the-need-for-capacity-market-replacement-or-reform.pdf (Nov. 2019)

[238] *See, e.g.*, Sean Murphy et al., *Bridging the gap on data and analysis for distribution system planning* 11, Lawrence Berkeley Nat'l. Lab. https://eta-publications.lbl.gov/sites/default/files/2025-01/bridging_the_gap_between_utilities_and_regulators_20250106.pdf (Jan. 2025)

governance regime in which incumbent utilities retain disproportionate influence over the institutions that are ostensibly designed to discipline them. In order to build a grid capable of supporting decarbonization, maintaining reliable electric service, and producing affordable rates, policymakers must revisit these procedural entitlements to ensure that market design reflects the interest of the broader public rather than incumbents. A procedural tool designed to facilitate monopoly rate regulation should not, in 2025, determine who gets to shape the rules of competitive electricity markets.