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The Case against Regional Transmission Monopolies

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THE CASE AGAINST REGIONAL TRANSMISSION MONOPOLIES

KRISTEN VAN DE BIEZENBOS*

ABSTRACT

Over the next decade, the United States will need to build significant regional transmission infrastructure to achieve the country's goal of net-zero power by 2035. However, there is a significant barrier: the transmission system is almost entirely owned by private monopolies. As a result, the grid has grown not to serve the public interest but in accordance with the economic priorities of these monopolies, which are not incentivized to innovate, find efficiencies, or lower costs. Past attempts to encourage competitive bidding for regional transmission projects have been stymied by laws intended to protect the monopolies, including the right of first refusal (ROFR) to build regional transmission lines. After years of legal battles over the Federal Energy Regulatory Commission's (FERC) removal of the federal ROFR, a circuit split has emerged over whether state ROFRs violate the Dormant Commerce Clause. This Article argues that the circuit split obscures the stronger legal analysis, which is that FERC's withdrawal of the federal ROFR was within its exclusive jurisdiction under the Federal Power Act and thus renders state ROFRs per se invalid. Additionally, FERC must maintain the withdrawal of the federal ROFR despite monopoly pressure, as doing so would result in the blanket removal of both federal and state ROFRs. Lifting the gatekeeping effects of the ROFRs would finally allow more robust competition for regional transmission projects and facilitate building the decarbonized grid we need.

* Professor, California Western School of Law. I would like to thank the organizers and participants of the UCLA-UColorado Climate Change Works in Progress Workshop and the AALS Environmental and Natural Resources Law Joint Works in Progress session for their invaluable feedback on earlier drafts, as well as William Boyd, Ari Peskoe, Uma Outka, Todd Aagard, Joshua Macey, Sharon Jacobs, Heather Payne, and Amy Stein for their insightful comments and suggestions.

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Table of Acronyms

EEI	Edison Electric Institute
ERCOT	Electric Reliability Council of Texas
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
FPC	Federal Power Commission
FTC	Federal Trade Commission
GHG	Greenhouse Gas
MISO	Midcontinent Independent System Operator
NERC	North American Reliability Corporation
NELA	National Electric Light Association
NOPR	Notice of Proposed Rulemaking
IPP	Independent Power Producer
IOU	Investor-Owned Utility
IRA	Inflation Reduction Act
ISO	Independent System Operator
OATT	Open Access Transmission Tariff
PUC	Public Utility Commission (state)
PUHCA	Public Utilities Holding Company Act of 1935
PURPA	Public Utilities Regulatory Policies Act of 1978
ROFR	Right of First Refusal
RTO	Regional Transmission Organization
SPP	Southwest Power Pool

INTRODUCTION

The United States has committed to cutting its greenhouse gas (GHG) emissions by 50–52% of 2005 levels by 2030 in order to meet its commitments under the Paris Agreement and has set an ambitious national target of net-zero electricity by 2050.¹ To help reach these goals, the Inflation Reduction Act (IRA) established a suite of financial incentives to add significantly more renewable generation with the aim of rapidly decarbonizing the nation’s electricity sector in the next decade or so.² Achieving this will also require that we upgrade existing systems and build more transmission lines, which are high voltage lines that carry power from generation facilities to distribution networks, and are collectively referred to as “the grid.”³ These lines are needed to connect wind and solar facilities, which are typically located in rural areas where there is sufficient space for them.⁴ However, our patchwork of state and federal rules governing the electricity sector have thus far worked against readying the grid for connecting new wind and solar facilities on a national scale.⁵

1. See U.S. DEP’T OF STATE & U.S. EXEC. OFF. OF THE PRESIDENT, THE LONG-TERM STRATEGY OF THE UNITED STATES: PATHWAYS TO NET-ZERO GREENHOUSE GAS EMISSIONS BY 2050, at 1, 4 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/10/US-Long-Term-Strategy.pdf> [<https://perma.cc/YPF9-RY7R>].

2. See THE WHITE HOUSE, BUILDING A CLEAN ENERGY ECONOMY: A GUIDEBOOK TO THE INFLATION REDUCTION ACT’S INVESTMENTS IN CLEAN ENERGY AND CLIMATE ACTION 34 (2023), <https://www.whitehouse.gov/wp-content/uploads/2022/12/Inflation-Reduction-Act-Guidebook.pdf> [<https://perma.cc/C4PA-ZDTU>]; Loan Programs Off., U.S. Dep’t of Energy, *Inflation Reduction Act of 2022*, ENERGY.GOV, <https://www.energy.gov/lpo/inflation-reduction-act-2022> [<https://perma.cc/Z2N8-GB2A>] (detailing the various renewable energy projects eligible for federal loan programs); *The Inflation Reduction Act*, EPA (Mar. 28, 2023), <https://www.epa.gov/green-power-markets/inflation-reduction-act> [<https://perma.cc/6SLA-4VJZ>].

3. See Alexandra Klass, Joshua Macey, Shelley Welton & Hannah Wiseman, *Grid Reliability Through Clean Energy*, 74 STAN. L. REV. 969, 1022 (2022) [hereinafter *Clean Energy*]; Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, 109 CALIF. L. REV. 209, 240 (2021); Alexandra B. Klass, *Expanding the U.S. Electric Transmission and Distribution Grid to Meet Deep Decarbonization Goals*, 47 ENV’T L. REP. 10749, 10749–51 (2017); Jesse D. Jenkins, Max Luke & Samuel Thornstrom, *Getting to Zero Carbon Emissions in the Electric Power Sector*, 2 JOULE 2498, 2506 (2018); ROB GRAMLICH & JAY CASPARY, AMS. FOR A CLEAN ENERGY GRID, PLANNING FOR THE FUTURE: FERC’S OPPORTUNITY TO SPUR MORE COST-EFFECTIVE TRANSMISSION INFRASTRUCTURE 89–95 (2021), <https://cleanenergygrid.org/portfolio/planning-for-the-future-fercs-opportunity-to-spur-more-cost-effective-transmission-infrastructure/> [<https://perma.cc/BZH6-PPHM>] (citing several studies to this effect).

4. See, e.g., Johan Cavert, *Transmission Is the Missing Piece of the Decarbonization Puzzle*, NISKANEN CTR. (Dec. 20, 2022), <https://www.niskanencenter.org/transmission-is-the-missing-piece-of-the-decarbonization-puzzle/> [<https://perma.cc/KGA8-QX6V>]; Liza Reed, *Clean Energy Needs More Electricity Transmission Lines*, OURENERGYPOL’Y (Nov. 9, 2022, 2:24 PM), <https://www.ourenergypolicy.org/clean-energy-needs-more-electricity-transmission-lines/> [<https://perma.cc/Z7M7-M8SE>].

5. See Alexandra B. Klass, *The Electric Grid at a Crossroads: A Regional Approach to Siting Transmission Lines*, 48 U.C. DAVIS L. REV. 1895, 1921–25 (2015) [hereinafter *Crossroads*].

Indeed, it could be argued that the most consistent regulator of electricity is the industry itself, which is dominated by investor-owned utilities (IOUs), some of which are vertically integrated monopolies, while others are transmission or distribution monopolies, depending on whether they are located in parts of the country that have unbundled or disaggregated their electricity markets.⁶ Until about twenty years ago, almost all IOUs were vertically integrated—meaning that they owned and operated all of the generation, transmission, and distribution in a particular area.⁷ Transmission lines carry electricity generated at power plants to substations, where the voltage is lowered and the electricity can be sent into distribution systems, which are the lines and poles connecting homes, businesses, and industry to the power system.

Today, while many regions have separate generation, transmission, and distribution sectors, IOUs still dominate all three of these markets.⁸ Further, even in disaggregated energy markets, transmission connections are overseen by Regional Transmission Organizations (RTOs) or Independent System Operators (ISOs) that are comprised of—and sometimes influenced by—member IOUs.⁹ These IOUs also exert powerful political and economic influence over state politicians, state public utility commissions, and even on occasion the Federal Energy Regulatory Commission (FERC) itself.¹⁰ But to achieve our decarbonization goals, we must find a way to break the monopoly stranglehold on regional transmission.

Working against this goal is the persistent narrative that adding “too much” intermittent renewable energy like wind and solar to a particular region’s power mix will negatively impact reliability.¹¹ As evidence for this line of thinking, critics of renewable power point to recent widespread power outages in Texas and California, because both states have significantly more wind and solar power as a percentage of their total dispatched electricity (at least at certain times) than most other parts of the

6. See *Clean Energy*, *supra* note 3, at 976–78; Welton, *supra* note 3, at 225; Joshua C. Macey, *Zombie Energy Laws*, 73 VAND. L. REV. 1077, 1080–81 (2022). As Professor Macey explains, monopolies in the electricity sector use the filed rate doctrine—prohibiting challenges to rates filed with public agencies—to shield themselves from antitrust laws which might otherwise have broken them up. See *id.* at 1079 n.4.

7. See Heather Payne, *Private (Utility) Regulators*, 50 ENV’T L. 999, 1001–03 (2020).

8. See Welton, *supra* note 3, at 240.

9. See, e.g., sources cited *supra* note 6.

10. See, e.g., Joshua A. Basseches, *The Key to Passing Climate Policy? Rein in (or Win Over) Utilities Monopolies*, GRIST (Mar. 2, 2021), <https://grist.org/fix/opinion/investor-owned-utilities-climate-policy/> [<https://perma.cc/Q3Z6-SH2B>] (detailing IOU political activity to keep costs high and protect their exclusive franchises and citing studies to that effect); Welton, *supra* note 3, at 246–51 (detailing the efforts of some RTOs to implement market designs that disfavor renewables, and FERC’s willingness to approve them).

11. See *Clean Energy*, *supra* note 3, at 975.

United States.¹² Plans to radically decarbonize electricity, according to these critics, will put the rest of the country in similar danger.¹³

This is not true. Unsurprisingly, this argument is one often deployed by IOUs that own generation facilities and upstream and downstream oil and gas companies, as well as politicians and executives who benefit from those industries.¹⁴ Indeed, some monopoly utilities, both vertically integrated and disaggregated, have used their influence with state politicians, regulators, and utility commissions, by themselves or through their trade association, to undermine state and federal clean electricity initiatives for years.¹⁵ At the same time, they have doubled down on investments in fossil fuel power plants and infrastructure and fiercely fought regulatory measures that would undercut the value of coal and natural gas assets.¹⁶ In fact, renewable power can be combined with storage technology to be reliable even when it makes up a high percentage of the total electricity mix in a particular area, and it is significantly cheaper than fossil fuels and nuclear power as there are no associated fuel costs, maintenance tends to be low, and the energy source is inherently local and abundant.¹⁷

Concerns about the ability (or lack thereof) of intermittent renewables to provide firm or baseload power are frequently cited as a reason not to prioritize adding more wind and solar resources over traditional fossil fuel

12. See, e.g., *id.*; see also Martin Farrer, *US Conservatives Falsely Blame Renewables for Texas Storm Outages*, GUARDIAN (Feb. 17, 2021, 1:50 AM), <https://www.theguardian.com/us-news/2021/feb/17/conservatives-falsely-blame-renewables-for-texas-storm-outages> [<https://perma.cc/4AQZ-N5SJ>]; Amory B. Lovins & M. V. Ramana, *Three Myths About Renewable Energy and the Grid, Debunked*, YALE ENV'T 360 (Dec. 9, 2021), <https://e360.yale.edu/features/three-myths-about-renewable-energy-and-the-grid-debunked> [<https://perma.cc/A7P9-7QNR>] (pointing out that North American critics of renewables blamed high levels of wind and solar power for blackouts in California and Texas, while European critics did the same regarding blackouts in Germany); *Final Report on February 2021 Freeze Underscores Winterization Recommendations*, FERC (Nov. 16, 2021), <https://www.ferc.gov/news-events/news/final-report-february-2021-freeze-underscores-winterization-recommendations> [<https://perma.cc/2GHL-JSYK>].

13. See, e.g., Motion to Intervene and Comments in Opposition of the States of Texas & Utah et al., FERC Docket No. RM21-17-000, at 7 (arguing against FERC's current proposed rulemaking on transmission planning and cost allocation to support the connection of more renewables by arguing that renewables make the grid less reliable).

14. See *cf.*, e.g., Peter Newell & Phil Johnstone, *The Political Economy of Incumbency: Fossil Fuel Subsidies in Global and Historical Context*, in *THE POLITICS OF FOSSIL FUEL SUBSIDIES AND THEIR REFORM* 66, 66–67 (Jakob Skovgaard & Harro van Asselt eds., 2018).

15. See generally Basseches, *supra* note 10; Robinson Meyer, *It Wasn't Just Oil Companies Spreading Climate Denial*, ATLANTIC (Sept. 7, 2022), <https://www.theatlantic.com/science/archive/2022/09/electric-utilities-downplayed-climate-change/671361/> [<https://perma.cc/VE2D-G87W>] (detailing the EEI's efforts to cast doubt on climate science using its own group of experts to discredit the claims).

16. See Meyer, *supra* note 15.

17. See *Clean Energy*, *supra* note 3, at 985–86.

sources.¹⁸ Additionally, even IOUs that are not vertically integrated have resisted changes to regional transmission markets, both within and without RTOs, that would encourage competition and facilitate more lines to connect renewable power generation, while at the same time showing little interest in building such lines themselves.¹⁹ As a result, our current grid is low on the long-distance transmission infrastructure needed to connect more renewable power and is thus inadequate to achieve our decarbonization targets without significantly more regional connections.²⁰

It is not difficult to see why IOUs are against competition. For decades, they have operated without challenge in their exclusive service areas under a system of regulated rates that guarantee them a return on their investments.²¹ Many IOUs also continue to dominate transmission planning, even in RTO-ISO regions, and prefer to focus on expanding and upgrading their current systems.²² Indeed, because there is little difference in their opposition to competition and they are both in control of access to existing transmission systems in different parts of the country, for the purposes of this Article, both vertically integrated IOUs and unbundled IOU transmission owners are referred to as “Transmission Monopolies.”

18. See *id.* at 984–85 (pointing out that the intermittent nature of renewables is used by some politicians to argue these sources are unreliable). This is not an accurate argument for many reasons, but it is one that is made by antirenewable voices. See, e.g., Michael Shellenberger, *The Reason Renewables Can't Power Modern Civilization Is Because They Were Never Meant To*, FORBES (May 6, 2019, 3:59 AM), <https://www.forbes.com/sites/michaelshellenberger/2019/05/06/the-reason-renewables-cant-power-modern-civilization-is-because-they-were-never-meant-to/?sh=580cb557ea2b> [https://perma.cc/HMU3-S4BA] (arguing wind and solar are too unreliable). There is also another strain of this view that favors replacing fossil fuels with nuclear power, which is too complex an issue to be treated in depth in this Article. See, e.g., Richard Rhodes, Opinion, *Why Nuclear Power Must Be Part of the Energy Solution*, YALE ENV'T 360 (July 19, 2018), <https://e360.yale.edu/features/why-nuclear-power-must-be-part-of-the-energy-solution-environmentalists-climate> [https://perma.cc/KST9-DZ7J].

19. See Ari Peskoe, *Is the Utility Transmission Syndicate Forever?*, 42 ENERGY L.J. 1, 29–30 (2021). Professor Peskoe explains how many transmission companies, especially those not in RTOs, have simply refused to build regionally. See *id.* Within RTOs, turning over transmission planning to the RTO has not led to the kinds of regional project planning we would expect to see either. See Welton, *supra* note 3, at 245–46.

20. See Jim Rossi, *Promoting Cost-Effective Grid Modernization*, REGULATION, Winter 2022–2023, at 34, 34, 36–39, <https://www.cato.org/regulation/winter-2022-2023/promoting-cost-effective-grid-modernization> [https://perma.cc/9JLP-34CA] (arguing that state ROFRs exacerbate the costs of transmission building and upgrading and violate the Dormant Commerce Clause by discriminating against out-of-state companies).

21. See RICHARD F. HIRSH, POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM 13–31 (1999); Paul L. Joskow, *Regulatory Failure, Regulatory Reform, and Structural Change in the Electrical Power Industry*, BROOKINGS PAPERS ON ECON. ACTIVITY: MICROECONOMICS, 1989, at 125, 129.

22. See *Crossroads*, *supra* note 5, at 1937; Welton, *supra* note 3, at 213 (describing RTOs as “private membership clubs in which incumbent industry members make the rules for electricity markets and the electricity grid through private mini-democracies”).

Despite FERC's efforts over the past few decades to encourage more regional transmission planning, the United States still does not have the kind of comprehensive infrastructure that would make connecting rural wind and solar projects easily accomplished, while competition for regional projects continues to be rare.²³ This is in large part due to continued efforts by Transmission Monopolies to resist any attempts to make transmission a competitive market or to participate in competitive bidding, even as they insist that competition in the context of transmission offers no benefits.²⁴ But even if this was true in the early days of electricity, it is simply not the case now for regional transmission.²⁵

Indeed, relying on Transmission Monopolies to build lines in the regional context is inefficient, costly, and perhaps worst of all for our net zero goals, results in projects that favor monopoly service areas, as opposed to the needs of renewable generators.²⁶ But thus far, every attempt to encourage competition for regional transmission projects has largely failed.²⁷ Although there is blame to be shared for this by FERC itself—which has waffled in following through on some of its own more ambitious plans to wrest control from Transmission Monopolies—and by RTOs engaging in monopoly-led regional planning processes, some states have exacerbated the problem.²⁸ In particular, a number of states have undercut

23. See Peskoe, *supra* note 19, at 29–30, 40–41 (explaining that, despite FERC's hopes, IOUs generally build all transmission projects within their service areas, including portions of regional lines, and that "IOUs have actively opposed merchants, no doubt seeking to protect their local monopolies").

