

ARTICLE

ZOMBIE ENERGY LAWS

by Joshua C. Macey

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This Article traces the development of three legal rules—cost recovery for vertically integrated utilities, the requirement that regulators assess the financial viability of energy projects before issuing a certificate of public convenience and necessity, and the filed rate doctrine—that emerged out of the view that electric power companies should be shielded from market forces. The Article argues that these legal rules have become “zombie energy laws.” Zombie energy laws are statutes, regulations, and judicial precedents that continue to apply after their underlying economic and legal bases dissipate. Such laws were originally designed to protect consumers by, among other things, preventing utilities from exploiting their market power. Today, however, zombie energy laws protect incumbent fossil fuel generators and have provided the legal basis for invalidating billions of dollars of wind and solar projects. The Article concludes by arguing that the Federal Power Act, which instructs the Federal Energy Regulatory Commission to maintain “just and reasonable” wholesale rates, can plausibly be read to mitigate—and, in some cases, eliminate—the market distortions caused by zombie energy laws.

*Editors' Note: This Article is excerpted from Joshua C. Macey, *Zombie Energy Laws*, 72 VAND. L. REV. 1077 (2020), and is reprinted with permission.*

Author's Note: My thanks to Douglas Baird, Tom Baker, Will Baude, Lisa Bernstein, Adam Chilton, Matthew Christiansen, James Coleman, Peter Damrosch, Monika Ehrman, Bill Eskridge, Tom Ginsburg, Michael Heise, Tony Kronman, Genevieve Lakier, Saul Levmore, Daniel Markoviits, Jerry Mashaw, Jonathan Masur, John Morley, Jennifer Nou, Saule Omarova, Ari Peskoe, Eric Posner, Jeff Rachlinski, Aziz Rana, John Rappaport, Jim Rossi, Jackson Salovaara, Alan Schwartz, David Spence, Jed Stiglitz, Nelson Tebbe, David Weisbach, and Shelley Welton. I am indebted to Cloe Anderson, Meredith Barrow, Nathan Campbell, Ann Cappetta, Madeleine Carpenter, Christina Claxton, Katherine Cohen, Amanda James, Natalie Komrovsky, Taeler Lanzer, William Ligon, Kelsey McKeag, Hannah Miller, Corinne Nabors, Tim Nevins, and all of the outstanding editors at the Vanderbilt Law Review.

I. Introduction

The “zombie energy laws” discussed in this Article—namely, rate regulation, the certificate of public convenience and necessity, and the filed rate doctrine—are vestigial remnants of the public utility era.¹ They originated when most Americans purchased electricity from rate-regulated, vertically integrated utilities.² In exchange for exclusive franchises, utilities agreed to provide non-discriminatory electricity at regulated rates.³ These laws were all intended to protect consumers against market power abuses.

Beginning in the 1970s, the electricity industry began to shift away from cost-of-service regulation as policymakers broke down barriers to entry.⁴ But courts and regulators have not abandoned the legal rules that emerged in the era of utility rate regulation, even though the original justification for these rules ceased to exist once regulators decided that electricity generation should be subject to market forces.

These zombie energy laws are now seriously degrading energy markets. They allow incumbents to raise prices and prevent clean energy companies from competing with incumbent fossil fuel generators.

This Article argues that the Federal Power Act (FPA) can plausibly be interpreted to make it illegal for regulators to apply some zombie energy laws in competitive markets

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1. The description of zombie energy laws is a doctrinal contribution that builds on the extensive theoretical literature about the challenges that arise when statutes persist beyond their useful life by identifying the original justification for energy laws that are now operating at cross-purposes with environmental goals.
 2. See Jeffrey D. Watkiss & Douglas W. Smith, *The Energy Policy Act of 1992—A Watershed for Competition in the Wholesale Power Market*, 10 YALE J. ON REG. 447, 451 (1993) (“During this period, most significant electric utilities were vertically integrated—they generated power, transmitted power within their service territory, and distributed power to their retail customers.”).
 3. See *New York v. Fed. Energy Regulatory Comm’n*, 535 U.S. 1, 5-7 (2002); *Jersey Cent. Power & Light Co. v. Fed. Energy Regulatory Comm’n*, 810 F.2d 1168, 1189 (D.C. Cir. 1987) (Starr, J., concurring) (“The utility business represents a compact of sorts; a monopoly on service in a particular geographical area (coupled with state-conferred rights of eminent domain or condemnation) is granted to the utility in exchange for a regime of intensive regulation, including price regulation.”); SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, *REGULATORY LAW AND POLICY: CASES AND MATERIALS* 109 (3d ed. 2003).
 4. See David B. Spence, *Can Law Manage Competitive Electricity Markets?*, 93 CORNELL L. REV. 765, 770 (2008).