24. See John D. Wilson, Mike O'Boyle & Ron Lehr, *Monopsony Behavior in the Power Generation Market*, ELEC. J., Aug.–Sept. 2020, at 1, 3 (referring to electric utilities as monopsonies but noting that monopsonies also display monopoly power and market behavior); Peskoe, *supra* note 19, at 29–30 (describing how incumbent transmission companies have resisted FERC's efforts to encourage regional transmission planning and buildout); Welton, *supra* note 3, at 241 (explaining how the monopoly interests of investor-owned utilities have often been catered to by RTOs, whose members are these same utilities).

25. See generally discussion *infra* Part II.

26. See Peskoe, *supra* note 19, at 40–41. Professor Peskoe explains that merchant companies often propose their own projects to connect generators that they have negotiated rates with. See *id.* at 40.

27. See *id.* at 2–3 (noting that IOUs are the primary antagonists to FERC's attempts to rein in transmission costs and encourage innovative development through competition: "These entitlement-claiming century-old companies are frustrating FERC's efforts to bring competitive discipline to transmission development.").

28. See *id.* at 29 (describing how FERC backed away from requiring all transmission companies to surrender planning decisions to RTOs due to "political pressure"); Welton, *supra* note 3, at 253–54 (noting that RTOs are unlikely to be able to break free from their member ISO's priorities). It must be said, however, that the regulation of the nation's electricity system is exceedingly complex, and while this Article focuses on an instance of state interference with FERC's legitimate jurisdiction and aims in promoting competition, there are also examples of FERC interfering with states' legitimate jurisdiction and aims in other contexts. See, e.g., MICHAEL GOGGIN & ROB GRAMLICH, GRID STRATEGIES LLC, A MOVING TARGET: AN UPDATE ON THE CONSUMER IMPACTS OF FERC INTERFERENCE WITH STATE POLICIES IN THE PJM REGION 3–4 (2020), <https://gridprogress.files.wordpress.com/2020/05/a-moving-target-paper.pdf> [https://perma.cc/JC2N-BT86].

the efforts of merchant transmission companies to build regional projects by imbedding preferential treatment for incumbent Transmission Monopolies in their siting and construction processes.²⁹

Prior to FERC's Order 1000 in 2010, the tariff (or rate) agreements for RTO members included a Right of First Refusal (ROFR) for regional projects, meaning that competitive bids for such projects would only be accepted if monopolies refused to build them first.³⁰ Order 1000 required the removal of this federal ROFR, which in turn prompted legal challenges and the introduction by some states of ROFRs that apply to regional projects at the siting or construction phases.³¹ With respect to these state ROFRs, a circuit split has emerged on the question of whether they violate the Dormant Commerce Clause by discriminating against out-of-state companies.³² The United States Court of Appeals for the Fifth Circuit, for its part, has held that the state ROFR in question violated the Dormant Commerce Clause, while the United States Court of Appeals for the Eighth Circuit reached the opposite conclusion.³³

The federal ROFR was a significant barrier to competition for regional projects, because if a particular project connected to generation facilities in or even passed through areas otherwise served by Transmission Monopolies, the ROFR would prevent any company other than the incumbent Transmission Monopoly from building the project. The recent surge of state ROFRs directed at competitive projects would have the same effect. If, for example, a regional project crosses three states and even one has an ROFR in their construction permitting process, a merchant company that was otherwise awarded that project by an RTO would be unable to build it.³⁴

29. See discussion *infra* Part II.D.

30. See FERC Order No. 1000, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49842, 49845–46 (Aug. 11, 2011) (to be codified at 18 C.F.R. pt. 35) [hereinafter Order 1000] (repealing the ROFR for federal transmission projects); Peskoe, *supra* note 19, at 44 (describing the withdrawal of the ROFR as consistent with FERC's attempts to counteract the power of IOUs over the electricity system); Alexandra B. Klass & Jim Rossi, *Revitalizing Dormant Commerce Clause Review for Interstate Coordination*, 100 MINN. L. REV. 129, 191–93 (2015) (distinguishing the pre-Order 1000 state ROFRs that apply only to in-state projects from the newer, broader ROFRs that some states have passed to apply to regional lines as well and noting their anti-competitive intent).

31. See Klass & Rossi, *supra* note 30, at 193 (noting that after the promulgation of Order 1000, some states began implementing ROFRs that made competition in the transmission sector difficult or impossible in those states).

32. See Rossi, *supra* note 20, at 36–37 (describing the circuit split); see also discussion of the circuit split *infra* Part II.D.2.

33. See Rossi, *supra* note 20, at 36–37 (describing the circuit split); see also discussion of the circuit split *infra* Part II.D.2.

34. See Klass & Rossi, *supra* note 30, at 191–92. This is indeed what happened to the merchant

Given the importance of this moment in the fight against climate change, anti-competitive laws like state ROFRs serve as real barriers to achieving cost-effective regional transmission buildout. However, FERC has also undermined the effect of Order 1000 by refusing to defend it in the face of state ROFRs. While other scholars have argued that such state ROFRs almost certainly do violate the Dormant Commerce Clause, a key piece of the legal analysis has thus far been missing. This Article is the first to argue that FERC's withdrawal of the federal ROFR was within its exclusive jurisdiction under the Federal Power Act (FPA), and therefore renders all state ROFRs that purport to reach regional projects invalid. This is true even if FERC itself has so far declined to advance this argument or enforce its own rule.

This analytical approach to the legality of state ROFRs is not only consistent with existing jurisprudence concerning conflicting FERC rules and state laws, but it would effectively remove *all* state ROFRs from regional projects, in turn clearing the way for more robust competition.³⁵ As part of the development of its central argument, this Article also explains why monopoly dominance of the regional transmission industry has resulted in the prioritizing of private economic interests over the public good in developing our electricity system. To correct this, it is crucial that protectionist measures like the ROFR are removed from every aspect of the regional transmission process to which they apply.

At this moment, with an ambitious decarbonization goal and billions of dollars available in federal incentives for regional transmission, FERC should not back away from its earlier conclusions that monopoly control of regional transmission does not benefit ratepayers but affirmatively harms them by distorting processes to their benefit and keeping the costs of transmission unreasonably high.³⁶ These arguments are also timely for another reason: the Supreme Court of the United States is poised to resolve the circuit split over ROFRs, while FERC is on the cusp of potentially reinstating the federal ROFR.³⁷

With respect to the latter, FERC's current proposed rule is directed squarely at remedying deficiencies in the long-term transmission planning

transmission company in *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Cir. 2022), one of the cases creating the circuit split on whether state ROFRs violate the Dormant Commerce Clause. See discussion *infra* Part II.D.

35. Cf. Matthew R. Christiansen & Joshua C. Macey, *Long Live the Federal Power Act's Bright Line*, 134 HARV. L. REV. 1360 (2021).

36. See Rossi, *supra* note 20, at 35–37.

37. See Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection, 87 Fed. Reg. 26504 ¶¶ 358–82 (May 4, 2022) (to be codified at 18 C.F.R. pt. 35) (issuing a notice of proposed rulemaking).

processes in anticipation of more wind and solar power being added to the power mix. In its Notice of Proposed Rulemaking (NOPR), FERC acknowledges that “vertically-integrated utilities do not have an incentive to expand the grid to accommodate new entries or to facilitate the dispatch of more efficient competitors.”³⁸ Yet instead of committing more fully to making the regional transmission process competitive, FERC is proposing to reinstate the federal ROFR with some conditions.³⁹ As this Article illustrates, this would be a serious mistake at the very moment when the country would be most hurt by it.

This Article proceeds as follows: Part I provides the history of the electricity utility industry, particularly the rise of investor-owned monopolies, and recounts past and present efforts by FERC to incentivize regional transmission and competitive bidding, including the withdrawal of the federal ROFR. Part II explains why it is so important to decouple regional transmission projects from monopoly protectionism and situates the legal challenges to FERC’s withdrawal of the federal ROFR and the current circuit split over whether state ROFRs violate the Dormant Commerce Clause within the larger context of monopoly dominance. Finally, Part III applies the FPA’s bright line jurisdictional test to the withdrawal of the federal ROFR in Order 1000 and shows that it was within FERC’s exclusive jurisdiction. As such, it effectively renders all state ROFRs that purport to reach regional projects per se invalid and preempted, which sets the stage for the removal of all ROFRs from the regional transmission space.

I. HOW MONOPOLIES GAINED DOMINANCE OVER THE U.S. ELECTRICITY INDUSTRY

Decarbonizing our electricity sector as part of the fight to prevent the worst effects of climate change faces significant hurdles, not the least of which is the current uneven distribution of renewable power generation across the country.⁴⁰ In some markets, like Texas and California, there is

38. *See id.* at 26511 (quoting Order 890, 118 FERC ¶ 61,119 at 57 (2007) (to be codified at 18 C.F.R. pts. 35, 37)).

39. *See id.* at 26512, 26561, 26566. FERC’s proposal would not be mandatory, and would require the federal ROFR, if applied by a particular state utility commission or RTO, to be predicated on the Transmission Monopoly entering “qualifying” joint ownership of the line with another, nonincumbent monopoly, or other “unaffiliated” developers. *See id.* at 26566. As discussed in Part III.C, *infra*, the fundamental problem with this approach is that while it may allow for more nonmonopoly participation as joint owners, it still blocks competition and the associated benefits.

40. Some of the impacts from climate change are already being felt acutely. *See, e.g., Climate Change and Extreme Heat Events*, WORLD HEALTH ORG. (May 2, 2008), <https://www.who.int/>

already significant renewable penetration, while in others, it is a mere fraction of the dispatchable power.⁴¹ Decarbonization is thus a more difficult prospect in some parts of the country than others, not only because of differing markets—some parts of the country have competitive generation markets, while others are served by vertically integrated monopolies—but also because of politics and the economic interests of IOUs.⁴²

As a result, any attempt to decarbonize the entire electricity system will face not only numerous hurdles due to the complex regulatory landscape of the power sector, but also the issue of physical distance: many markets that desperately need more renewable power to decarbonize are not located anywhere near existing facilities or where most of our wind and solar resources are located.⁴³ This, along with aging infrastructure where there are lines, is why one of the greatest impediments to more renewable uptake in all markets is a lack of adequate transmission infrastructure.⁴⁴

Wind and solar are land-intensive and so are generally built in more rural areas where land is available.⁴⁵ While the distance itself is no longer a technical challenge, due to improved high-current direct transmission lines that can span hundreds of miles (but also cost many more hundreds of millions of dollars),⁴⁶ decarbonization will require building these advanced

publications/i/item/climate-change-and-extreme-heat-events [https://perma.cc/N4HS-QD5V]; Justin Worland, *An American Emergency*, TIME, <https://time.com/extreme-heat-climate-change/> [https://perma.cc/8E3H-AC2L]; Intergovernmental Panel on Climate Change, *Summary for Policymakers*, in CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY 3, 14–15 (2022), <https://www.ipcc.ch/report/ar6/wg2/> [https://perma.cc/Z8NG-ZUQ3].

41. See Umair Irfan & Javier Zarracina, *4 Maps that Show Who's Being Left Behind in America's Wind-Power Boom*, VOX (June 14, 2019, 2:46 PM), <https://www.vox.com/energy-and-environment/2018/5/2/17290880/trump-wind-power-renewable-energy-maps> [https://perma.cc/R7BF-JZFB].

42. See *Clean Energy*, *supra* note 3, at 990–93 (explaining the connections between parts of the country and market structure, IOU dominance, politics, and level of renewable power uptake). Though, in the electricity context, we can rarely say that these connections always exist the way we might expect. See *id.* at 991–92. For example, while most of Texas is not under FERC's jurisdiction due to a lack of interconnections with neighboring states, and even though Texas is home to an economically and politically powerful oil and gas industry, it also has one of the highest levels of wind energy as a percentage of total generation capacity in the country. See, e.g., Kyle Bakx, *Once the Epicentre of the Oilpatch, Texas Now Humming with Wind and Solar Power*, CBC (Mar. 25, 2022), <https://www.cbc.ca/news/business/bakx-texas-wind-solar-1.6390107> [https://perma.cc/G7ZX-9295]. This is not without controversy within the state, especially after Winter Storm Uri in 2021 crippled the state's electricity system, which some blamed (wrongly) on renewables. See *id.*; see also *Clean Energy*, *supra* note 3, at 974–75.

43. See, e.g., Rossi, *supra* note 20, at 35.

44. See *id.*; see also *infra* Part II.B.

45. See Rossi, *supra* note 20, at 35–36.

46. See ERIC LARSON, CHRIS GREIG, JESSE JENKINS, ET AL., PRINCETON UNIV., NET ZERO AMERICA: POTENTIAL PATHWAYS, INFRASTRUCTURE, AND IMPACTS (2021), <https://>

transmission lines on an unprecedented scale, enough to link the entire country to sufficient clean power.⁴⁷ Indeed, experts estimate that we will indeed need over a million miles of new transmission, in addition to desperately needed upgrades of our existing infrastructure, a project that is sometimes described as a “macrogrid.”⁴⁸

While the scale of this endeavor is daunting for many reasons, from the legal perspective it demands a reckoning with our current, IOU-dominated, system of transmission planning and building. This system, which developed in the early days of the country’s electricity industry, continues to endure even as the industry and the country’s electricity needs have become vastly more complex and interconnected.

A. *The Electrification of America Begins*

Just a few years after Thomas Edison first used electricity to power a lightbulb, the battle for exclusive franchises to provide power to growing cities was on, with fledging businesses including General Electric and The Westinghouse Company vying for contracts throughout New York, New England, and the Midwest, especially in large cities where demand was high.⁴⁹ By 1907, both companies had lost New York City: the Consolidated Gas Company of New York (majority owned at the time by oil monopoly Standard Oil), later renamed the Consolidated-Edison Company of New York, or Con Edison, ultimately dominated all other providers in the city.⁵⁰ Con Edison was⁵¹ a vertically integrated IOU with an exclusive monopoly granted by the State of New York, meaning that it owned the AC transmission lines that connected to its generation facilities, the generation

netzeroamerica.princeton.edu/img/Princeton%20NZA%20FINAL%20REPORT%20SUMMARY%20(29Oct2021).pdf [https://perma.cc/NQB9-EGR2]; Steve Cicala, *Decarbonizing the U.S. Economy with a National Grid*, ENERGY POL’Y INST. AT THE UNIV. OF CHI. 82–87 (2021), https://epic.uchicago.edu/wp-content/uploads/2021/02/Decarbonizing-the-U.S.-Economy-with-a-National-Grid.pdf [https://perma.cc/UUS3-S8KK]; Robinson Meyer, *Unfortunately, I Care About Power Lines Now*, ATLANTIC (July 28, 2021), https://www.theatlantic.com/science/archive/2021/07/america-is-bad-at-building-power-lines-lets-fix-that-transmission-climate/619591/ [https://perma.cc/PJ29-6E7U].

47. See Klass, *supra* note 3, at 10752–53.

48. See *Clean Energy*, *supra* note 3, at 1022–23.

49. See Robert L. Swartwout, *Current Utility Regulatory Practice from a Historical Perspective*, 32 NAT. RES. J. 289, 299 (1992).

50. See *id.*

51. Con Edison is still the default provider of electricity services in New York, but it has been unbundled, meaning that it is no longer vertically integrated and other companies compete with it in the retail and generation sectors, but not transmission and distribution. See ANGUS CHAN, GREGORY GANGLHOFF & AMY KLOPFENSTEIN, N.Y.U. CTR. FOR SUSTAINABLE BUS., INNOVATING A NEW BUSINESS MODEL FOR ELECTRIC UTILITIES: CONSOLIDATED EDISON’S BROOKLYN & QUEENS DEMAND MANAGEMENT PROJECT 3 (2019), https://www.stern.nyu.edu/sites/default/files/assets/documents/NYU%20Con%20Edison%20Case%20Study%20FINAL.pdf [https://perma.cc/4QBZ-FL25].

facilities themselves, and the line-and-pole distribution networks that connected homes, businesses, and industrial facilities in New York to power.⁵²

Con Edison, as an IOU with an exclusive market, is also the default provider of electricity in New York, so it is also responsible for connecting newly constructed buildings to the distribution network, and for turning off access to the network if a customer failed to pay her bills.⁵³ In short, Con Edison has total power over electricity within its service area, and for decades, many other electric utilities in the United States that sprang up to provide power in other urban parts of the country followed this model.⁵⁴ The rise of companies like Con Edison was also the beginning of what would become a concerted effort by private utilities to edge out, and in some cases outright smear, plans for municipal or public utilities, even as the IOU's were only interested in serving urban customers.⁵⁵

1. Vertically Integrated Monopolies and the Fight Against Publicly Owned Power

For the first fifty or so years after the creation of the electric utility, vertically integrated IOUs flourished, building electricity systems in the country's major cities and vigorously fighting proposals for municipal utilities and publicly funded power projects.⁵⁶ The fact that many of these facilities were being proposed in places utilities did not want to serve was of no moment—the threat these projects posed was real to the IOUs, even as the publicly owned companies Tennessee Valley Authority and the Bonneville Power Administration served less populated parts of the country.⁵⁷ The utilities were right to worry: then-President Franklin D. Roosevelt was concerned about privately owned utilities, and particularly

52. See Chris Blazek, *The U.S. Electric Markets, Structure, and Regulations*, in *ELECTRICITY COST MODELING CALCULATIONS* 43, 47–48 (Monica Greer ed., 2011) (explaining the vertically integrated model of electric utilities).

53. See Blazek, *supra* note 52, at 51–55 (also noting that federal power companies like the Tennessee Valley Authority were part of Roosevelt's New Deal).

54. See *id.* at 47; see also Naomi Oreskes, *The Fact of Uncertainty, the Uncertainty of Facts and the Cultural Resonance of Doubt*, *PHIL. TRANSACTIONS: MATHEMATICAL, PHYSICAL & ENG'G SCIS.*, Nov. 2015, at 1, 4.

55. See Blazek, *supra* note 52, at 47. Note that there were also rural electricity organizations and federal power companies that sprang up to provide power where IOUs were not interested in setting up shop. See *id.* at 47–56. Municipal utilities, however, were the target of IOU ire, discussed *infra* notes 66–69 and accompanying text.

56. See WILLIAM LASSER, *BENJAMIN V. COHEN: ARCHITECT OF THE NEW DEAL* 109–10 (2002).

57. See Blazek, *supra* note 52, at 51–55 (observing that many supporters of the creation of the Tennessee Valley Authority and Bonneville Power argued that privately owned utilities charged too much for power).

the electric utility holding companies, for a number of reasons, the most pressing of which were IOU corruption, political machinations, and financial dealings.⁵⁸

The concentration of electricity services in private companies only serving urban areas was also anathema to Roosevelt, who viewed power as essential to all Americans, as “[i]t touches and gives life to all forms of human concern.”⁵⁹ To the IOUs, however, the formation of publicly owned power companies was a threat that needed to be fought and defeated. As the president of one IOU put it, “[t]o take our market . . . is to take our property.”⁶⁰ The struggle between private companies and publicly funded power projects had begun. While it is not surprising that monopolies would want to fend off competition, what is surprising is the lengths to which these companies were willing to go and the unprecedented aggression they showed in fighting publicly funded electricity.

2. *The National Electric Light Association and the Campaign Against Public Utilities*

By the time private electric utility companies began coalescing into monopolies, they already had a powerful ally: the National Electric Light Association (NELA).⁶¹ NELA was formed as a trade association and advocacy group that represented all aspects of the private electric power industry, from electrical engineers to large electric utilities.⁶² In 1897, Chicago Edison executive Samuel Insull became the president of NELA, and his inaugural address to the association’s members made it clear that there was only one way to deliver electricity to the people at the lowest cost: privately owned monopolies.⁶³ He also suggested that the idea of a municipal utility invited mismanagement by local officials, and proposed a remedy to concerns over monopoly price manipulation.⁶⁴ This remedy was regulation of IOU rates by state public utility commissions, an arrangement sometimes referred to as the “regulatory compact.”⁶⁵

58. See LASSER, *supra* note 56, at 109–10.

59. See *id.*

60. See *id.*

61. See Oreskes, *supra* note 54, at 7.

62. See *id.* at 8.

63. See Richard D. Cudahy & William D. Henderson, *From Insull to Enron: Corporate (Re)Regulation After the Rise and Fall of Two Energy Icons*, 26 ENERGY L.J. 35, 46 (2005).

64. See *id.*

65. See *id.* at 49–50; see also Jim Rossi, *The Common Law “Duty to Serve” and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1248–51 (1998) (explaining the regulatory compact).

NELA's push for more state regulation of IOUs was successful, but it did not eliminate the lure that municipal utilities held for some cities. NELA had previously used marketing campaigns to encourage state lawmakers to adopt their regulatory model, but in 1919, Insull ordered a greatly expanded pro-IOU campaign, coordinating public relations efforts and pushing politicians and lawmakers to reject publicly owned utilities.⁶⁶ In response to Insull's demands, the Illinois Committee for Public Utility Information was formed, and by 1920, that organization had published "[m]illions upon millions of pieces of literature" decrying "any and all attempts at public ownership and operation of utilities—federal, state, or municipal" and placed them with newspapers and distributed them to utility customers, bankers, lawyers, librarians, preachers, college students, and many others.⁶⁷

The Illinois Committee also distributed its literature to high schools "for classroom theme work, and debating society use."⁶⁸ The propaganda campaign was wide-ranging and generational, aiming to ingrain the economic and societal good of monopoly IOUs in the minds of present and future law and policymakers, so that "all public officials—will be so trained as automatically to oppose genuine regulation, public ownership, honest valuations, equitable rates, etc." and to mold public opinion such that "voters will elect officials who will approve such policies as benefit the industry."⁶⁹ While we tend to think of tobacco companies and Big Oil as masters of the public relations campaigns designed to discredit critics of their products, IOUs were truly ground-breaking in their attempts to mold public perception in their favor and to buy political influence that would protect their interests.

3. *Congressional Investigation of NELA and the Utility Industry*

At this point, most electric utility regulation was state and municipal, with state regulatory commissions largely responsible for approving and overseeing utilities and rates.⁷⁰ Over time, however, the strategy to protect

66. See JOHN L. NEUFELD, *SELLING POWER: ECONOMICS, POLICY, AND ELECTRIC UTILITIES BEFORE 1940*, at 143–44 (2016).

67. See Ernest Gruening, *Power and Propaganda*, 21 AM. ECON. REV. 202, 203, 225–27 (1931).

68. See *id.* at 203.

69. See Oreskes, *supra* note 54, at 10 (citing the Federal Trade Commission report on NELA's propaganda activities). NELA was also a vocal proponent of utility holding companies, some of which owned dozens of IOUs and were not subject to state regulation. See Cudahy & Henderson, *supra* note 63, at 61; William J. Hausman & John L. Neufeld, *How Politics, Economics, and Institutions Shaped Electric Utility Regulation in the United States: 1879–2009*, 53 BUS. HIST. 723, 729–32 (2011). Additionally, unlike the utilities themselves, the holding companies were able to avoid state regulators. See *id.* at 731–32.

70. See NEUFELD, *supra* note 66, at 64–67.

the business model of monopoly IOUs through a coordinated and expansive propaganda campaign attracted the attention of the federal government.⁷¹ In 1925, Nebraska Senator George W. Norris raised the issue in Congress, pointing out that nearly all electricity in the United States was controlled by a handful of companies due to the holding company model employed by IOUs.⁷² By a narrow vote, Congress approved a Federal Trade Commission (FTC) investigation into General Electric, one of the largest IOUs, due in part to concern over corrupt business practices and its monopoly status.⁷³ While the initial report exonerated the company, concern remained.⁷⁴

In 1928, a revived call for an FTC investigation was once again successful, but this investigation was far more in-depth than the first.⁷⁵ The FTC's probe took seven years to complete and included a paper trail encompassing "ninety-six Senate reports, including transcripts and documents gathered in the hearings, [which] totaled over 65,000 pages. At the investigation's end, three final reports filled over 1,500 pages."⁷⁶ The investigation revealed widespread election rigging, deliberate sabotage of public utilities and plans for the same, and an aggressive propaganda campaign that, in the view of the FTC, "measured by quantity, extent, and cost, . . . was probably the greatest peace-time propaganda campaign ever conducted by private interests in this country."⁷⁷

At the time, the public was taken aback at the idea that corporations would go so such lengths to discredit competition and critics.⁷⁸ While the FTC's conclusions were bad enough for IOUs and utility holding companies, they were swiftly followed by the Stock Market Crash of 1929. In the years leading up to the crash, the number of holding companies had grown smaller as the larger firms had absorbed the smaller ones.⁷⁹ Some of these large holding companies were already highly leveraged and the crash finally tipped them into bankruptcy.⁸⁰ Shortly thereafter, Congress passed the Public Utilities Holding Company Act of 1935 (PUHCA) over vigorous

71. *See id.* at 145–46.

72. *See id.* at 113.

73. *See id.*

74. *See id.* at 114.

75. *See id.* 115.

76. *See id.*

77. *See id.* at 143. At this point in time, NELA was so powerful that it was able to dictate the explanations of electricity and the electricity industry in American school textbooks. *See Oreskes, supra* note 54, at 13–17 (discussing the extent of NELA's infiltration of high schools and universities and comparing it to later propaganda campaigns waged by Big Tobacco and the fossil fuels industry).

78. *See NEUFELD, supra* note 66, at 143.

79. *See* Paul G. Mahoney, *The Public Utility Pyramids*, 41 J. LEGAL STUD. 37, 40–41 (2012).

80. *See id.* at 43 (describing how the Insull Utility Group, one of the then-largest utility holding companies, went bankrupt after the collapse of the stock market, triggering Insull's flight from the country to avoid fraud charges).

objections from NELA.⁸¹ PUHCA instituted numerous regulatory reforms, including restrictions on risky investments, and signaled federal interest in the electricity industry.⁸² Anticipating the turn in public opinion after the collapse of the electric holding companies and the FTC investigation, NELA dissolved and reformed into a smaller organization, the Edison Electric Institute (EEI).⁸³

B. The Era of Federal Regulation over Transmission Begins

The report of the FTC convinced Congress that action was needed to curb the market power of the monopolies. The same year as PUHCA, the federal government passed the Federal Power Act (FPA).⁸⁴ The FPA gave the federal government the power to regulate interstate transmission lines and interstate wholesale power sales, or the selling of power from one utility to another.⁸⁵ It also created the Federal Power Commission (FPC), the federal regulator that would later become FERC.⁸⁶ The FPA was at least partly intended to counteract the monopoly power of private utilities, particularly with respect to rates, and to make clear where the line between state and federal regulation of electricity lay.⁸⁷ It did this by clarifying that the federal government has jurisdiction over wholesale power sales and interstate transmission lines, while states retained regulatory authority over the siting and construction of generation facilities, transmission lines, and distribution systems.⁸⁸

81. See NEUFELD, *supra* note 66, at 151.

82. See *id.*

83. See *id.* at 146–47. The EEI, which represents IOUs nationwide, has lobbied hard against policies intended to promote decarbonization and has resisted calls to retire existing fossil fuel generation, including coal and natural gas. In particular, much of the EEI's ire is directed at renewables, especially incentives for rooftop solar and electric vehicles and incentives for wind and solar generation that work to the detriment of existing fossil fuel plants, as these types of programs cut into their constituents' rates. As the industry association for IOUs, the EEI also fights nonmonopoly competition, including in the regional transmission sector. See David Pomerantz, *EEI Used Anti-Clean Energy Campaigns as Role Models in Political Boot Camp for Utility Execs*, ENERGY & POL'Y INST. (Aug. 27, 2020), <https://www.energyandpolicy.org/eei-campaign-institute/> [https://perma.cc/4DG5-HZVN]; see also Nick Tabor, *Meet the Group Lobbying Against Climate Regulations – Using Your Utility Bill*, GRIST (June 7, 2022), <https://grist.org/regulation/utility-lobbying-ferc-rule-change-edison-electric-institute/> [https://perma.cc/XD86-MHXW].

84. See 16 U.S.C. § 824.

85. See 16 U.S.C. § 824(b)(1). This delineation of federal jurisdiction over electricity was made necessary by the “Attleboro Gap” caused by the Supreme Court's decision in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927). In that case, the Court found that the Dormant Commerce Clause prevented states from regulating interstate power sales, which left a gap that the federal government needed to fill. *Id.* at 90.

86. See Christiansen & Macey, *supra* note 35, at 1372.

87. See *id.*

88. See *id.*

In addition to giving FERC the power to oversee transmission rates, the FPA also requires that those rates be “just and reasonable.”⁸⁹ However, at the time the FPA was passed, the power of FERC to oversee transmission rates was constrained by the vertical integration of IOUs.⁹⁰ Thus, while the FPA gave FERC the power to review rates and ensure their fairness, trying to understand whether the rates were fair was hampered by IOU unwillingness to share information and data that would be needed by potential competitors.⁹¹ With respect to grid coordination efforts, IOUs further consolidated their dominance by forming connections or “power pools” only with other IOUs, sharing information with each other that they did not otherwise disclose.⁹²

By the 1970s, IOU dominance coupled with sharply rising electricity rates led to concerns that, despite regulation, the IOUs were using their monopoly power to inflate prices for their services.⁹³ As time went on, a growing chorus of scholars and policymakers argued that the answer to high electricity bills was to deregulate the electricity sector, with a goal of separating the segments of the electricity market that could be made competitive.⁹⁴ Competition, it was believed, would lead to innovation and lower costs for consumers—but not for transmission or distribution systems, which remained monopolies with regulated rates.⁹⁵

1. FERC, PURPA, and the Breakup of (Some) Vertically Integrated Monopolies

In 1978, Congress passed the Public Utilities Regulatory Policies Act (PURPA), the first step on the road to deregulate parts of the electricity industry and to break up, or unbundle, vertically integrated IOUs.⁹⁶ Because transmission and distribution were thought to be natural monopolies, there was a desire to encourage more competition in electricity, but FERC’s focus

89. See *id.* at 1368; 16 U.S.C. § 824d(a); see also Richard F. Hirsh, *PURPA: The Spur to Competition and Utility Restructuring*, ELEC. J., Aug./Sept. 1999, at 60, 62.

90. See, e.g., CARL PECHMAN, *REGULATING POWER: THE ECONOMICS OF ELECTRICITY IN THE INFORMATION AGE 100* (Michael A. Crew ed., 1993).

91. See *id.*

92. See Peskoe, *supra* note 19, at 11–14 (explaining in detail the numerous concerns over IOU power pools, which were also used to systematically refuse to allow independent generation facility owners to connect to IOU-owned transmission lines, effectively protecting IOU dominance).

93. See *id.* at 16–19.

94. See *id.*

95. See Richard D. Cudahy, *PURPA: The Intersection of Competition and Regulatory Policy*, 16 ENERGY L.J. 419, 421–23 (1995); *Clean Energy*, *supra* note 3, at 1024–25 (as the authors explain, FERC’s initial efforts to encourage competition were focused on wholesale power sales, not transmission, for reasons I explore in the subsequent section).

96. Hirsh, *supra* note 89, at 61–64; 16 U.S.C. 46 §§ 2601–2645.

was directed—at least initially—at promoting a competitive generation sector.⁹⁷ PURPA created a “nasty surprise” for Transmission Monopolies in the form of special protections for “qualifying” small generation facilities, which could have no more than fifty percent IOU ownership.⁹⁸ These facilities were exempted from some of the more onerous regulatory requirements of the FPA and PUHCA, a development that IOUs tried—and failed—to block.⁹⁹ The loosened rules encouraged investors to become involved in the generation sector as qualifying facilities, paving the way for robust competition in that sector.¹⁰⁰

Another motivation for the passage of PURPA was to encourage more wind and solar power.¹⁰¹ In the wake of the Arab Oil Embargo, President Carter believed that adding more renewables—which require no fuel and thus are not connected to international trade—via Independent Power Producers (IPPs) and nonutility generators would help break the country’s dependence on foreign oil.¹⁰² However, IOUs were loath to connect generation that they did not own and either refused to allow competitors to connect to their lines or provided poorer service than the companies would have given to their own generation or those of affiliates.¹⁰³ As a first step to overcoming these issues, PURPA required the IOUs to purchase power from qualifying facilities, whether they owned those facilities or not.¹⁰⁴ This laid the groundwork for the deregulation of the generation sector, as PURPA made it possible for independent generators to enter the market without being charged abusive transmission rates.¹⁰⁵

In the mid-1990s, FERC began to expand the work that PURPA began, with the goal of creating a truly competitive generation sector—something that had yet to materialize because IOUs continued to resist offering service to independent generators, either continuing to refuse to connect third-party generation facilities or charged abusively high rates to do so.¹⁰⁶ The regulator’s first major push was Order 888, which required all IOUs to

97. See Hirsh, *supra* note 89, at 61–63.

98. See *id.*

99. See *id.* at 62; see also *Transmission Access Pol’y Study Grp. v. Fed. Energy Regul. Comm’n*, 225 F.3d 667, 702–03 (D.C. Cir. 2000).