when those laws serve no useful purpose and allow incumbents to abuse their market power. The FPA instructs the Federal Energy Regulatory Commission (FERC) to make sure that wholesale electricity rates are “just and reasonable” and not “unduly discriminatory.”⁵ This Article argues that the transition to competitive power markets renders “unjust and unreasonable” many of the very laws and regulations that had supported “just and reasonable” wholesale rates when energy markets were rate-regulated.

II. Utility Regulation

This part summarizes several views on why regulators exempted a significant percentage of the American economy from market pressures between 1880 and 1920 and presents evidence that the rise in public utility regulation was likely due to a combination of all three views.

A. Utilities as Natural Monopolies

A natural monopoly exists when it is efficient for a single firm to control an entire market.⁶

Historically, many segments of the energy industry possessed significant economies of scale. Although it was costly to build the transmission lines that transport electricity, once a company built a transmission line, it was often able to provide electricity to an entire community at rates lower than those of its competitors.⁷ Many policymakers therefore felt that electricity in a region could be provided and transported most efficiently by a single firm and viewed the industry as a natural monopoly.⁸

The decision to protect utilities from market forces was in large part based on this view. To prevent market power abuses, utilities were required to serve all customers on a nondiscriminatory basis and at regulated rates.⁹

B. Regulatory Capture

Scholars have also suggested that public utility regulation reflected regulators’ attempts to support the industries that had managed to curry favor with energy regulators.¹⁰

Utility regulation was immensely profitable for the energy companies that managed to use it to shield them-

selves from competition, and prominent public service commissioners worked for the industries they regulated before and after becoming commissioners.¹¹

The capture theory is not inconsistent with the natural monopoly theory. Even if one believes that regulatory capture accounts entirely for the sudden rise in utility regulation, policymakers nonetheless justified utility rate regulation on the theory that public utilities were natural monopolies—even if that justification was pretextual.¹²

C. *Lochner* Evasion

The *Lochner* era is remembered for the U.S. Supreme Court’s willingness to strike down regulations that interfered with private contract.¹³

The regulatory structure that came to dominate the energy industry, in which companies with exclusive franchises agreed to cap rates and provide nondiscriminatory service to all customers in their service areas, allowed state legislatures to regulate energy contracts without falling afoul of the *Lochner* era Supreme Court’s substantive due process jurisprudence. In *Munn v. Illinois*, a decision that predated *Lochner*, the Supreme Court held that the legislature could cap rates and regulate services of companies when their property ceased to be “purely and exclusively private”¹⁴ and was “affected with a public interest.”¹⁵

The *Lochner* Court did not reject *Munn*’s holding.¹⁶ By granting public utilities legally protected monopoly franchises and conditioning their right to operate in a given market on companies’ willingness to hold themselves out to the public, state regulators managed to ensure that public utilities were “clothed with the public interest” and therefore subject to regulatory control.

III. Restructuring

In most of the country today¹⁷, electric power generators no longer enjoy exclusive franchises.¹⁸ In the 1970s, policymakers abandoned the economic theory that utilities needed to be protected from competition and began a lengthy process to introduce competitive pressures.¹⁹

5. 16 U.S.C. §824e(a).

6. See Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 548 (1969) (“If 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 . . .”).

7. See PAUL L. JOSKOW & RICHARD SCHMALENSEE, *MARKETS FOR POWER: AN ANALYSIS OF ELECTRIC UTILITY DEREGULATION* 59 (1983).

8. Technological advances increased the efficiency of small gas wellheads and electricity generators and, in doing so, eroded the economic justification for natural monopoly regulation. See Richard J. Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 HARV. L. REV. 345, 357-63 (1983).

9. See SAMUEL INSULL, *CENTRAL-STATION ELECTRIC SERVICE* 45 (William E. Keily ed., 1915); Spence, *supra* note 4, at 767-68 (“[G]overnments licensed private firms as monopoly suppliers, closely regulating their rates and conditions of service.”).