100. See Hirsh, *supra* note 89, at 63–64.

101. See *id.* at 64.

102. See *id.* at 61.

103. See Pescoe, *supra* note 19, at 20–22 (describing efforts by IOUs to foreclose competition).

104. See Hirsh, *supra* note 89, at 62.

105. See *id.*

106. See James E. Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 COLUM. L. REV. 64, 86–87 (1972); *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities*, 61 Fed. Reg. 21540, 21546 (May 10, 1996) (to be codified at 18 C.F.R. pts. 35, 385) [hereinafter Order 888].

unbundle their transmission and generation rates from their other services and create open access transmission tariffs (OATTs) for their transmission lines.¹⁰⁷ The OATTs, which had to be submitted to FERC, required transmission owners to connect IPPs and nonutility generators for the same price that they paid to connect their own power plants.¹⁰⁸

While PURPA had encouraged wholesale power competition and the participation of IPPs and nonutility generators, Order 888 made it possible for these non-IOU market participants to compete with the IOUs on equal footing.¹⁰⁹ Order 888 also recognized that more transmission planning and connections outside of utility-exclusive service areas could loosen the market power of the IOUs.¹¹⁰ However, it soon became clear that the OATTs were not enough to accomplish this, as IOUs still found ways to give preferential treatment to their own generation facilities and that of neighboring utilities over IPPs and nonutility generators, which not only served to stifle competition but to confine transmission buildout primarily to monopoly-exclusive service areas instead of encouraging more interconnections.¹¹¹

2. *The Push for Policy-Oriented Transmission Planning and Regional Transmission Organizations*

In the mid-aughts, FERC turned its attention to reforming planning and cost allocation for regional transmission. Orders 1000 and 2000 made several changes to promote regional planning for transmission owners in ISOs and RTOs. These changes were intended to address the shortcomings of previous attempts to encourage regional transmission, including changes to ex ante cost allocation to ensure that regional transmission costs would accurately reflect the benefits and burdens of such projects. As part of this effort, Order 1000 withdrew the right of first refusal (ROFR) from RTO tariffs.¹¹² The tariffs, or schedules of rates available for regional transmission projects, also include the terms and conditions associated with

107. See Order 888, *supra* note 106, at 21546.

108. See *id.*; see also Christiansen & Macey, *supra* note 35, at 1375. Note also that before Order 888, some IOUs had formed power pools with neighboring utilities and would buy and sell from each other, which meant that these IOUs had already formulated fair transmission tariffs that they charged to generators owned by power pool members. See Welton, *supra* note 3, at 218.

109. See Blazek, *supra* note 52, at 84.

110. See Welton, *supra* note 3, at 218–19.

111. See *id.* at 219 (citing Regional Transmission Organizations, 65 Fed. Reg. 810, 815 (Jan. 6, 2000) (to be codified at 18 C.F.R. pt. 35 [hereinafter Order 2000])).

112. See Peskoe, *supra* note 19, at 44; Order 1000, *supra* note 30, ¶ 253.

these projects that potential bidders must agree to.¹¹³ The stated goal of Rule 1000 was to prioritize public-policy-driven regional transmission planning, including increasing the buildout of lines to connect wind and solar generation facilities that are often located a significant distance away from where the demand is.¹¹⁴

FERC believed that RTOs were essential because state regulators were only responding to the siting submissions of in-state monopolies; it believed that RTOs and ISOs offered a more regional view that maximized the benefits of interconnections and was not skewed toward private profits.¹¹⁵ When the uptake of these central transmission planning organizations was not robust enough in FERC's view, the regulator issued Order 2000 in an effort to require the formation of RTOs, under its statutory authority to ensure just and reasonable rates.¹¹⁶ Because the RTOs represented groups of utilities over large areas, the hope was that they would not replicate the narrow planning decisions of state regulators. However, while FERC ultimately backed down from requiring all IOUs to join RTOs, their belief in the power of RTOs to put regional power needs over IOUs and their shareholders has not materialized.¹¹⁷

Order 1000 also made a number of changes to the RTO selection process for regional projects, including the withdrawal of the ROFR in the RTO tariffs on a going-forward basis.¹¹⁸ FERC made this change after hearing expert testimony and reports to the effect that the ROFR was making competition impossible.¹¹⁹ While RTOs and monopolies argued that competition was not desirable for regional transmission, they also fought hard for the protection of the ROFR to freeze out the participation of merchant transmission companies in the event that such companies did seek to compete for projects.¹²⁰ As discussed in Parts II.C and D, the withdrawal of the federal ROFR was met first with a wave of legal challenges to FERC's authority, and then by a burst of state laws that reinstated the ROFR for regional projects crossing their borders.

113. See Peskoe, *supra* note 19, at 10 (stating that FERC requires "minimum terms and conditions that all regulated transmission owners or operators (also known as providers) must include in their transmission tariffs").

114. See *id.*; see also Shelley Welton & Michael B. Gerrard, *FERC Order 1000 as a New Tool for Promoting Energy Efficiency and Demand Response*, 42 ENV'T L. REP. NEWS & ANALYSIS 11025, 11026–28 (2012).

115. See *id.*

116. See Welton, *supra* note 3, at 212–13; Order 2000, *supra* note 111, at 810.

117. See Welton, *supra* note 3, at 213–14; *Clean Energy*, *supra* note 3, at 1028.

118. See Peskoe, *supra* note 19, at 44; Order 1000, *supra* note 30, at 49885.

119. See Order 1000, *supra* note 30, at 49885.

120. See discussion *infra* Part II.D.

The overall result is that, even with FERC's rulemaking push to deregulate electricity and break the grip of IOUs by encouraging competition in the generation market, some parts of the country remain dominated by vertically integrated IOUs, with no RTOs or ISOs to consider regional needs, even putatively.¹²¹ And, even in parts of the United States where RTOs do exist and the generation and retail sectors are competitive, Transmission Monopolies often remain devoted to, on the one hand, fighting attempts to encourage competition and, on the other hand, refusing to build many regional projects even when there is no competition.¹²²

II. THE PROBLEM: ROFRS IN THE ELECTRICITY CONTEXT ARE ANTI-COMPETITIVE AND PROTECT MONOPOLY INTERESTS

In Order 1000, FERC directed RTOs to consider new lines based on criteria that affected its entire member area, including generation diversification and reliability, the latter of which is generally increased the greater the number of interconnections.¹²³ But even though many RTOs have largely embraced regional interconnections that bolster reliability, others have not made the connection of renewable resources a priority.¹²⁴ As Professor Welton points out, this is partly to appease their transmission owner members, as the withdrawal of these companies would shrink the size of the RTO.¹²⁵ But, as discussed below, even when RTOs award projects through competitive processes, those projects must still obtain state permits and, if necessary, utilize the state eminent domain power if some landowners on a proposed route object.¹²⁶ State ROFRs can thus have the effect of negating the results of an RTO's competitive bidding process, by

121. See *U.S. Electricity Grid & Markets*, EPA (May 5, 2022), <https://www.epa.gov/green-power-markets/us-electricity-grid-markets> [<https://perma.cc/95EY-FC59>].

122. See Order 2000, *supra* note 111; Peskoe, *supra* note 19, at 4.

123. See Order 1000, *supra* note 30, at 48845–46.

124. See Welton, *supra* note 3, at 241–48 (outlining several attempts by RTOs to resist FERC orders to improve service and lower rates, including the forceful efforts by some RTOs with capacity markets to resist adding more renewable generation). Though, as Professor Welton notes, this is not uniformly true, as some RTOs have been leaders in integrating wind power and battery storage into regional power systems. See *id.* at 251–52 (identifying the Midcontinent Independent System Operator, the California Independent System Operator, and the Southwest Power Pool as successfully adding these resources). Professor Welton also observes that RTOs do sometimes override state policies in the distribution and retail sectors of electricity, but these sectors are not within FERC jurisdiction and are thus not within the scope of this Article's central argument. See *id.* at 246–48.

125. See *id.* at 254–55. As Professor Welton notes, fighting climate change as robustly as needed to make a difference would require changes that would cut into the profits of IOUs, including Transmission Monopolies, and expecting these companies to make these changes themselves is unrealistic. See *id.* at 255.

126. See James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 MINN. L. REV. 659, 700–02 (2019).

refusing to let some winning bidders build transmission lines in those states.¹²⁷ But why are some states so determined to keep merchant companies out of their borders?

At times, FERC has been tolerant of state protectionism, apparently believing that voluntary cooperation in regional transmission planning and building offered efficiency gains that offset the lack of competition, at least to a degree.¹²⁸ As an example of this, even when it withdrew the federal ROFR, FERC did not require states to eliminate their pre-existing ROFRs for in-state projects.¹²⁹ Although the arguments that Transmission Monopolies make in support of their continued dominance hold little weight in the context of regional transmission, some states continue to use their spheres of authority over transmission siting and construction to limit the ability of out-of-state companies to build within their borders.

A. *State Regulation of Transmission Siting and Construction Protects Monopolies*

Authority over transmission planning is somewhat diffuse, as RTOs generally plan regional projects and IOUs plan extensions and improvements to their existing systems subject to state utility commission approval.¹³⁰ For regional projects, RTOs use two approaches, a sponsorship model and a solicitation model.¹³¹ Both models begin with the RTO identifying the need for new transmission infrastructure within its regional footprint.¹³² Under the solicitation model, developers are invited to propose projects that will address the identified need, while under the sponsorship model, the RTO itself proposes the project and opens it to competitive bidding.¹³³ Both processes encourage merchant developers, member Transmission Monopolies, and other independent developers to participate.¹³⁴ Both models also require state-level permitting for siting and

127. See Rossi, *supra* note 20, at 36.

128. See *id.*

129. See *id.* at 36–37. These are not the same ROFRs that underlie the current circuit split, as these apply only to in-state projects, not RTO-approved regional projects. See *id.*

130. See Peskoe, *supra* note 19, at 44–46; Rossi, *supra* note 20, at 35–36. Technically, Congress also has the power to designate transmission corridors, but as of this writing they have never done so. See, e.g., Felix Mormann, *Clean Energy Federalism*, 67 FLA. L. REV. 1621, 1636 (2015) (explaining that a decision from the United States Court of Appeals for the Ninth Circuit vacated a study that formed the basis for the “designation of national interest electric transmission corridors,” a “prerequisite to FERC’s siting authority”).

131. See Peskoe, *supra* note 19, at 45.

132. See *id.*

133. See *id.*

134. See *id.*

construction of the lines, and this is where state ROFRs can derail an otherwise competitive process.

Even when the RTO awards a project through a round of bidding, the processes to obtain the necessary state permits to build often reflect the fact that these processes were designed with state monopolies in mind, often by requiring evidence only they can provide.¹³⁵ This has curbed FERC's ability to implement regional siting plans, and an attempt to give FERC backstop siting authority in the Energy Policy Act of 2005 was interpreted by courts in a way that allowed states to retain their siting power—though, as explained below, this may not be true for much longer.¹³⁶ As a result, all transmission companies must obtain state permits to build their lines as well as state certificates of convenience and necessity in order to obtain the power of eminent domain.¹³⁷

Because state public utility commissions have developed their siting and permitting criteria based on the assumption that the applicants will be Transmission Monopolies with exclusive service areas within the state, the analysis of a line's benefits or public utility *to that state* that is part of the permitting process often hinges on service to in-state consumers.¹³⁸ Further, some states have actively used their siting authority over transmission projects within their borders to stifle competition and exclude non-IOU and merchant transmission companies from pursuing projects in the state.¹³⁹ The result is that the siting and construction process is often stacked against merchant transmission companies and, indeed, against regional transmission itself, because those lines may not be connecting any generation or distribution within a state they pass through.¹⁴⁰

Thus, while the regulation of the wholesale market is within FERC's jurisdiction, the reality is that the siting and construction permitting processes have given states a critical role in deciding not only where

135. See Coleman & Klass, *supra* note 126, at 700 (also noting that there a few exceptions, such as transmission projects on federal land or for federal generation projects, like large hydropower plants).

136. See *id.*

137. See *id.* at 700–01. As Professors Klass and Coleman explain, the eminent domain power is often required to build linear projects like transmission lines, because it is entirely foreseeable that at least one landowner along a proposed route will refuse to negotiate for a right of way. See *id.* This makes it necessary to exercise the power of eminent domain to complete the project. See *id.*

138. See *id.* at 701; see also Klass, *supra* note 3, at 152–53; Peskoe, *supra* note 19, at 63 (noting that some states have used “traditional” standards that merchant companies do not meet to block them from building projects).

139. See Peskoe, *supra* note 19, at 62–63 (explaining how some states have done this as “willing participants” in efforts to stop competition against incumbent Transmission Monopolies).

140. See *id.*; see also Ashley C. Brown & Jim Rossi, *Siting Transmission Lines in a Changed Milieu: Evolving Notions of the “Public Interest” in Balancing State and Regional Considerations*, 81 U. COLO. L. REV. 705, 705–12 (2010).

transmission lines are built, but who builds them.¹⁴¹ Indeed, most regional transmission lines that have been built to date are monopoly-to-monopoly projects, reflecting the willingness of IOUs to work with each other, but only with each other.¹⁴² Many scholars have argued persuasively that FERC should have siting power over transmission instead of states, especially given the interconnected nature of the grid and the fact that the federal government does have siting and eminent domain power.¹⁴³

There is also a recent glimmer of hope: in 2022, Congress gave FERC the authority to reverse construction permit denials by states for lines within a designated national interest corridor, which could potentially be a game-changer—if Congress actually does designate such corridors.¹⁴⁴ But despite this development and the compelling reasons for transferring the siting authority to FERC, in whole or in part, the reality is that changes to the siting process face significant political and economic headwinds, given the entrenchment of monopoly utility interests in state and even national politics.¹⁴⁵ Further, even if FERC were able to exercise backstop siting

141. See Brown & Rossi, *supra* note 140, at 718–19. As Professors Brown and Rossi note, the multiple levels of state and federal approvals that regional transmission projects must obtain also make the costs of entry prohibitively high for some independent and merchant transmission companies. See *id.*; see also Peskoe, *supra* note 19, at 63 (noting that states have taken steps that block non-IOU transmission developers, including merchant companies, from building lines).

142. See Peskoe, *supra* note 19, at 13–15.

143. See, e.g., James J. Hoecker & Douglas W. Smith, *Regulatory Federalism and Development of Electric Transmission: A Brewing Storm?*, 35 ENERGY L.J. 71, 85–91 (2014) (discussing state law barriers to new electric transmission infrastructure); Alexandra B. Klass & Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 VAND. L. REV. 1801, 1859–65 (2012) (evaluating alternatives to exclusive state authority over the siting of interstate transmission lines); Jim Rossi, *The Trojan Horse of Electric Power Transmission Line Siting Authority*, 39 ENV'T L. 1015, 1017–18 (2009) (outlining political interest in expanding transmission infrastructure); Joel F. Zipp, *Amending the Federal Power Act: A Key Step Toward an “Energy Security and Supply Act of 2009” for the New Administration*, ELEC. J., Dec. 2008, at 6, 7 (arguing that FERC should have “plenary authority over electric transmission facilities”); Alexandra B. Klass & Jim Rossi, *Reconstituting the Federalism Battle in Energy Transportation*, 41 HARV. ENV'T L. REV. 423, 428 (2017) (arguing for a greater federal role in transmission-line siting). But see Welton, *supra* note 3, at 257–60 (pointing out that some RTOs are thwarting state renewable targets); David E. Adelman & Kirsten H. Engel, *Reorienting State Climate Change Policies to Induce Technological Change*, 50 ARIZ. L. REV. 835, 852 (2008) (arguing that states play an important role in climate-policy innovation); Mormann, *supra* note 130, at 1628 (arguing for a split national–state approach).

144. See Federal Power Act § 216, 16 U.S.C. § 824p(b)(1)(a). Note that the Energy Policy Act of 2008 attempted something similar by giving FERC backstop authority over lines within designated national corridors when states did not render a decision, but the states’ ability to defeat this by refusing siting proposals was upheld, and Congress did not subsequently designate any such corridors. See Mormann, *supra* note 130, at 1636.

145. See Coleman & Klass, *supra* note 126, at 724. As an example of the political power of IOUs, in 2022, West Virginia Senator Joe Manchin abandoned a proposal that would have given FERC siting authority over certain transmission projects after pushback from utilities and eighteen attorneys general from Republican states, among others. See Miranda Willson, *With Manchin Bill Stalled, Will FERC Ever Site Power Lines?*, ENERGYWIRE (Sept. 29, 2022, 7:11 AM), <https://www.eenews.net/articles/with->

authority, the problem of monopoly protectionism will not be solved if the federal ROFR is withdrawn.

However, while modifying state processes to better reflect current public interest priorities, including the connection of more renewable facilities, would absolutely be beneficial, the ROFRs create a gatekeeping effect. Ten states have enacted ROFRs that limit construction permits to in-state monopolies, even if another company has won the project from an RTO.¹⁴⁶ Even if state siting and construction permitting processes were reformed, without the withdrawal of these ROFRs only incumbent Transmission Monopolies would be permitted to build in these states. And, as discussed previously, this can also impose the ROFR on other states that do not have them, as these ROFRs also apply even when a transmission project is merely passing through the state. This begs the question of why states that have these ROFRs are so determined to protect Transmission Monopolies.

B. Transmission Monopolies Are Not Natural Monopolies

One of the oldest and most historically influential rationales for the maintenance of transmission monopolies is that they are natural monopolies.¹⁴⁷ As Judge Richard Posner explained, “[i]f the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more, the market is a natural monopoly, whatever the actual number of firms in it.”¹⁴⁸ In other words, a natural monopoly exists because there is nothing to be gained, in terms of price or efficiency, in having multiple transmission companies serving the same markets.¹⁴⁹ Another justification for the claim that transmission companies are natural monopolies is the contestability rationale: if there really were a genuine threat of competition, monopolies would begin acting as though there were

manchin-bill-stalled-will-ferc-ever-site-power-lines/ [https://perma.cc/J78W-4XT2]. Then again, as of this writing, Rhode Island Senator Sheldon Whitehouse has introduced the SITE Act, which would give FERC the siting power—including eminent domain—and the permitting authority for transmission lines. See S. 2651, 117th Cong. (2021).

146. See list of state ROFRs *infra* note 188.

147. See Paul L. Joskow, *Restructuring, Competition and Regulatory Reform in the U.S. Electricity Sector*, 11 J. ECON. PERSPS. 119, 119 (1997).

148. Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 548 (1969). Posner’s view of natural monopolies is that market conditions create them, but as explained in the subsequent text, there is a compelling argument that this is not precisely true. Instead, monopolies are given to certain companies in order to provide them with an economic upside to entering a market that otherwise has prohibitively high costs to entry. See text *infra*; see also Rossi, *supra* note 65, at 1263–64.

149. See Posner, *supra* note 148, at 548; Rossi, *supra* note 65, at 1264–65.

a competitive market to discourage new entrants.¹⁵⁰ Because transmission companies have not done that, they must be true natural monopolies.

The contestability rationale is easily rebutted by the many examples of Transmission Monopolies fighting competition precisely because they do not want to act like companies in a competitive market. The natural monopoly explanation is harder to dismiss, especially because it may have been more compelling in the past, with respect to the initial buildout of the transmission and distribution systems. This is because it is unlikely that companies would have been willing to pay the high upfront costs of building these networks without a guaranteed profit and no risk of being pushed out of the market by competitors.¹⁵¹ But even if one accepts the idea that transmission and distribution companies are natural monopolies within their exclusive service areas, this rationale does not hold up in the context of regional transmission.

When we need a line built to connect a wind farm three states over from the purchasing utility or customer, there is no reason to believe that a transmission company with years of experience building transmission lines in one corner of one of those states is better equipped to build the line than a merchant company with national and international experience.¹⁵² Likewise, reliability standards are assured by meeting specific requirements set out by the North American Reliability Corporation, not by the identity of which company has built the line.¹⁵³ Of course, these facts have not stopped Transmission Monopolies from continuing to insist that they have natural monopolies, even as the regional nature of the projects in question unravels their arguments.

The existence of the federal ROFR before Order 1000 also points to the potential for robust competition in the space. As Judge Posner observed, it “makes no sense” to impose a ROFR where there is a true natural monopoly:

Had there been no intention or expectation of competition, there would have been no need for a right of first refusal. A market that can support only one firm because conditions of supply and demand leave room for no more—what is called a “natural monopoly”—has no need for a right of first refusal. Such a right implies a possibility of entry (why otherwise create such a right?)—in other words room for

150. See, e.g., Thomas W. Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise*, 134 U. PA. L. REV. 1335, 1341–42 (1986) (considering various arguments justifying the existence of natural monopolies).

151. See Joskow, *supra* note 147, at 122.

152. See, e.g., Rossi, *supra* note 20, at 36.

153. These requirements are set out by the North American Reliability Corporation (NERC) and are also part of the considerations in the RTO planning process. See *Standards*, NERC, <https://www.nerc.com/pa/Stand/Pages/default.aspx> [<https://perma.cc/KA22-LBRT>].

an additional firm or firms, yet the right enables the incumbent firm to ward off entry.¹⁵⁴

In sum, Transmission Monopolies are not natural monopolies. They are state-granted monopolies, and the concerns that have led us to strongly disfavor monopolies in most markets are present in the context of regional transmission.¹⁵⁵ Among these concerns are lack of innovation and high costs—two features of Transmission Monopolies that have kept the regional grid from expanding and modernizing to keep pace with technology and demand, while also keeping costs to ratepayers high.

With respect to innovation, transmission companies are not pressured by the market to achieve efficiencies or adopt new technologies to improve service, because there is no market.¹⁵⁶ Instead, they make these changes only when they are required to, either by regulators or by customer demand.¹⁵⁷ In some cases, that demand is coming from companies seeking to please their own sustainability-minded investors or create a secondary revenue stream through the sale of renewable energy credits or contract payments under contract.¹⁵⁸ Whatever the impetus, it is not the need to respond to climate change, adopt new and better technologies, or provide cost-efficient

154. See *MISO Transmission Owners v. Fed. Energy Regul. Comm'n*, 819 F.3d 329, 333–34 (7th Cir. 2016). As an aside, Judge Posner’s statements are equally applicable to state ROFRs for intrastate projects, supporting the arguments against Transmission Monopolies even in in-state markets. See, e.g., Rossi, *supra* note 20, at 37–38.

155. See John J. Flynn, *Antitrust Policy, Innovation Efficiencies, and the Suppression of Technology*, 66 ANTITRUST L.J. 487, 487–90 (1998). Antitrust is a complex field, and although the “traditional” thinking behind regulation like the Sherman Act is that monopoly power frustrated competition, there has been scholarship arguing that this is not always true in the context of digital products and services—though these claims have faced their own backlash in light of the monopoly dominance of companies like Amazon, Google, Apple, and Microsoft. See, e.g., Rebecca Haw Allensworth, *Antitrust’s High-Tech Exceptionalism*, 130 YALE L.J.F. 588, 589 (2021).

156. See Emily Hammond & Jim Rossi, *Stranded Costs and Grid Decarbonization*, BROOK. L. REV. 645, 660 (2017) (describing how regulated rates, which guarantee a profit, have the effect of “locking in the [utility] status quo, including slowing the uptake of new technologies”); Peskoe, *supra* note 19, at 35 (noting that utilities often disfavor adopting new technologies in favor of adding new infrastructure, which form part of their revenue calculation in regulated rate formulas).

157. See *id.* at 659–60 (noting that lobbying by utilities has resulted in regulations that have not required them to adopt new technologies or take steps that would affect the utilities’ financial bottom line).

158. See Trevor D. Stiles, *Regulatory Barriers to Clean Energy*, 41 U. TOL. L. REV. 923, 931–40 (2010) (discussing the ways in which renewable generation, including IOU-owned facilities, is encouraged); see also Herman K. Trabish, *As Corporate Renewable Buying Surges, Innovative PPAs Pressure Utilities to Improve Green Tariffs*, UTIL. DIVE (Feb. 6, 2019), <https://www.utilitydive.com/news/as-corporate-renewable-buying-surges-new-deals-pressure-utilities-to-impro/547485/> [https://perma.cc/ZVG8-JNK7]; Herman K. Trabish, *The Corporate Green Team: Utilities Partner to Meet Renewables Demand from Large US Firms*, UTIL. DIVE (June 2, 2016), <https://www.utilitydive.com/news/the-corporate-green-team-utilities-partner-to-meet-renewables-demand-from/419611/> [https://perma.cc/3M6N-6TZX].

service that is driving them, and thus they innovate only when they have to.¹⁵⁹

Additionally, Transmission Monopoly dominance of regional transmission raises serious cost concerns.¹⁶⁰ A “nation-building” effort to rapidly connect significantly more renewable power over the next decade is going to be expensive no matter who is building the lines, but that means that cost containment should be more of a priority, not less. But, as discussed below, Transmission Monopolies do not have any incentive to keep their costs under control.

C. Monopoly Cost-of-Service Rates Keep Regional Transmission Costs Unreasonably High

RTO projects are subject to cost-of-service rates when built by member Transmission Monopolies.¹⁶¹ As discussed in Part I, IOUs long ago convinced states that they did not need to be concerned about abuse of monopoly power in the electricity sector because state public utility commissions would set rates. Cost-of-service emerged as the dominant formula for calculating the IOU revenue requirement, which is the total amount of money the monopolies must recover from individual rates in order to both cover their costs and make a profit, or rate of return.¹⁶² It was also believed that these regulated rates would prevent monopoly utilities from charging overly high prices for power by compensating them based on their actual expenses.¹⁶³

The backbone of these rates is generally referred to as the rate base, which consists of capital assets minus depreciation multiplied by a reasonable rate of return.¹⁶⁴ Fixed expenses like overhead and taxes are then

159. See, e.g., *Who's Fighting the Clean Power Plan and EPA Action on Climate Change?*, UNION OF CONCERNED SCIENTISTS (Apr. 15, 2016), <https://www.ucsusa.org/resources/whos-fighting-clean-power-plan> [<https://perma.cc/HDP3-38C5>] (listing some of the companies pushing against the Obama-era rule to phase out fossil fuel power generation, which includes major IOUs like Southern Company).

160. See Rossi, *supra* note 20, at 35–36.

161. See *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 593–99 (1944). This is the seminal case on FERC's ratemaking authority, and although the term “cost of service” is not used, this was the method used by FERC to regulate natural gas rates. See *id.* Although, as the Supreme Court noted in the same case, any ratemaking formula used by FERC that results in a “just and reasonable rate” will not be subject to judicial review. See *id.* at 602 (“If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end.”).

162. See JOEL B. EISEN, EMILY HAMMOND, JIM ROSSI, DAVID B. SPENCE, JACQUELINE L. WEAVER & HANNAH J. WISEMAN, *ENERGY, ECONOMICS AND THE ENVIRONMENT* 456 (Robert C. Clark et al. eds., 4th ed. 2015).

163. See *id.* at 456–57.

164. See Katharine M. Mapes, Lauren L. Springett & Anree G. Little, *Retooling Ratemaking: Addressing Perverse Incentives in Wholesale Transmission Rates*, 42 *Energy L.J.* 339, 344–45 (2021); see also *Hope Nat. Gas*, 320 U.S. at 596–99.

added directly to this number. The total is referred to as the “revenue requirement.”¹⁶⁵ The formula is thus expressed $R = O + B \times r$, where revenue requirement equals operating costs plus the rate base (value of assets minus depreciation), with the rate base multiplied by a reasonable rate of return.¹⁶⁶ The revenue requirement is then split into rates, which are generally passed on to customers on a volumetric basis.¹⁶⁷ The use of cost-of-service is intended to ensure that a nexus exists between the cost of providing electricity services and the rates that are being paid by customers. This nexus has historically been the way in which regulators have ensured that rates are just and reasonable.

Over the years, controversies over whether certain assets should be allowed in the rate base have arisen.¹⁶⁸ In order for an asset to be included in the rate base, FERC requires that it be “used and useful,” or (among other things) necessary to the generation or delivery of electricity.¹⁶⁹ In theory, this would mean that only assets that are required and actually used to deliver services to ratepayers should be included.¹⁷⁰ However, monopolies have argued that the “used and useful” standard should be modified or discarded.¹⁷¹ The prudent investment test allows for potentially stranded assets—assets that were built but cannot be used—to be included in the rate base, despite the fact that they do not offer any benefit to ratepayers.¹⁷² This test ensures that monopolies will not be made to absorb the costs of what turned out to be bad business decisions, as long as they could be justified at the time the decision was made.¹⁷³

Because the revenue portion of the utility’s rate is based on the value of its capital assets, building any new transmission lines would seem to be in the company’s financial interest. However, if a process is open to competition, as with regional projects, monopolies frequently refuse to participate—with the obvious but unstated reason being that they are unwilling to bid competitively.¹⁷⁴ Instead, they have brought legal challenges to stop the development and implementation of competitive

165. See Mapes, Springett & Little, *supra* note 164, at 344.

166. See Payne, *supra* note 7, at 1019.

167. See *id.* at 1020.

168. See Hammond & Rossi, *supra* note 156, at 659–63.

169. See James J. Hoecker, “Used and Useful”: *Autopsy of a Ratemaking Policy*, 8 ENERGY L.J. 303, 310–12 (1987) (noting that the doctrine of “used and useful” is not completely clear).

170. See Julia D’Souza & John Jacob, *Electric Utility Stranded Costs: Valuation and Disclosure Issues*, 39 J. ACCT. RSCH. 495, 498 (2001).

171. See *id.*; see also Hammond & Rossi, *supra* note 156, at 659–63.

172. See Hammond & Rossi, *supra* note 156, at 661 (noting that electricity utilities have been historically opposed to regulatory changes to the rate formula and have pushed for high recovery for stranded costs).

173. See *id.*

174. See Peskoe, *supra* note 19, at 47–51.

processes, arguing that they amount to taking of their private property under the Fifth Amendment and offend legal doctrines protecting rates agreed to by contract.¹⁷⁵ When those challenges have failed, they have largely prioritized building in their own service areas and connecting to lines owned by other IOUs, consolidating the power of the monopolies and effectively blocking third-party transmission building.¹⁷⁶

Those third parties are primarily merchant transmission companies, which do not have exclusive service areas and do not make their profits through regulated rates, as monopolies do.¹⁷⁷ Instead, they make money by charging negotiated rates to generators and other transmission owners that wish to connect to their lines.¹⁷⁸ As an example, Professor Jim Rossi has pointed to the case of New York (which does not have an ROFR), where merchant transmission companies are building transmission lines to connect renewable power plants that will result in significant cost savings for ratepayers over time.¹⁷⁹ Just one line being built from Ontario by a merchant transmission company, for example, will save New Yorkers an estimated \$950 million in efficiency savings.¹⁸⁰

Yet, as with other past hopes that the IOU-exclusive service area model would give way to more policy-oriented planning and buildout of transmission, dreams of merchant transmission companies competing on a level playing field with monopolies for regional projects have not materialized.¹⁸¹ Indeed, it is comparatively rare to see merchant companies behind major projects, with most transmission lines still being built by IOUs, which would much rather build lines that they can make a profit on than pay to access lines built by an independent company.¹⁸² Among the ways in which the IOUs have been able to keep merchant transmission companies out of their service areas is through the use of ROFRs.

D. The Right of First Refusal for Transmission Monopolies

Before Order 1000, the RTO tariffs also contained the federal ROFR, which gave preferential treatment to member monopolies and reflected the

175. *See id.*

176. *See id.* Merchant transmission lines connect generation facilities to the grid and are generally paid for by generation owners. *See id.* at 39–40.

177. *See id.* Professor Peskoe explains that FERC believed regional planning by RTOs would encourage merchant transmission development, which in turn would effectively reveal the true cost of transmission services by providing a contrast to the regulated rates requested by IOUs. *See id.* at 40.

178. *See id.*

179. *See* Rossi, *supra* note 20, at 37.

180. *See id.*

181. *See id.*

182. *See id.*

fact that most state siting processes also contained ROFRs in favor of incumbents.¹⁸³ The RTO tariffs (the rates charged by regional transmission companies) also provide cost of service rates for members. This means that the federal ROFR both acted as a potential bar to merchant transmission and kept regional transmission costs high by ensuring that cost of service rates would apply to those projects. This might not be as much of a concern if transmission ROFRs looked like the kinds of ROFRs one might find, for example, in a real estate contract. But they deviate from “standard” ROFRs in an important way.

Outside of the electricity context, most ROFRs only give parties the right to preferential treatment if they are willing and able to meet competitors’ bids.¹⁸⁴ By contrast, the federal ROFR for transmission projects simply offered monopolies the first opportunity to build projects, regardless of whether the costs were comparable to what other companies might have proposed.¹⁸⁵ Indeed, the question of cost was only addressed if the monopoly passed on the project, as only then were companies allowed to submit bids.¹⁸⁶ By contrast, removing the federal ROFR meant that regional transmission projects within the RTO’s member territory would be open to competitive bidding as a matter of course.¹⁸⁷

However, Order 1000 has been undermined by states that responded to the withdrawal of the federal ROFR by imposing their own state ROFRs

183. See Klass & Rossi, *supra* note 30, at 187–88. There have been several notable attempts to give FERC siting authority over transmission, from the Energy Policy Act of 2005 to the recent push by West Virginia Senator Joe Manchin to pass a bill that would have greatly expanded FERC’s siting powers. See *Crossroads*, *supra* note 5, at 1918–20; Ethan Howland, *Manchin Permitting-Reform Bill Allows DOE to Designate ‘National Interest’ Transmission Projects*, UTIL. DIVE (Sept. 22, 2022), <https://www.utilitydive.com/news/manchin-permitting-reform-bill-ferc-transmission-pipeline-NEPA-Mountain-Valley/632418/> [<https://perma.cc/4MBS-7HQ2>]. However, none of these attempts have been successful, either because of state action and Congressional inaction (with respect to the Energy Policy Act) or because of successful lobbying by the EEI (Manchin’s bill). See *Crossroads*, *supra* note 5, at 1918–20; Wilson, *supra* note 143.

184. See *Right of First Refusal*, LAW DICTIONARY, <https://thelawdictionary.org/?s=right%20of%20first%20refusal> [<https://perma.cc/94HH-QWE5>] (defining the right of first refusal as “[a] right in a contract where the seller must give the other party the chance to match the offer that a third party has given to buy a certain asset”); RISHI GARG, NAT’L REGUL. RSCH. INST., *WHAT’S BEST FOR THE STATES: A FEDERALLY IMPOSED COMPETITIVE SOLICITATION MODEL OR A PREFERENCE FOR THE INCUMBENT? STATE ADOPTION OF RIGHT OF FIRST REFUSAL STATUTES IN RESPONSE TO FERC ORDER 1000 AND THE DORMANT COMMERCE CLAUSE 3–4* (2013), <https://pubs.naruc.org/pub/FA86B912-F8B8-74F6-AA34-4E7BCE42A234> [<https://perma.cc/H87A-ZM5Y>] (comparing the federal and state ROFRs and noting that neither requires an incumbent monopoly to match a competing offer to exercise the right).