10. See George L. Priest, *The Origins of Public Utility Regulation and the “Theories of Regulation” Debate*, 36 J.L. & ECON. 289, 291-94 (1993).

11. See *id.* at 299-305 (“[F]indings that profits were higher under regulation suggested that regulatory commissions were created as a result of industry demand rather than to pursue the public interest.”).

12. See *id.* (“Demsetz intimated that the natural monopoly defense for regulation may well be a pretext disguising a regulatory regime that benefited and, therefore, might be demanded by the regulated monopolists themselves.”).

13. See Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874 (1987); see also *Lochner v. New York*, 198 U.S. 45, 53 (1905).

14. 94 U.S. 113, 125 (1876).

15. *Id.* at 126.

16. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 304 (1932).

17. About one-third of the country continues to receive power from vertically integrated utilities that are subject to rate regulation. See *Map of Deregulated Energy States and Markets*, ELEC. CHOICE, <https://www.electricchoice.com/map-deregulated-energy-markets/> (last updated 2018) [<https://perma.cc/LVE9-USQF>].

18. See Jim Rossi, *The Electric Deregulation Fiasco: Looking to Regulatory Federalism to Promote a Balance Between Markets and the Provision of Public Goods*, 100 MICH. L. REV. 1768, 1772-78 (2002).

19. See generally Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998).

Restructuring the electric power industry began with the Public Utility Regulatory Policies Act (PURPA).²⁰

A core insight that led to deregulation of the sale of electric power was that power generation—the process of producing and selling electricity—could be unbundled from the transmission services that deliver electricity to end-users. PURPA required vertically integrated utilities to purchase power from merchant power plants, known as qualifying facilities, and allow those facilities to connect to the grid.²¹

FERC then ordered utilities to “functionally unbundle” generation from transmission,²² to provide independent power producers with real-time pricing information,²³ and to encourage the formation of independent system operators (ISOs) to manage day-to-day grid operations.²⁴ Today, ISOs manage a bidding process that selects the least expensive generators that are available to provide the electricity the grid needs at a given moment. In these markets, load-serving entities, which distribute electricity to end-users, are required to purchase electricity in auctions overseen by grid operators.²⁵ Energy market auctions are supposed to ensure that market forces replace competition as the mechanism for determining which generators operate in a given moment.

IV. Laws for Rate-Regulated Utilities

This part traces the origins of the laws that persist from the public utility era and describes the original justifications for three doctrines—rate regulation for vertically integrated utilities, the certificate of public convenience and necessity, and the filed rate doctrine—developed by regulators to preserve utilities’ exclusive franchises and ensure that they were able to honor their service obligations.

A. Origins of Rate Regulation

Once policymakers decided to treat energy companies as public utilities and grant them exclusive franchises, they had to figure out how to mitigate market power

abuses of the utility companies that enjoyed a legal right to a monopoly.²⁶

Rate regulation emerged as the solution. In an industry that was subject to rate regulation, the government—rather than market forces—became responsible for disciplining corporate behavior. The utilities that were entitled to operate in a given market were required to charge rates that were established by an administrator during a ratemaking proceeding.

B. Origins of the Certificate of Public Convenience and Necessity

A certificate of public convenience and necessity is a license issued by a regulatory body that allows the holder of the permit to operate in a particular area.²⁷

Regulators have offered at least five related justifications for laws requiring such certificates in the energy industry: (1) avoiding “wasteful duplication” of physical facilities; (2) preventing “ruinous” or “destructive” competition between energy providers²⁸; (3) cross-subsidizing customers who otherwise would not receive service or who would otherwise have had to pay higher prices for service; (4) protecting investments in assets that have large upfront capital costs; and (5) protecting the community against externalities such as environmental harms and eminent domain.

The certificate of public convenience and necessity emerged largely as the solution to these perceived problems. By preventing competitors from stealing utilities’ most lucrative customers, certificates allowed utilities to use the profits generated from profitable customers to sell electricity at below-cost rates to less financially remunerative electricity consumers. Thus, the certificate of public convenience and necessity ensured that utilities were in a financial position to provide nondiscriminatory rates and services to all of their customers.

C. Origins of the Filed Rate Doctrine

The filed rate doctrine was designed to prevent judicial enforcement of state and federal laws from forcing rate-regulated utilities to modify rates that they had already filed with state and federal regulators.