185. See Joel B. Eisen, *FERC’s Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783, 1827–29 (2016).

186. See *id.*

187. See *id.*; see also *Oklahoma Gas & Elec. Co. v. Fed. Energy Regul. Comm’n*, 827 F.3d 75, 76 (D.C. Cir. 2016).

that apply to regional projects.¹⁸⁸ Some of these state ROFRs require that incumbent or nonincumbent Transmission Monopolies always be given the first opportunity to build a project, even when another company has been awarded that project by an RTO, while others are written such that if an in-state monopoly refuses to build the project, no one can.¹⁸⁹ Challenges to these reinstatements has led to a circuit split, with one federal court of appeal finding the reinstatement a violation of the Dormant Commerce Clause and another drawing the opposite conclusion, leaving the issue in doubt.¹⁹⁰

1. *FERC's Withdrawal of the ROFR in Order 1000 Has Been Upheld*

FERC's stated rationale in eliminating the ROFR for RTO tariffs was that it discouraged non-IOU participants "from proposing much-needed infrastructure reforms, discourag[ed] competition within the industry, and potentially dr[ove] up the cost of rates charged for wholesale electricity service."¹⁹¹ Soon after the order was issued, the legal challenges brought by monopolies and states began.¹⁹² In one of the first opinions to consider the issue, *South Carolina Public Service Authority v. FERC*, the United States Court of Appeals for the District of Columbia not only upheld Order 1000, but also made clear that FERC has exclusive jurisdiction over regional transmission planning and interstate transmission rates.¹⁹³

Among their many arguments, the petitioners¹⁹⁴ in *South Carolina Public Service Authority* insisted that Order 1000 infringed upon the states'

188. There have been at least ten state ROFRs that apply to transmission lines within RTOs since Order 1000 was promulgated. See IND. CODE § 8-1-38-9 (2018); TEX. UTIL. CODE ANN. § 37.056(e) (West 1997); MINN. STAT. § 216B.246(c)(2) (2012); NEB. REV. STAT. § 70-1028(1) (2013); OKLA. STAT. tit. 17, § 292(A)(1)–(2) (1997); S.D. CODIFIED LAWS § 49-32-20 (2011); N.D. CENT. CODE § 49-03-02(2) (2013); MONT. CODE ANN. § 69-5-202 (2017); IOWA CODE § 478.16(2) (2022). Mississippi, Kansas, and Missouri are also considering enacting ROFRs to protect their incumbent Transmission Monopolies, while Minnesota is considering withdrawing its ROFR. See Ethan Howland, *State Bills Spur Debate over Who Should Build Transmission: Incumbent Utilities or Independent Companies*, UTIL. DIVE (Feb. 23, 2023), <https://www.utilitydive.com/news/bills-transmission-rofr-first-refusal-nextera-ls-power-evergy-itc/643414/> [https://perma.cc/U4UL-CWT5].

189. See *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 314 (2022).

190. See *LSP Transmission Holdings, LLC v. Seiben*, 954 F.3d 1018 (8th Cir. 2020) (holding that Minnesota's ROFR for incumbent transmission companies did not violate the Dormant Commerce Clause); *NextEra*, 48 F.4th 306 (finding that Texas's ROFR for incumbent transmission companies did violate the Dormant Commerce Clause).

191. See *Okla. Gas & Elec. Co.*, 827 F.3d at 76.

192. See, e.g., *S.C. Pub. Serv. Auth. v. Fed. Energy Regul. Comm'n*, 762 F.3d 41, 73–74 (D.C. Cir. 2014); *Emera Maine v. Fed. Energy Regul. Comm'n*, 854 F.3d 662, 665 (D.C. Cir. 2017).

193. See *S.C. Pub. Serv. Auth.*, 762 F.3d at 73–74.

194. The Petitioners consisted of "[f]orty-five petitioners and sixteen intervenors includ[ing] state regulatory agencies, electric transmission providers, regional transmission organizations, and electric industry trade associations." *Id.* at 48.

“traditional regulation of transmission planning, siting, and construction, violating the federalism principle recognized in Section 201(a)” of the FPA.¹⁹⁵ While the D.C. Circuit did note that states do traditionally oversee transmission siting and construction, it pointed out that Order 1000 specifically does not touch on those matters.¹⁹⁶ With respect to transmission planning, the court rejected the assertion that states retained authority, pointing out that while FPA section 201 does preserve state jurisdiction over the electricity system where it is appropriate, the FPA also gives FERC broad authority over transmission, including planning and making changes to the rates in order to encourage more competition.¹⁹⁷

The D.C. Circuit also upheld Order 1000’s withdrawal of the ROFR from the RTO tariffs.¹⁹⁸ The petitioners argued that FERC erred in determining that the ROFR was a “practice . . . affecting . . . rate[s]” under Section 206 of the FPA for two reasons, but the first is most germane to this Article: that is, because the ROFR was only connected to transmission rates in an “attenuated” way, and FERC’s authority under Section 206 “is limited to those methods or ways of doing things on the part of the utility that directly affect the rate or are closely related to the rate,” it was an overreach.¹⁹⁹

This argument gets at the heart of judicial confusion over state protections for Transmission Monopolies: the difficulty of seeing the difference between a rule that is directed at the interstate transmission market, and a rule that only indirectly effects it. For its part, the D.C. Circuit agreed with FERC that the connection between rates and the ROFRs was much closer than the petitioners suggested and upheld the withdrawal of such provisions from RTO rates.²⁰⁰

This was not the end of challenges to the withdrawal of the ROFR. In *Emera Maine v. FERC*, a group of New England IOUs argued that the

195. *See id.* at 62.

196. *See id.*

197. *See id.* at 62–63 (citing *New York v. Federal Energy Regulatory Commission*, 535 U.S. 1, 15 (2002); *United States v. Public Utilities Commission of California*, 345 U.S. 295, 299 (1953); and *Duke Power Co. v. Federal Power Commission*, 401 F.2d 930, 935 (D.C. Cir. 1968), as support for FERC’s jurisdiction over interstate transmission).

198. *See S.C. Pub. Serv. Auth.*, 762 F.3d at 76.

199. *See id.* at 73–74 (quoting *Cal. Indep. Sys. Operator Corp. v. Fed. Energy Regul. Comm’n*, 372 F.3d 395, 403 (D.C. Cir. 2004)). The second argument petitioners made was in reference to the Natural Gas Act, which contains provisions similar those in the FPA and gives FERC authority to regulate interstate natural gas pipelines. *See id.* at 75. Because courts have used both statutes as interpretive aids for each other, the petitioners argued that because the Natural Gas Act specifically did not provide FERC with authority over the construction of gas pipelines, the FPA must be read as not providing that authority over the construction of transmission lines. *See id.* The implication of this position is that the ROFR should be understood as part of the building of transmission lines and not their rates, which the court declined to do. *See id.* at 75–76.

200. *See id.* at 76.

withdrawal of the ROFR had to be struck down, because it could not overcome the *Mobile-Sierra* presumption that rates agreed to by contract are just and reasonable, and thus could not displace the regulated rates.²⁰¹ The *Mobile-Sierra* presumption states that negotiated rates between natural gas pipeline and electricity transmission companies are presumed to satisfy the requirements of the Natural Gas Act and the FPA that rates be “just and reasonable.”²⁰² The “contract” here was the tariff agreement between ISO New England and its transmission members.²⁰³

The D.C. Circuit had already determined in a previous case that the *Mobile Sierra* presumption did not apply to the compliance filings of individual utilities, and likewise was not swayed by this argument, noting that, in the first place, the presumption is applied as a matter of FERC’s discretion, not a matter of law.²⁰⁴ Further, it held that in any case, FERC was justified in its finding that the *Mobile Sierra* presumption did not automatically prevent the withdrawal of the ROFR, because the record before it was insufficient to make that determination—and, in such a case, it could not say that FERC was mistaken.²⁰⁵

The parties did not raise, and so the court did not discuss, whether the *Mobile Sierra* presumption even applies to the ROFR—it is an interesting position for monopoly transmission owners to take, because the presumption applies to rates and thus making this argument seems to acknowledge the direct connection between rates and the ROFR.²⁰⁶ Further,

201. See *Emera Maine v. Fed. Energy Regul. Comm’n*, 854 F.3d 662, 665 (D.C. Cir. 2017).

202. See *Fed. Power Comm’n v. Sierra Pac. Power Co.*, 350 U.S. 348, 353–55 (1956); see also Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 47–51 (2014) (discussing how the *Mobile-Sierra* presumption has not been interpreted to deprive FERC of the power to authorize market-based rates as opposed to contract or cost-of-service based rates); David G. Tewksbury & Stephanie S. Lim, *Applying the Mobile-Sierra Doctrine to Market-Based Rate Contracts*, 26 ENERGY L.J. 437, 459–60 (2005) (arguing the same).

203. See *Emera Maine*, 854 F.3d at 667.

204. See *id.* at 667–68 (citing its own prior decision to that effect in *Oklahoma Gas*). The court refused to endorse the IOUs’ proposition that, where the *Mobile-Sierra* presumption applies, it can only be overcome by findings of “unequivocal public necessity” or “extraordinary circumstances.” See *id.* at 671 (quoting *Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 550–51 (2008)). The case in which the D.C. Circuit found that the *Mobile-Sierra* doctrine did not apply to individual compliance filings is *Oklahoma Gas & Electric Co. v. FERC*, 827 F.3d 75, 76 (D.C. Cir. 2016).

205. See *Emera Maine*, 854 F.3d at 667–70. The IOUs in this case had an existing agreement that they claimed rendered the withdrawal of the ROFR unjust in contravention of *Mobile-Sierra*, but the court pointed out that FERC had not received any evidence from the plaintiffs about the agreement or that it was being contravened by Rule 1000. See *id.* at 669. The court also clarified that the public interest standard that applied to FERC’s rulemaking power was different from the standard that applied to modification of private contracts, with the former being broader than the latter. See *id.* at 670 (stating that new policies may satisfy general, as opposed to particularized, policy goals).

206. See *S.C. Pub. Serv. Auth. v. Fed. Energy Regul. Comm’n*, 762 F.3d 41, 73–74 (D.C. Cir. 2014).

even where the presumption does apply, it can be rebutted by proof that the rate is not just and reasonable.²⁰⁷

Instead, the petitioners in *Emera Maine* argued that the ROFR was in the public interest.²⁰⁸ The court observed that FERC’s rationale for withdrawing the ROFR was premised on a basic economic principle: that competition will lead to innovation and lower prices.²⁰⁹ The IOUs argued that the public interest rationale for rulemaking had to be specific, but the court disagreed, quoting its opinion in *South Carolina Public Service Authority* in support of the idea that propositions widely accepted to be true are sufficient to support rulemaking, such that “[a]gencies do not need to conduct experiments in order to rely on the prediction that . . . competition will normally lead to lower prices.”²¹⁰

As discussed, monopolies have long pushed the narrative that they are the only ones who can deliver safe, reliable, and cost-efficient electricity service, and that competition would impair those things.²¹¹ Indeed, they made these same arguments during the comment period for Order 1000, along with asserting that withdrawing the ROFR would in fact drive up prices due to slower siting approval processes from state regulators and the loss of economies of scale.²¹² It is perhaps no surprise then that the petitioner IOUs in *Emera Maine* also pushed this narrative, offering as proof their own multi-billion dollar investment in the ISO-New England Regional System Plan as proof that the ROFR did not harm the public interest.²¹³

But, as the D.C. Circuit pointed out, holding up the status quo as “evidence” that the system works does not reveal anything about whether alternatives would be better, because we cannot know how reliable, technologically advanced, efficient, and cost-effective our grid might be if our electricity system were not dominated by monopoly utilities.²¹⁴ In other

207. See *Emera Maine*, 854 F.3d at 671.

208. See *id.*

209. See *id.* (referring to its own previous statements in other cases that, where empirical data would be impractical or impossible to obtain, FERC was justified in relying on “economic and competition theory”).

210. See *id.* at 671–72 (quoting *S.C. Pub. Serv. Auth.*, 762 F.3d at 65); see also *S.C. Pub. Serv. Auth.*, 762 F.3d at 73–74.

211. See discussion *supra* Part II.B.

212. See *S.C. Pub. Serv. Auth.*, 762 F.3d at 72–73. See also *MISO Transmission Owners v. Fed. Energy Regul. Comm’n*, 819 F.3d 329, 333–34 (7th Cir. 2016), in which a group of Transmission Monopolies in MISO argued that the decision in *South Carolina Public Service Authority* should not apply to them, to the exasperation of Judge Posner, who noted that the petitioners had “made no effort to show that the right [of first refusal] is in the public interest.” See *id.* at 333.

213. 854 F.3d at 672.

214. See *id.* (“Where the evidence might support more than one rational interpretation, ‘the question we must answer . . . is not whether record evidence supports [the petitioner’s] version of events, but whether it supports FERC’s.’” (quoting *Cogeneration Ass’n of Cal. v. Fed. Energy Regul. Comm’n*, 525 F.3d 1279, 1283 (D.C. Cir. 2008) (alterations in original))).

words, Transmission Monopolies cannot use their own dominance, achieved through years of fighting FERC's attempts to allow for more competition, as proof that they are the only companies capable of building reliable regional transmission lines.

2. *The Circuit Split over Whether State ROFRs Violate the Dormant Commerce Clause*

Despite the court opinions upholding FERC's authority to withdraw the ROFR from RTO tariffs, this did not end efforts to undo or undermine FERC's steps toward competitive regional transmission.²¹⁵ As of this writing, ten states, including Minnesota and Texas, have enacted a ROFR that applies to RTO projects within their borders, leading to an unresolved circuit split and conflicting court opinions on the division between FERC and state authority.²¹⁶ Before taking a closer look at these cases, it must be said that FERC itself has done nothing to clarify its own authority with respect to the state laws at issue—in fact, it has done the opposite. Indeed, the regulator has been tolerant and even deferential toward state ROFRs out of an apparent desire not to disturb state authority over transmission and siting.

The cases discussed below illustrate the circuit split that has formed over the issue of whether these state ROFRs violate the Dormant Commerce Clause. Under the U.S. Constitution, the power to regulate commercial activity between states rests with Congress.²¹⁷ The Dormant Commerce Clause is typically implicated when a state enacts rules or prohibitions in a way that “is driven by concern about ‘economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’”²¹⁸ Commenters have noted that the Dormant Commerce Clause, though sometimes controversial, prevents or is intended to prevent state interests from frustrating national objectives.²¹⁹

215. *See id.*

216. For the complete list of state ROFRs that apply to competitive projects, see *supra* note 188. At the time this case was decided, only six of the ultimately ten states that would enact ROFRs applying to RTO projects had done so: Minnesota, Texas, Nebraska, Oklahoma, South Dakota, and North Dakota. *See NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 314 (5th Cir. 2022) (listing statutes reinstating the ROFR for monopolies within their states).

217. *See* U.S. CONST. art. I, § 8, cl. 3.

218. *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988)).

219. *See, e.g.,* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 431–32, 431 n.27 (1982) (“[O]ne in my place sees how often [a] local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.” (citing OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 296 (1920))). The

In the case of state ROFRs, courts have disagreed on whether they run afoul of the Dormant Commerce Clause, or whether they are directed at legitimate state objectives—specifically, in-state grid reliability. In *LSP Transmission Holdings, LLC v. Sieben*, a merchant transmission company was interested in building lines in the Midcontinent Independent System Operator’s (MISO) fifteen-state²²⁰ service area, only to be blocked from doing so by a newly enacted Minnesota ROFR that applied to all projects in the state.²²¹ Because Minnesota is in the MISO service area, the effect of its ROFR was to make it impossible for any transmission company that did not already own transmission lines in the state to build any MISO-awarded regional projects that crossed through its borders.²²²

In a bewildering move, FERC allowed Minnesota’s ROFR to be included in the MISO tariff for transmission lines located in or passing through the state.²²³ This prevented the merchant company, LSP Transmission, from making bids for the projects, which is the very thing that Order 1000 was designed to make possible. LSP challenged this decision, but FERC determined that it could consider and incorporate state laws, including the Minnesota ROFR, into its tariff decisions.²²⁴ When FERC denied LSP’s request for a rehearing, it sought an appeal from the United States Court of Appeals for the Seventh Circuit, which was denied.²²⁵ Subsequently, two Minnesota-based utilities exercised their rights under the ROFR to build one of the lines that LSP had hoped to bid on.²²⁶

LSP then filed suit against the Minnesota Public Utility Commission and Department of Commerce, arguing that the state’s reinstatement of the ROFR was a violation of the Dormant Commerce Clause and discriminated against interstate commerce.²²⁷ The district court granted the defendants’ motion to dismiss for failure to state a claim, and LSP appealed to the Eighth

Dormant Commerce Clause has played an important role in the energy context. As Professors Klass and Rossi explain, early attempts by states to regulate the interstate transmission and wholesale power markets ran afoul of the Dormant Commerce Clause, created the Attleboro Gap, and ultimately lead to federal regulation, particularly the FPA. See Klass & Rossi, *supra* note 30, at 156–57.

220. See *About MISO*, MISO, <https://www.misoenergy.org/about/> [https://perma.cc/A8GA-CTXW].

221. 954 F.3d 1018, 1024–25 (8th Cir. 2020).

222. See *id.* (including the text of the Minnesota ROFR to the effect that “[a]n incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and connects to facilities owned by that incumbent electric transmission owner”).

223. See *id.* at 1024.

224. See *id.*

225. See *id.*

226. *Id.* at 1025.