The Supreme Court formally established this doctrine in *Keogh v. Chicago & Northwestern Railway Co.*, after a group of merchants sued railroads for colluding to establish rates.²⁹ The railroads argued that regulators—not

20. Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §2601.

21. 16 U.S.C. §824a-3.

22. See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Order No. 888, 61 Fed. Reg. 21540, 21577 (May 10, 1996).

23. See Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct, Order No. 889, 61 Fed. Reg. 21737, 21740 (May 10, 1996) (“This final rule contains three basic provisions that, taken together, will ensure that transmission customers have access to transmission information enabling them to obtain open access transmission service on a non-discriminatory basis.”).

24. See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Order No. 888, 61 Fed. Reg. 21540, 21552 (May 10, 1996).

25. See *Reliability Assurance Agreement Among Load Serving Entities in the PJM Region*, PJM INTERCONNECTION 41 (Sept. 17, 2010), <https://www.pjm.com/directory/merged-tariffs/raa.pdf> [<https://perma.cc/PPU6-E5D8>]; *Understanding the Differences Between PJM’s Markets*, PJM INTERCONNECTION 1 (Mar. 6, 2019), <https://learn.pjm.com/-/media/about-pjm/newsroom/fact-sheets/understanding-the-difference-between-pjms-markets-fact-sheet.aspx?> [<https://perma.cc/2HNC-PDMS>].

26. Absent regulatory interference, a monopolist will produce lower quality goods at a higher price than it would in competitive markets. See HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS: A MODERN APPROACH* 11-17 (7th ed. 2006).

27. See, e.g., 49 U.S.C. §10901(c) (“The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity.”).

28. See *Northhampton Elec. Lighting Co., Petitioner*, 7 ANNUAL REPORT OF THE BOARD OF GAS AND ELECTRIC COMMISSIONERS OF THE COMMONWEALTH OF MASSACHUSETTS 14, 21 (Jan. 1892).

29. 260 U.S. 156, 163 (1922).

courts—were responsible for determining the validity of rates and that, once they did so, railroads were shielded from judicial enforcement of private antitrust suits.³⁰ The Supreme Court agreed³¹ and was especially concerned that judicial enforcement of antitrust laws could prevent regulators from effectively controlling utility rates and services. The Supreme Court recognized that antitrust actions that resulted in lower rates in one area might disrupt a region's rate framework by making it difficult for utilities to provide adequate and profitable service across their entire service areas.

V. Zombie Energy Laws

This part explains how the legal rules—described in the previous part—that were designed to mitigate the market power abuses of utilities subject to cost-of-service regulation have the opposite effect in restructured markets. Today, these doctrines distort electric power markets and impede the development of renewable energy sources.

A. Zombie Rate Regulation

FERC's failure to require utilities to fully divest themselves of their generation assets has allowed utilities to manipulate generation bids in a manner that ensures that generators owned by vertically integrated utilities continue to operate despite being unable to compete with alternative electricity providers.

In restructured markets, grid operators oversee a bidding process that determines which generators will provide electricity to meet demand in a given period of time. The grid operator determines how much electricity is needed to meet all demand for electricity and identifies which generators are able to provide power to the region at the lowest cost.³² Generators that submit successful bids are said to “clear” the market.³³ The least expensive bids clear the market first, followed by the next cheapest options, until the grid operator is able to provide enough electricity to match the region's demand for electricity.³⁴ Every supplier is paid the price offered by the last generator to clear.³⁵

Merit order dispatch is supposed to ensure that consumers receive electricity at the lowest cost.³⁶ In practice, however, generators can send electricity to the grid even when market conditions render it uneconomic for them to do so. Specifically, generators can self-schedule, or submit bids that are below their costs of production.

When a generator self-schedules, it identifies the hours in which it operates and commits to providing a certain amount of electricity during those times regardless of the market clearing price.³⁷ Like all generators that clear, it receives the market clearing price.³⁸ Grid operators count generators that self-schedule in the merit order as zero-cost bids.³⁹

Alternatively, generators may submit a bid that is below their cost of production. If the bid is low enough, this will ensure that the generator clears the market but is still paid the last-offered price.