227. See *id.*

Circuit.²²⁸ LSP argued that the reinstatement of the ROFR discriminated against interstate commerce, both on its face and in purpose and effect, and that it placed an undue burden on interstate commerce as well.²²⁹

The Eight Circuit was not persuaded by any of these assertions.²³⁰ With respect to the argument that the state law was discriminatory against interstate commerce on its face, the court stated that the law applied to all utilities which owned existing transmission facilities in Minnesota, regardless of where they were incorporated.²³¹ LSP argued that the existing utilities should be regarded as in-state, regardless of where they were incorporated, as they all owned existing infrastructure in the state, but the court was unpersuaded.²³² With respect to whether the Minnesota law had a discriminatory purpose, the court looked to the legislative history of the law and concluded that Minnesota wished to maintain its long-standing approach to approving proposals for building transmission lines in the state.²³³

Of course, Minnesota's long-standing approach has resulted in just four companies, three of which are utilities, owning seventy-nine percent of the transmission infrastructure in the state.²³⁴ But instead of concluding that the challenged law was directed at protecting the monopoly interests of those companies, the court stated that the ROFR was not discriminatory in effect, because any company that did not already own transmission lines in Minnesota faced the "incidental hurdle" of losing an otherwise-approved project that connected to existing lines in Minnesota to an incumbent.²³⁵ The opinion does not make a distinction between the lines that are purely intrastate Minnesota and those that are regional, and there is no consideration of whether it is reasonable for Minnesota ratepayers to pay for lines that do not necessarily provide service to them at all.

Thus, in *LSP Transmission*, the court agreed that the state has the power to choose which companies build transmission lines in or through Minnesota, and to keep choosing the same companies for cost and reliability reasons. In refusing to find a discriminatory effect, the court describes the granting of a ROFR to the incumbents as "incidental," as merchant companies like LSP may simply wait until the incumbent passes on a project—despite the evidence that only three companies have successfully

228. *See id.*

229. *See id.*

230. *See id.* at 1027–31.

231. *See id.* at 1027–29.

232. *See id.* at 1028.

233. *Id.* at 1029.

234. *See id.*

235. *Id.* at 1030.

monopolized Minnesota’s transmission system, and without considering what that information suggests about the likelihood of a company like LSP ever having the chance to build transmission in such a market.²³⁶

Ultimately, the court concluded that there was no undue burden on interstate commerce from the law, as Order 1000 created uncertainty and the reinstatement of the ROFR alleviated this by “preserv[ing] the historically proven status quo for the construction and maintenance of electric transmission lines.”²³⁷ The fact that Order 1000 was intended to move away from this status quo in order to promote competitive regional transmission did not come up in the Dormant Commerce Clause analysis.²³⁸ Again, however, the fact that FERC would not defend its own jurisdiction in this case did nothing to provide clarity on the issue.

In contrast to the court’s conclusion in *LSP Transmission*, in *NextEra Energy Capital Holdings, Inc. v. Lake*, the United States Court of Appeals for the Fifth Circuit found that a state’s reinstatement of the ROFR may indeed violate the Dormant Commerce Clause.²³⁹ Most of the electricity system in Texas is unconnected to infrastructure in neighboring states, exempting it from FERC’s jurisdiction.²⁴⁰ Instead, Texas has its own ISO, the Electric Reliability Council of Texas (ERCOT), and it, along with the Public Utility Commission of Texas (PUCT), oversees the state’s unbundled electricity system.²⁴¹ Not all of Texas is within ERCOT’s footprint; much of the north-western part of Texas is within an RTO, the Southwest Power Pool (SPP), and part of East Texas is within MISO.²⁴²

Though the PUCT (as well as SPP and MISO) initially complied with Order 1000 and the withdrawal of the ROFR, the state legislature intervened in 2019, passing a law that effectively banned merchant transmission in the state by stating that “the ability to build, own, or operate new lines ‘that directly [connect] with an existing utility facility . . . may be granted only to the owner of that existing facility.’”²⁴³ And, if the existing facility owner decided not to pursue a proposed transmission project, another company

236. *See id.*

237. *See id.* at 1030–31 (quoting brief of Appellees).

238. *See id.* at 1023 (stating that the Minnesota ROFR does not violate the Dormant Commerce Clause. The subsequent analysis by the Court reveals that a consideration of Order 1000 was not part of its decision).

239. *See* 48 F.4th 306, 310 (5th Cir. 2022).

240. *See id.* at 313.

241. *See id.*

242. *See id.* at 313–14. Note that the court refers to MISO as the Midwest Independent System Operator, its previous name. *Cf. About MISO*, *supra* note 220. The Southwest Power Pool also includes transmission lines in thirteen other states aside from Texas. *See Fast Facts*, SW. POWER POOL, <https://www.spp.org/about-us/fast-facts/> [<https://perma.cc/MWD2-JS4N>].

243. *See NextEra*, 48 F.4th at 310 (quoting TEX. UTIL. CODE ANN. § 37.056(e) (West 2021)) (alterations in original).

could take over—but only if it too was an existing IOU within “the same region.”²⁴⁴ This law applied to the entire state, including the regions in the SPP and MISO.²⁴⁵

NextEra, a merchant transmission company, along with two of its subsidiaries, sought to build transmission lines in the part of the state within MISO, relying on Order 1000 to open the market.²⁴⁶ After participating in a competitive bidding process for a specific project that involved building five high-voltage lines and one substation, NextEra won the contract, which would be paid for by generation customers across the MISO service area.²⁴⁷ In awarding the project to NextEra, MISO praised the company’s low-cost, high-quality plans and the benefits its proposals would bring to ratepayers.²⁴⁸

Even so, NextEra still needed to secure a certificate of public convenience and necessity from the PUC prior to building the line.²⁴⁹ Before it could begin this process, Texas passed its ROFR, effectively blocking merchant transmission.²⁵⁰ NextEra brought suit in federal court against the PUC and the state, arguing that the ROFR was in violation of the Contracts Clause and the Dormant Commerce Clause.²⁵¹ The district court rejected these arguments and granted a motion to dismiss with prejudice.²⁵²

On appeal, the Fifth Circuit clarified as a threshold matter that the Commerce Clause does apply to utilities, despite their history as monopolies, although there can be some confusion when the Clause is being applied to a regulated utility with a captive market.²⁵³ However, the court noted that transmission is a competitive market, because it includes both incumbents and merchant transmission companies, both of which build and operate lines.²⁵⁴ The defendant utility commissioners argued that the Supreme Court’s decision in *General Motors Corp. v. Tracy* provided Commerce Clause immunity to any company that had “at least one foot in

244. *See id.* at 314 (“[T]he incumbent utility may only ‘designate another electric utility that is currently certificated by [PUCT] within the same electric power region,’ for example, SPP or MISO, ‘to build . . . a portion or all of’ the new lines.” (quoting TEX. UTIL. CODE ANN. § 37.056(g) (West 2021))) (alterations in original).

245. *See id.*

246. *See id.* at 314–15.

247. *See id.* at 315.

248. *See id.*

249. *See id.* The certificate—which most states have some version of—allows the company to use the state’s eminent domain power, if necessary, along the route of the transmission line. *See Crossroads*, *supra* note 5, at 1916–17 (explaining the process of obtaining the certificate of public convenience and necessity from state regulators).

250. *See NextEra*, 48 F.4th at 315.

251. *Id.*

252. *See id.*

253. *See id.* at 318 (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 291 n.8 (1997)).

254. *See id.* at 319.

a captive market,²⁵⁵ but the Fifth Circuit observed that if that were true, it would be inconsistent with the Supreme Court’s statement that there is no blanket immunity from the Commerce Clause for public utilities.²⁵⁶

With respect to the law at issue, the court observed that the impacted transmission lines were not only in Texas, but also in SPP and MISO’s member areas, and were thus in interstate commerce and subject to FERC regulation.²⁵⁷ Even if some of those lines were located entirely within Texas, electricity flowing through them may have originated elsewhere because of the interconnections with the RTO-run systems.²⁵⁸ Indeed, the court went on to state that “transmission lines that are part of an interstate grid are much closer to the heartland of interstate commerce than the wine stores, dairies, or waste processing facilities that have faced [D]ormant Commerce Clause scrutiny.”²⁵⁹

Unlike the Eight Circuit, the court was not swayed by the fact that many of the Texas transmission incumbents were not incorporated in Texas.²⁶⁰ Instead, it explained that it is local presence that matters, not the “empty formality” of where a company has chosen to incorporate.²⁶¹ Only companies with a Texas presence were permitted to build transmission under the challenged law, and the court rightly held that this could indeed be a violation of the Commerce Clause.²⁶² After all, as a practical matter, the law ensured that only companies that currently owned transmission lines in Texas would *ever* own transmission lines in Texas.²⁶³ This is precisely the type of state protectionism of in-state interest that runs afoul of the Dormant Commerce Clause.²⁶⁴ The court thus reversed and remanded the case back to the district court for reconsideration.²⁶⁵

255. *See id.* at 320.

256. *See id.* (citing *Tracy*, 519 U.S. at 291 n.8).

257. *Id.* at 321. Note that outside of Texas, the fact that nearly all in-state transmission lines are eventually connected to out-of-state lines means that they are in interstate commerce and thus subject to FERC’s jurisdiction. *See, e.g.*, *Fed. Power Comm’n v. Fla. Power & Light Co.*, 404 U.S. 453, 465–69 (1972).

258. *See NextEra*, 48 F.4th at 321.

259. *See id.* at 321.

260. *See id.* at 322.

261. *See id.* at 322–24 (quoting *Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1259 (11th Cir. 2012)). The court also noted that the Eighth Circuit is the outlier on this issue. *See id.* at 323 (citing *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1027–29 (8th Cir. 2020)).

262. *See id.* at 325 (“If a company had not built transmission lines in Texas before 2019, it can never build such lines.”).

263. *See id.*

264. *See id.*

265. *Id.* at 329. Though again, only on the Dormant Commerce Clause issue. *Id.* With respect to the Contract Clause claim, the court noted that the force of the Contracts Clause has been greatly diluted over time, such that parties must now anticipate the possibility that regulation may change their private

The Fifth Circuit's decision in *NextEra* is an important one for challenging state overreach in the electricity sector, especially in its clarification that power monopolies are not protected from Commerce Clause claims and that place of incorporation does not prevent a discriminatory effect, particularly when the state law at issue is attempting to close the door on transmission companies that do not already own lines in the state. At the time of this writing, the petition for certiorari to the Supreme Court has been docketed for *NextEra*, and, if granted, the Court will determine whether Texas's ROFR does indeed violate the Dormant Commerce Clause.²⁶⁶ However, the Fifth Circuit—and, by extension, the Supreme Court—did not need to engage with the issue of whether Texas's ROFR was a violation of the Dormant Commerce Clause, because it was invalid and preempted by FERC's withdrawal of the federal ROFR.²⁶⁷

III. THE SOLUTION: REMOVAL OF ALL FEDERAL AND STATE ROFRS FROM REGIONAL TRANSMISSION PROJECTS

The circuit split shows that the confusion over the division of authority between FERC and states over the interstate transmission sector lingers, and this lack of clarity is exacerbated by FERC's own waffling on the issue. While this Article advances a different legal argument for why state ROFRs do not survive a constitutionally based challenge, the Fifth Circuit's decision in *NextEra* is an important one for challenging state overreach in the electricity sector. Indeed, the Dormant Commerce Clause can and perhaps should play an important role in resolving interjurisdictional disputes between FERC and states over siting and eminent domain processes that discriminate against out-of-state companies.²⁶⁸

However, the Fifth Circuit did not need to engage with the issue of whether Texas's ROFR was a violation of the Dormant Commerce Clause,

agreements. *See id.* at 328–29. Further, *NextEra* won their contract to build from MISO, not Texas; the contract that it needed from Texas—the certificate of public convenience and necessity—had not been issued, and so *NextEra* had no contract with Texas on which to base its claim. *See id.* at 329. Thus, the court upheld the district court's finding that there was no violation of the Contracts Clause. *See id.*

266. *See* Petition for Writ of Certiorari, *Lake v. NextEra Energy Cap. Holdings, Inc.*, No. 22-601 (Dec. 28, 2022). Note that at least one sitting justice, Justice Thomas, has expressed the view that he would do away with the Dormant Commerce Clause altogether. *See, e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610–20 (1997) (Thomas, J., dissenting).

267. *See, e.g.*, Eisen, *supra* note 185, at 1828–29 (noting that the D.C. Circuit's holding in *S.C. Public Service Authority* with respect to FERC's authority to withdraw the federal ROFR made it clear that that “[t]he challenged orders here provide . . . an economic principle that directly ties the practice the Commission sought to regulate to rates”) (alteration in original) (citing *S.C. Pub. Serv. Auth. v. Fed. Energy Regul. Comm'n*, 762 F.3d 41, 74–76, 75–76 nn.7–8 (D.C. Cir. 2014)).

268. *See, e.g.*, Klass & Rossi, *supra* note 30, at 177–207 (advocating for the expanded use of the Dormant Commerce Clause in such cases).

because it (and any other state ROFR) was per se invalid and preempted by FERC's withdrawal of the federal ROFR. The fact that FERC itself has not sought to assert its own authority—and, in *LSP Transmission*, even incorporated a state ROFR into an RTO tariff—does not change the legal consequences of state overreach.²⁶⁹ Using the Dormant Commerce Clause instead of the preemption analysis means that the focus is on the effects on out-of-state commerce, when the focus should instead be on why the federal ROFR was withdrawn and the jurisdictional grounds that support the enforceability of FERC's decision to do so.

A. *The ROFR and the FPA's Jurisdictional "Bright Line"*

The Federal Power Act (FPA) was passed during the New Deal Era to delineate federal and state jurisdiction over the growing electricity system and the issue of interstate power sales, and despite its age, still provides clarity on the boundaries of FERC's jurisdiction.²⁷⁰ Section 205 of the FPA gives the FPC (now FERC) the authority to set rates for interstate transmission and power sales, requiring that all such rates must be "just and reasonable," and forbids utilities from conferring any "undue preference or advantage," calculating rates in such a way as to cause "undue prejudice," or in any way maintaining an "unreasonable difference" in rates "in any other respect."²⁷¹ FPA section 206 also gives FERC the ability to strike any rate that it determines does not meet the requirements of section 205 and to set a rate that does meet those requirements.²⁷² This ratemaking and rate approval authority applies to interstate transmission lines and wholesale power transactions.²⁷³

By contrast, retail rates and regulation of electricity distribution systems are exclusively matters under state authority, and FERC may not direct its regulations to these sectors.²⁷⁴ While the division of authority may initially seem straightforward, the U.S. electricity sector has become significantly more complex since the passage of the FPA and that complexity can bleed

269. See, e.g., *Idaho Power Co. v. Fed. Energy Regul. Comm'n*, 312 F.3d 454, 463 (D.C. Cir. 2002) (reversing a decision by FERC to enforce the pre-Order 1000 federal ROFR where there was a competing bid, on the grounds that Order 888-A prevented FERC from doing so). While *Idaho Power* does not involve a state law being invalidated, it does show that even FERC itself cannot undo the legal effects of its own validly enacted rules. See *id.*

270. See Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399, 408–10 (2016).

271. *Id.* at 411 (quoting the Federal Power Act ch. 687, sec. 213, § 205(a), 49 Stat. 838, 851 (1935) (codified as amended at 16 U.S.C. § 824d(a))).

272. See *id.*

273. See *id.*; see also Christiansen & Macey, *supra* note 35, at 1372.

274. Cf. Federal Power Act ch. 687, sec. 213, § 206(a), 49 Stat. 838, 852 (1935) (codified as amended at 16 U.S.C. § 824e(a)).

into the legal analysis. The industry now involves competitive and regulated markets, transmission-connected and distributed power including rooftop solar and plug-in electric vehicles, a geographic patchwork of ISOs, RTOs, and areas where vertically integrated IOUs still dominate, international power sales, and more.²⁷⁵ It is tempting to simply say that the FPA did not contemplate these developments, and so we should not rely on it.

But despite the evolutions of the power sector, the FPA's jurisdictional division—what has been termed its “bright line”—is still relevant and can be applied to present-day disputes, even those that were not contemplated at the time of the FPA's enactment.²⁷⁶ Drawing the line is done using the “aiming at” standard, such that state regulations that are aimed at transmission or wholesale power will be overruled by FERC's jurisdictional authority, just as FERC regulations aimed at distribution or retail rates would be overruled by state authority.²⁷⁷ The Supreme Court has held, for example, that FERC-set transmission rates preempt state attempts to adjust or overrule those rates.²⁷⁸

There is scholarly disagreement on whether the FPA's bright line still exists in light of more recent Supreme Court jurisprudence, with some scholars arguing that it has been replaced by cooperative federalism or concurrent jurisdiction, such that there are no more hard divisions between FERC and state regulators, but rather a system in which FERC works with states and will only overrule their decisions if necessary.²⁷⁹ But Christiansen and Macey have proposed a framework for applying the FPA's bright line to modern jurisdictional disputes over electricity matters that is consistent with recent Supreme Court jurisprudence on the effect of state intrusions into FERC's regulatory realm.²⁸⁰ It also avoids wading into conflict

275. See, e.g., Christiansen & Macey, *supra* note 35, at 1376–81.

276. See *id.*

277. See *id.* at 1373.

278. See *id.* (citing *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988)).

279. See *id.* at 1383 n.129 (citing Joel B. Eisen, *Dual Electricity Federalism Is Dead, but How Dead, and What Replaces It?*, 8 GEO. WASH. J. ENERGY & ENV'T L. 3, 22 (2017); Matt Flaherty, *Evolving Energy Federalism: Zero Emissions Credits and Opportunities in State Energy Policy*, 10 SAN DIEGO J. CLIMATE & ENERGY L. 1, 3 (2019) (arguing that the Supreme Court has transitioned to a system of cooperative federalism); Rossi, *supra* note 270, at 403; Amy L. Stein, *Regulating Reliability*, 54 HOUS. L. REV. 1191, 1196–97 (2017) (“[I]n all three cases, the Court cast aside its historical constraints and adopted a more functional analysis of the allocation of energy authority.”); Ashwini Bharatkumar, Comment, *Formalism, Functionalism, and Federalism: The Practical Import of Electric Power Supply Association v. STAR and Coalition for Competitive Electricity v. Zibelman for State Clean Energy Support Policies*, 43 HARV. ENV'T L. REV. 547, 547–48 (2019) (arguing that the legality of state proceedings will be limited by the scope of federal interventions); see also Eisen, *supra*, at 3; Daniel A. Lyons, *Protecting States in the New World of Energy Federalism*, 67 EMORY L.J. 921, 924–26 (2018).