While generators may occasionally have legitimate reasons to operate even when it is unprofitable for them to do so, coal-fired power plants owned by vertically integrated utilities seem to be recouping losses they incur in energy markets from their captive ratepayers. Many state regulators continue to allow vertically integrated utilities to recover their costs even when those utilities participate in restructured markets.⁴⁰ Self-scheduled, zero-cost bids allow generation facilities owned by vertically integrated utilities to manipulate competitive energy markets, which seriously distorts energy market prices and reduces revenues enjoyed by generators that could offer electricity more competitively, including solar and wind generators.

B. Zombie Certificate of Public Convenience and Necessity Rules

Once regulators embraced competitive energy markets in the 1970s, there were no longer economic reasons for regulators to assess the demand for a product before authorizing a company to enter a market.

States have not, however, eliminated laws requiring companies to receive a certificate of public convenience and necessity in order to build new energy infrastructure.⁴¹ These requirements protect incumbents, raise electricity prices, and obstruct green energy projects. For example, Clean Line Energy abandoned a \$3.5 billion wind development project after failing to receive such a certificate from the Arkansas Public Service Commission.⁴² Entergy, an Arkansas utility, filed an objection in which it pointed out

30. *Id.* at 160.

31. *Id.* at 163.

32. See FRANCISCO FLORES-ESPINO ET AL., NAT'L RENEWABLE ENERGY LAB., COMPETITIVE ELECTRICITY MARKET REGULATION IN THE UNITED STATES: A PRIMER 12-13 (2016), <https://www.nrel.gov/docs/fy17osti/67106.pdf> [<https://perma.cc/B78F-7NH8>].

33. *See id.*

34. *Id.*

35. *Id.*

36. *See How Resources Are Selected and Prices Are Set in the Wholesale Energy Markets*, ISO NEW ENG., <https://www.iso-ne.com/about/what-we-do/in-depth/how-resources-are-selected-and-prices-are-set> (last visited May 7, 2020) [<https://perma.cc/T9CG-AH9J>].

37. *See, e.g., Authorization to Self-Schedule Capacity*, PJM, <https://www.pjm.com/-/media/etools/erpm/20070302-rpm-authorization-self-sched.ashx> (last visited May 7, 2020) [<https://perma.cc/T3QH-2DFT>] (“Because PJM will self-schedule the Unit, Owner recognizes that the Unit's offer will always clear an auction. . .”).

38. *See id.* (“[The] Owner must accept the applicable clearing price.”).

39. *See* SOUTHWEST POWER POOL, MKT. MONITORING UNIT, SELF-COMMITTING IN SPP MARKETS: OVERVIEW, IMPACTS, AND RECOMMENDATIONS 6 (Dec. 2019), <https://assets.documentcloud.org/documents/6573451/Spp-Mmu-Self-Commitment-Whitepaper.pdf> [<https://perma.cc/5NZA-BSJ2>].

40. *See* *Calpine Corp. v. PJM Interconnection, LLC*, 163 FERC ¶ 61236, at 8 (Glick, C., dissenting) (2018).

41. *See* NAT'L ASS'N OF REGULATORY UTIL. COMM'RS, 1975 ANNUAL REPORT ON UTILITY AND CARRIER REGULATION 507-20, 560-65, 575-78, 601-04 (1976).

42. *Order, The Application of Plains and Eastern Clean Line LLC for a Certificate of Public Convenience and Necessity to Construct, Own, and Operate as an Electric Transmission Public Utility in the State of Arkansas*, No. 10-041-U, at 11 (Ark. Pub. Serv. Comm'n, Jan. 11, 2011), http://www.apscservices.info/pdf/10/10-041-u_41_1.pdf [<https://perma.cc/A839-29CL>].

that because Clean Line did not own or operate any transmission lines in Arkansas, it was not a public utility and was not authorized to build transmission lines.

Restrictive transmission siting laws pose significant impediments to renewable developments partly because renewable-rich regions tend to be located outside of cities. Wind and solar developments thus need to build transmission lines to population-dense areas that will consume the electricity they produce.⁴³

The permitting requirements for these certificates are problematic because regulators—not price signals—determine when it is “appropriate and necessary” to construct new transmission lines and certificate requirements stifle competition by explicitly protecting incumbent transmission line owners.

These requests for siting proposals should not be limited to incumbents, and a merchant power producer that is willing to pay to construct transmission lines that will connect its generation facilities to the grid should be able to do so regardless of whether a regulatory body agrees with the developer’s financial assessment of a region’s future demand for electricity.