280. See Christiansen & Macey, *supra* note 35, at 1384–85. Several Supreme Court cases are at

preemption by instead making clear that FERC occupies the field, leaving no room for state regulation within matters on its side of the jurisdictional divide.²⁸¹ Their framework uses the “aiming at” standard to determine whether FERC or state regulatory efforts are intruding on the other’s exclusive domain, but also allows for the possibility that regulation can be properly within, say, FERC’s jurisdiction because it is aimed at transmission or wholesale markets, even if that regulation also has an effect on the retail or distribution systems.²⁸²

That it is not to say the possibility of conflict preemption does not exist—it does, even when a proposed rule is not within an exclusive jurisdictional sphere.²⁸³ As Christiansen and Macey note, it may be necessary in some circumstances to apply conflict preemption to prevent “an end run around” the division of authority in the FPA.²⁸⁴ The example they provide is if a state used its ratemaking authority over distribution or retail rates to override a transmission or wholesale power rate already approved by FERC as just and reasonable.²⁸⁵ This could most easily happen in parts of the country that are not within RTOs or ISOs, because state regulators approve rates for vertically integrated monopolies that incorporate the open access transmission tariffs and wholesale power rates approved by FERC.²⁸⁶

However, though conflict preemption could apply to state ROFRs to the extent that state ROFRs are directed at projects within RTOs, we need not resort to it in the first instance. That is because the withdrawal of the federal ROFR, which should be maintained, is within FERC’s side of the FPA’s bright line, and thus state ROFRs that apply to RTO projects are per se invalid.

issue. *See Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 375, 384–85 (2015) (stating that the “aiming at” standard is used to determine whether a state law is intruding upon FERC’s side of the jurisdictional line, and if it is, such a law would be field pre-empted); *Fed. Energy Regul. Comm’n v. Elec. Power Supply Ass’n*, 577 U.S. 260, 282–83 (2016) (upholding a FERC rule encouraging demand response because it did so only when cutting retail consumption of power affected wholesale power rates, satisfying the “aiming at” inquiry); *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 153 (2016) (finding that a state law directed at wholesale power market participants was preempted by FERC’s authority, even if intended to reach only generation facilities under state jurisdiction).

281. *See* Christiansen & Macey, *supra* note 35, at 1384–85. It is worth noting that field preemption means that the federal government occupies all of a regulatory sphere, which means that there is no room for state regulation. By contrast, conflict preemption means that states can regulate in a certain sphere, but if those laws conflict with federal regulations, the state regulations must fall. *See id.*

282. *See id.* at 1395–97.

283. *See id.* at 1399–400.

284. *See id.* at 1397.

285. *See id.* at 1400; *see also* *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988) (holding that a state may not invalidate a rate set by FERC); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (finding that state regulators may not set rates in such a way as to prevent an IOU from recovering rates already approved by FERC).

286. *See, e.g., Miss. Power & Light Co.*, 487 U.S. at 371.

B. ROFRs Are Within FERC's Exclusive Jurisdiction, Rendering State ROFRs Per Se Invalid

As the Supreme Court has stated, matters within FERC and state jurisdiction “are not hermetically sealed from each other,” and so the fact that FERC rulemaking may impact matters within state jurisdiction are “of no legal consequence” provided that the rule is aimed at an area of federal authority.²⁸⁷ So, to determine whether FERC or the states have the authority to require or withhold the ROFR for regional transmission projects—because they cannot both have it, given the FPA’s bright line—it is necessary to determine what the ROFR is “aiming at.”²⁸⁸ If the ROFR is aiming at an area of exclusive federal jurisdiction, then the states are preempted from changing FERC’s decision to either grant or withdraw the right.²⁸⁹

In order to ascertain what FERC was aiming at with the withdrawal of the ROFR, looking at the history of Order 1000 is instructive. According to the Notice of Proposed Rulemaking that preceded Order 1000, FERC was cognizant of the fact that a growing number of state renewable mandates were going to spur significant transmission development, and that even without a national mandate, “the siting and construction of transmission lines will need to significantly accelerate to maintain reliability over the coming years.”²⁹⁰ With so many potential projects on the table, FERC was also concerned that merchant transmission companies had “lost opportunities to construct proposed projects in some areas because incumbent transmission owners have exercised rights of first refusal to construct such transmission facilities in that transmission provider’s service territory.”²⁹¹

In other words, the ROFR was preventing competition. Not only has the lack of competition been a contributing factor to the slow buildout of regional transmission in general, but it also has an inflationary effect on rates and the cost allocation of regional lines that are built, due to monopoly

287. See *Fed. Energy Regul. Comm’n v. Elec. Power Supply Ass’n*, 577 U.S. 260, 281 (2016).

288. See Christiansen & Macey, *supra* note 35, at 1395–96.

289. See *id.*

290. See Notice of Proposed Rulemaking, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, FERC Docket No. RM10-23-000 ¶ 31 (June 17, 2010) (to be codified at 18 C.F.R. pt. 35) [hereinafter Notice of Proposed Rulemaking, Transmission Planning]. The NOPR estimated that compliance with existing mandates would require as much as 40,000 miles of new transmission lines, and that was in 2010. See *id.*

291. See Nicolas Adrian McTyre, *FERC’s Order No. 1000 from a Historical Perspective: Restructuring and Reorganization of Electric Transmission Markets from 1996 Until Present*, 6 GEO. WASH. J. ENERGY & ENV’T L. 51, 53 (2015) (citing Notice of Proposed Rulemaking, Transmission Planning, *supra* note 290, ¶ 32).

cost of service rates.²⁹² As the court observed in *South Carolina Public Service Authority*, “[r]eforming the practices of failing to engage in regional planning and *ex ante* cost allocation for development of new regional transmission facilities . . . involves a core reason underlying Congress’ instruction in Section 206.”²⁹³ Thus, the court found that “rights of first refusal are *directly tied to rates* charged for electricity transmission.”²⁹⁴ That being the case, the fact that the state ROFRs are incorporated into siting and construction processes does not change the fact that they are aimed at rates, which is within FERC’s exclusive jurisdiction.²⁹⁵

Monopolies may argue, as they did in *South Carolina Public Service Authority*, that FERC does not have any evidence that regional transmission development would improve with greater competition or that using the cost-of-service formula results in unjust or unreasonable rates.²⁹⁶ To the first point, it is true that FERC has described the existing dominance of monopolies in building regional transmission as a “theoretical threat” to regional development, and it is also true that the FPA requires that the regulator have “substantial evidence” that rate practices are unjust and unreasonable in order to revise them under section 206.²⁹⁷ But despite FERC’s use of the word “theoretical,” the D.C. Circuit stated that the strangulation of the regional transmission market by monopoly interests was “well-understood” and “not based on guesswork.”²⁹⁸

With respect to the second point, the D.C. Circuit has previously held that commonly accepted economic rationales in favor of competition were indeed “substantial evidence” that including the cost of regional transmission lines in monopoly rates is unjust and unreasonable.²⁹⁹ Generally accepted economic principles thus support FERC’s assertion that withdrawing the federal ROFR was intended to modify unjust and unreasonable rates, thereby “aiming at” a subject within FERC’s exclusive

292. *See id.* at 53 (citing Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000, 76 Fed. Reg. 49842 (2011), *order on reh’g and clarification*, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000-A, FERC Docket No. RM10-23-001 (May 17, 2012) (to be codified at 18 C.F.R. pt. 35), *order on reh’g and clarification*, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000-B, FERC Docket No. RM10-23-002 (Oct. 18, 2012) (to be codified at 18 C.F.R. pt. 35)).

293. *S.C. Pub. Serv. Auth. v. Fed. Energy Regul. Comm’n*, 762 F.3d 41, 57 (D.C. Cir. 2014).

294. *See id.* at 75 n.7 (emphasis added).

295. *See id.* at 62, 76.

296. *See id.* at 76–77.

297. *See id.* at 64, 76–77.

298. *See id.* at 65.

299. *See id.*

jurisdiction.³⁰⁰ The withdrawal of the federal ROFR thus amounts to a rate determination by FERC and state attempts to counteract that decision are invalid and preempted.³⁰¹ Indeed, both the concerns over monopoly barriers to entry preventing regional buildout and entrenching high costs motivated FERC to pass Order 890, and to remedy the deficiencies in that rule with Order 1000, both of which were also held to be within FERC's jurisdictional mandate.³⁰²

This conclusion is also bolstered by the design of state ROFRs. The inclusion of projects open to competitive bidding in state ROFRs shows an intention to deliberately defeat the withdrawal of the federal ROFR—in essence, to trump FERC's finding that the ROFR for RTO projects was anti-competitive and thus resulted in unjust and unreasonable rates.³⁰³ But, as the Supreme Court has noted, when FERC has made a determination on rates, states do not have the authority to subvert that determination.³⁰⁴ Though states have justified their ROFRs by arguing that they relate to siting and construction, the possibility that the withdrawal of the federal ROFR affects matters of state concern does not change what it is aiming at: rates.³⁰⁵

In sum, taking away the ROFR in RTO tariffs was not only intended to incentivize merchant transmission companies to participate in bidding for regional projects, but to ensure that the costs of regional transmission are fairly allocated and not artificially high due to monopoly cost-of-service rates, which is within FERC's mandate under FPA sections 205 and 206 to both set transmission rates that are just and reasonable and alter existing rates to make them so.³⁰⁶

300. See *Fed. Energy Regul. Comm'n v. Electric Power Supply Ass'n*, 577 U.S. 260, 277–78 (2016); see also *ISO New England, Inc.*, 158 FERC ¶ 61,138, at 4 (Feb. 3, 2017) (order on rehearing) (“The Commission has acknowledged the right of states to pursue their own policy interests but must be mindful of state regulatory actions that impinge on FERC-jurisdictional market mechanisms to set price.”).

301. See, e.g., *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988) (observing the preemptive effect of FERC determinations on state actions affecting utilities, in this case the calculation of wholesale power rates) (citing *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962–72 (1986)) (finding that a state prudence review of rates approved by FERC was preempted).

302. See *id.*

303. The only in-state transmission lines that are not within FERC's authority are those within ERCOT, but that in turn means that ERCOT has no need to attempt circumventing FERC rules, including the withdrawal of the federal ROFR. See *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 313 (5th Cir. 2022) (explaining that the Texas state utility regulator has exclusive jurisdiction over ERCOT, as it is “wholly within Texas”).

304. See, e.g., *Miss. Power & Light Co.*, 487 U.S. at 371; *Nantahala*, 476 U.S. at 962–72.

305. See, e.g., *Eisen*, *supra* note 185, at 1827–29.

306. See *id.*

C. FERC’s Current (or Future) Efforts to Reinstate the Federal ROFR Are Misguided and Should Be Dropped

One possible explanation for why the Eighth Circuit did not consider the Minnesota ROFR through a preemption lens is that FERC itself not only declined to make clear that the state law could not apply, but also incorporated it into the MISO tariff.³⁰⁷ Courts can perhaps be forgiven for not vigorously protecting the jurisdictional grounds of a rule that FERC itself does not seem eager to defend. Indeed, FERC is on the cusp of doing away with the withdrawal of the federal ROFR altogether in the interests of promoting what it hopes will be more rapid buildout of regional transmission ahead of decarbonization.

As of this writing, FERC is once again making changes to the transmission planning and cost allocation process for regional transmission.³⁰⁸ In its NOPR issued in April of 2022, FERC stated that it is “concerned that continuing with the status quo approach” would continue to contribute to “piecemeal” expansions of the grid that are based on near-term goals, the costs of which are recovered in regulated monopoly rates.³⁰⁹ There are several elements in the proposed rule that, though highly technical, would positively impact future attempts to build regional transmission lines.³¹⁰

However, the proposed rule also includes reinstating the federal ROFR for monopolies, with conditions.³¹¹ In prefacing this change, FERC notes that since the passage of Order 1000, almost all investment in transmission projects has been local, which indicates that monopolies are avoiding projects that are open to competition.³¹² While FERC concedes in the NOPR that some commentators believe that this is due to poorly designed competitive processes—including a too-narrow scope for the withdrawal of the federal ROFR—others (including the Edison Electric Institute) argue that the urgent need for new regional transmission necessitates the end of

307. See *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1024–25 (8th Cir. 2020). FERC does not seem to have responded one way or the other to the Texas ROFR in *NextEra*. See generally *NextEra*, 48 F.4th 306.

308. See Notice of Proposed Rulemaking, Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection, FERC Docket No. RM21-17-000 (Apr. 21, 2022) (to be codified at 18 C.F.R. pt. 35) [hereinafter Notice of Proposed Rulemaking, Building for the Future].

309. See *id.* ¶ 25. FERC goes on to note its obligation to ensure that transmission rates are “just and reasonable” and “not unduly discriminatory or preferential.” See *id.*

310. See generally Notice of Proposed Rulemaking, Building for the Future, *supra* note 308. This includes requirements for RTOs to make long-term changes to the generation mix and take associated benefits into account during the regional planning processes. See *id.* ¶¶ 32–33.

311. See generally Notice of Proposed Rulemaking, Building for the Future, *supra* note 308.

312. See *id.* ¶¶ 346–47.

competitive transmission bidding altogether, including the withdrawal of the federal ROFR.³¹³

Perhaps trying to find the middle ground, FERC's NOPR includes a proposal to reinstate the federal ROFR, conditioned upon joint ownership with "unaffiliated partners," including nonincumbent monopoly transmission companies.³¹⁴ Only if no qualifying Transmission Monopolies wished to build the project would it then be open to competition.³¹⁵ This reflects FERC's concern that Order 1000's changes—including withdrawal of the federal ROFR—are the reason why so little regional transmission has been built.³¹⁶ The more likely reasons, however, are both continued resistance by Transmission Monopolies to participate in competitive processes and FERC's own unwillingness to truly commit to the withdrawal of the ROFR.

But commit it should. Not only are the cost concerns that motivated FERC to withdraw the federal ROFR in the first place still true, they are more relevant than ever, given the scale of the regional lines achieving net-zero demands coupled with rising electricity bills across the country that are putting economic pressure on many households.³¹⁷ But, while building the grid of the future will be expensive and challenging, FERC does not need a "make it happen at any cost" mindset that includes catering to Transmission Monopolies in order to facilitate it.

This is particularly true at this moment, because the Inflation Reduction Act has put billions of dollars on the table in loans and tax incentives for transmission projects that connect renewable generation—money that might draw Transmission Monopolies into the competitive processes they have thus far eschewed.³¹⁸ This unprecedented amount of government financial assistance coupled with backstop siting authority for FERC could signal the beginning of a truly competitive market for regional transmission. But all of that will be undone if FERC reinstates the federal ROFR.

It is time to change course. For decades, IOUs have refused to build projects in the public interest, preferring to stay in their exclusive service areas and pile costs into their regulated rates. In comparison with merchant transmission companies, they do not offer services that are more reliable, better built, or more cost-effective as merchant transmission companies, and so there is no reason to offer them a ROFR that does not require them to

313. *See id.* ¶¶ 347–48.

314. *See id.* ¶¶ 364–65. FERC also includes "unaffiliated public power entities . . . municipally-owned utilities or electric cooperatives" or other unaffiliated companies. *Id.* ¶ 365.

315. *See id.* ¶ 368.

316. *See id.* ¶ 353.

317. *See* Rossi, *supra* note 20, at 34–36.

318. *See* authorities cited *supra* note 2.

match competing bids. It is true that FERC demonstrating its commitment to the removal of the federal ROFR and preempting state attempts to reinstate it will not, on its own, create a more competitive market. However, reinstating the federal ROFR—even with conditions—will likely doom any chances to decouple regional transmission planning and cost allocation from the economic priorities of Transmission Monopolies. The United States is on the verge of a major transformation of its electricity system, and it is time for FERC’s approach to regional transmission to transform as well.

CONCLUSION

For over one hundred years, private monopolies have dominated the U.S. electricity sector, and in that time, we have repeatedly seen a failure of these companies to engage in regional planning, make a more aggressive push for decarbonization, or to budge from their profit motive as the primary driver of their investment decisions. Until now, every attempt that FERC has made to increase competition and lower costs has been met with fierce resistance and a refusal of monopolies to participate in building the regional infrastructure we desperately need. At this critical moment, as we are seeking to stop the most devastating impacts of climate change by achieving net zero by 2035, we cannot rely on the status quo any longer. As a necessary first step to ensuring robust competition for regional transmission projects, FERC must use its authority under the FPA to definitively withdraw the federal ROFR, which will render any state laws to the contrary invalid. If we cannot break away from the monopoly model for building regional transmission lines, we may lose our chance to undertake a historic expansion of our grid in a way that prioritizes the public good over private profit.