C. *The Zombie Filed Rate Doctrine*

The problem with the filed rate doctrine today is that many generators no longer actually file rates with public service commissioners.⁴⁴

In the mid-1950s, the Supreme Court announced that it would assume that rates that had been negotiated at arm’s length were just and reasonable.⁴⁵ Thus, in most of the country, private ordering—not formal ratemaking proceedings—now determines the profits generators make when they sell electricity.⁴⁶

There is therefore no need for regulators to worry that antitrust suits will prevent the public service commissions from realizing their mandate to prevent discriminatory rates, because regulators in these parts of the country no longer rely on ratemaking proceedings to ensure that rates are just and reasonable. Thus, FERC and state energy regulators do not have an opportunity to assess whether a contract has anticompetitive effects.

Yet, the application of the filed rate doctrine to competitive energy markets means that market participants are largely shielded from the laws that mitigate anticompetitive behavior in ordinary markets. In 1986, the Supreme Court affirmed the filed rate doctrine on *stare decisis* grounds despite recognizing that the doctrine no longer served its original purpose.⁴⁷ Without authority to enforce

antitrust laws, consumers have to trust that regulators will prevent collusive behavior and monopolistic pricing.

Regulators, however, have failed to prevent market power abuses in electricity markets. Consider the 2000/2001 California energy crisis. Companies such as Enron would purposefully export electricity that was needed in California to neighboring states in order to drive up California electricity prices.⁴⁸ Pacific Gas and Electric, one of two California companies that purchased electricity from generators to sell to consumers, was forced into bankruptcy when it found itself unable to afford electricity it was required to supply to Californians.⁴⁹

Further, studies of energy prices have demonstrated that market manipulation is an ongoing problem and that the tools FERC uses to deter manipulation are ill-equipped to prevent the types of abuses that pervade energy markets.⁵⁰

Restructured energy markets are intended to create the same incentives as ordinary markets. Exempting energy companies from judicial enforcement of ordinary tort, contract, and antitrust claims gives energy companies an exceptional privilege. In this way, a doctrine that was originally meant to protect consumers by ensuring utilities treat all customers fairly has become a weapon that generators yield to exploit their market power.

VI. “Just and Reasonable” Rates in Competitive Energy Markets

While all three of the zombie energy laws described in the previous part should be abandoned, the abandonment would have to take different forms. As is discussed in detail below: (1) overturning the filed rate doctrine should be a straightforward affair; and (2) preventing vertically integrated utilities from using ratemaking proceedings to recoup the losses their generation assets incur in energy markets should also be fairly uncontroversial; but (3) the illegality of restrictive certificates of public convenience and necessity is more speculative.

A. *Ratemaking Should Not Circumvent Competitive Wholesale Markets*

FERC could disincentivize the practice of using state ratemaking proceedings to circumvent competitive wholesale markets; though if FERC fails to act, the U.S. Congress, state legislatures, and state public service commissions should also step in to eliminate this practice.

The FPA gives FERC authority to regulate “the sale of electric energy at wholesale in interstate commerce.”⁵¹

43. See GRETCHEN BAKKE, *THE GRID: THE FRAYING WIRES BETWEEN AMERICANS AND OUR ENERGY FUTURE* xvii (2016).

44. See Fed. Energy Regulatory Comm’n v. Elec. Power Supply Ass’n, 136 S. Ct. 760, 768 (2016).

45. See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 381 (1956); *Fed. Power Comm’n v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956).

46. See Joshua Macey & Jackson Salovaara, *Rate Regulation Redux*, 168 U. PA. L. REV. (2020) (manuscript at 18), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3362920 [<https://perma.cc/B38Q-58C5>].

47. See *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 423–24 (1986); see also *McCray v. Fid. Nat’l Title Ins. Co.*, 682 F.3d 229,

238 (3d Cir. 2012).

48. See CAISO, *ANALYSIS OF TRADING AND SCHEDULING STRATEGIES DESCRIBED IN ENRON MEMOS 5* (2002), http://www.caiso.com/Documents/Analysis-TradingandSchedulingStrategiesDescribedinEnronMemosDMA1O_402_.pdf [<https://perma.cc/XJ6J-UU9H>].

49. Cf. PAUL W. MACAVOY, *THE UNSUSTAINABLE COSTS OF PARTIAL DEREGULATION 70* (2007). Market manipulation was only one reason California energy prices increased in this period. See *id.* at 69–93.

50. See David B. Spence & Robert Prentice, *The Transformation of Energy Markets and the Problem of Market Power*, 53 B.C. L. REV. 131, 132 (2012).

51. 16 U.S.C. §824(b)(1).

The FPA further mandates that FERC “shall” preempt “any rule, regulation, practice, or contract affecting” a rate within the Commission’s jurisdiction that “is unjust, unreasonable, unduly discriminatory or preferential.”⁵² State programs are preempted when they have the effect of “adjusting an interstate wholesale rate.”⁵³ Thus, while states retain authority to regulate generation facilities and retail electric rates, they cannot alter or “set” wholesale rates.⁵⁴

When state ratemaking proceedings increase generation revenues without furthering a legitimate state interest, they may guarantee an income to generation facilities that are owned by vertically integrated utilities. Those generators are thus protected from energy market prices because they can recover costs elsewhere. Such practices are arguably preempted when they “aim at” or functionally “set” FERC-jurisdictional rates.

That is not to say that states cannot subsidize generation facilities or provide additional revenue in ratemaking proceedings. States simply have to identify a valid regulatory objective that is subject to their jurisdiction.⁵⁵

While the Commission cannot prevent states from subsidizing preferred resources, it might be able to prohibit generators that benefit from rate regulation from participating in wholesale auctions. In doing so, it would force states to bear the full costs of their decisions to retain inefficient generation assets.

B. Certificates of Public Convenience and Necessity Should Not Undermine Competitive Wholesale Markets

While courts may be able to ameliorate some of the problems associated with certificates of public convenience and necessity, legislative solutions are likely necessary to facilitate transmission line siting because states retain jurisdiction over such siting.

In the absence of legislative action, however, FERC may be able to reduce some of the barriers to entry created by restrictive transmission siting laws by invoking its existing authority. FERC has exclusive jurisdiction over the “transmission of electric energy in interstate commerce,” over the “sale of electric energy at wholesale in interstate commerce,” and over “all facilities for such transmission or sale of electric energy.”⁵⁶ To the extent that excessively restrictive state transmission siting laws undermine these objectives, it would seem that FERC has authority to issue regulations that create an incentive for states to adopt more permissive laws and regulations to govern transmission line siting.

C. The Filed Rate Doctrine Has Outlived Its Purpose

The judiciary could likely end the filed rate doctrine. *Stare decisis* provides the only justification for the filed rate doctrine in restructured energy markets.

Even the most militant adherents of *stare decisis* agree that courts should overturn past judicial decisions that have proven to be “unworkable.”⁵⁷ The Supreme Court has said, for example, that courts should not affirm prior judicial decisions that have been left behind by “the growth of judicial doctrine or further action taken by Congress” or that create “a direct obstacle to the realization of important objectives embodied in other laws.”⁵⁸

The filed rate doctrine passes this high threshold for overturning judicial precedents. It creates a “direct obstacle to the realization” of FERC’s objective to encourage competitive energy markets, and congressional action that indicates a clear intent to further break down barriers to competition in energy markets, such as the Energy Policy Act, qualify as “further actions” that render the doctrine obsolete.

VII. Conclusion

The energy sector in restructured markets looks very different than the electric power industry that emerged in the late 19th and early 20th centuries when most energy was provided by vertically integrated monopolies that enjoyed exclusive franchises and protection from competition. Their revenues came from rate-making proceedings that guaranteed recovery for costs that regulators deemed reasonable. That regulatory design led to a number of energy doctrines that courts and policymakers felt were necessary to protect the public utility model.

Today, these doctrines do not seem to serve any socially useful purpose. Instead, zombie energy laws provide a financial windfall for incumbent fossil fuel generators and often create significant barriers to entry for competitive renewable projects. The process of restructuring energy markets should go beyond market processes that procure the cheapest energy in a given moment. Fully restructured markets would also eliminate vestigial energy laws that protect incumbent fossil fuel generators from being subject to laws and regulations that would ensure markets remain competitive.

52. 16 U.S.C. §824e(a).

53. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297, 46 ELR 20078 (2016).

54. *See id.* at 1293.

55. *See Allco Fin. Ltd. v. Klee*, 805 F.3d 89, 92 (2d Cir. 2015).

56. 16 U.S.C. §824(b).

57. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 173-74 (1989).

58. *Id.* at 173.