

TESTIMONY OF JOHN P. COYLE
ENERGY, UTILITIES AND TECHNOLOGY COMMITTEE
MAINE LEGISLATURE
LD 1708 PUBLIC HEARING
MAY 20, 2021

Senator Lawrence, Representative Berry, and Member of the Committee: My name is John P. Coyle. I am an attorney based in Washington, D.C., who has represented consumer-owned utilities in federal and State courts, before State regulatory agencies and the Federal Energy Regulatory Commission (“FERC”) for the past 34 years. I submit this testimony in support of L.D. 1708, “An Act to Create the Pine Tree Power Company, a Nonprofit Utility, to Deliver Lower Rates, Reliability, and Local Control for Maine Energy Independence.” I am filing this testimony as an uncompensated volunteer to provide some background information that I hope will prove useful in the Committee’s deliberations on L.D. 1708.

The Value, Purpose and Vitality of Public Enterprise

First, opponents of L.D. 1708 will likely flood you with cautionary tales about why a public enterprise is financially dangerous or, worse, doomed to failure. There is plenty of negative narrative going both ways in the past 130 years or so of conflict between private and public ownership models in the electric utility industry. The Committee likely does not have the time for point-by-point rebuttal. One State, Nebraska, has entirely embraced consumer-ownership of electric utilities, and has not a single investor-owned utility. Many large American cities – Seattle, Los Angeles, and Sacramento in California, San Antonio and Austin in Texas for example have found the public ownership model quite successful over time. A large number of smaller communities – including the City of Burlington and about twenty other communities in Vermont, the forty-one municipal lighting plants in Massachusetts, and Houlton, Kennebunk, Madison, and Van Buren in Maine – have also found public ownership quite satisfactory (I’m ignoring the Maine islands, which present a whole different set of issues). And that is before you acknowledge the consumer ownership of electric cooperatives throughout New England (including in Calais, Maine’s own Eastern Maine Electric Cooperative).

There are at least three agencies at the State level that are analogous to what Pine Tree Power would become under L.D. 1708: the New York Power Authority, the South Carolina Public Power Authority (also known as “Santee Cooper” after the two rivers that were its original source of power), and the Lower Colorado River Commission in Texas. All of these entities are successful enterprises that have enviable records of providing safe, reliable, and economical electricity to their customers over long histories. And, of course, the use of a State

authority to advance infrastructure development has a proud history here in the Maine Turnpike Authority.

In September 1932, then-Governor Franklin D. Roosevelt, gave a speech in Portland, Oregon that succinctly summed up two points that are useful to the Committee in its deliberations, and that always remind me how little the struggle between public enterprise and private capital has changed in the last 90 years or so. I have submitted a copy of Roosevelt's Portland Speech as an exhibit to my testimony.

Roosevelt's first point was that all monopolies, which is what utilities are, exist because the sovereign permits them to exist, and the sovereign has the right to change or withdraw that authorization. He traced the origins of regulation to King James I of England, who asked his Chief Justice, Lord Hale, to advise him about price gouging by ferry owners. As Roosevelt summarized the situation:

The greed and avarice of some of these ferry-boat owners were made known by an outraged people to the King himself, and he invited his great judge, Lord Hale, to advise him.

The old law Lord replied that the ferrymen's business was quite different from other businesses, that the ferry business was, in fact, vested with a public character, that to charge excessive rates was to set up obstacles to public use, and that the rendering of good service was a necessary and public responsibility. 'Every ferry,' said Lord Hale, 'ought to be under a public regulation, to-wit: that it give attendance at due time, keep a boat in due order, and take but reasonable toll.'

In those simple words, my friends, Lord Hale laid down a standard which, in theory at least, has been the definition of common law with respect to the authority of Government over public utilities from that day down to this.

Roosevelt's second point was that the public has the right to go into business for itself where a regulated monopoly fails to provide reliable service at a fair price:

I therefore lay down the following principle: That where a community — a city or county or a district is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable basic right, as one of its functions of Government, one of its functions of home rule, to set up, after a fair referendum to its voters has been had, its own governmentally owned and operated service.

That right has been recognized in a good many of the States of the Union. Its general recognition by every State will hasten the day of better service and lower rates. It is perfectly clear to me, and to every thinking citizen, that no community which is sure that it is now being served well, and at reasonable rates by a private utility company, will seek to build or operate its own plant. But on the other hand the very fact that a community can, by vote of the electorate, create a yardstick of its own, will, in most cases, guarantee good service and low rates to its population. I might call the right of the people to own and operate their own utility something like this: a 'birch rod' in the cupboard to be taken out and used only when the 'child' gets beyond the point where a mere scolding does no good.

That is the principle which applies to communities and districts, and I would apply the same principles to the Federal and State Governments.

State owned or Federal owned power sites can and should and must properly be developed by Government itself. That has been my policy in the State of New York for four years. When so developed by Government, private capital should, I believe, be given the first opportunity to transmit and distribute the power on the basis of the best service and the lowest rates to give a reasonable profit only. The right of the Federal Government and State Governments to go further and to transmit and distribute where reasonable and good service is refused by private capital, gives to Government — in other words, the people — that very same essential 'birch rod' in the cupboard.

In Roosevelt's hands, that 'birch rod' of public enterprise became the Tennessee Valley Authority, which lifted large parts of seven States out of an endless cycle of flood and poverty, and the Bonneville Power Administration, which electrified the Pacific Northwest. The 'birch rod' works, and so does the public enterprise behind it.

Has Maine reached the point where the price and quality of electric utility service makes it time to reach for the birch rod? The proponents of L.D. 1708 believe that to be the case, and they offer compelling arguments. Being "from away," it is not for me to make that judgment. It is for you, the Members of this Committee to make that judgment and a substantial number of your citizens are telling that it is time that you did. A vote in support of Pine Tree Power Company and L.D. 1708 is precisely the way to express that judgment.

Valuing Higher Returns Over Reliable Service

Another witness for Our Power, my friend Bill Dunn, has submitted testimony presenting compelling statistical evidence concerning the reliability – more precisely, the lack of reliability – and cost of electric distribution service furnished by Maine’s investor-owned utilities. I wanted to amplify one area of Bill’s comments with an article by another friend, Lon L. Peters, a Ph.D. economist with over forty years’ experience in observing and analyzing regulated industries, especially the electric utility industry. Lon’s article, entitled *Shareholders v. Ratepayers in New England*, was published in the March 2021 issue of the *Electricity Journal*, and appears as Exhibit 2 to this testimony.

Lon begins with the observation that transmission rates and investment in transmission assets that drive those rates have grown exponentially over the past fifteen years or so – ever since ISO New England, Inc. became New England’s Regional Transmission Organization. Lon notes that: “From 2007–2020, the [Regional Network Service transmission] rate grew by more than 460 percent, a simple annual growth rate of more than 35 percent.” Like the information provided in Bill Dunn’s testimony concerning the relative returns on transmission assets as compared to distribution system improvements that deliver electricity to the neighborhood and the home, Lon concludes that excessive returns on transmission investment cause that investment to balloon without providing verifiable benefits to the public. Lon concludes:

Do the benefits of more infrastructure justify the costs to consumers? The simplest and most accurate answer is that no one really knows, including FERC. As we have seen, the ISO’s system-wide energy market has not obviously become more competitive; local capacity markets are structurally bound by multiple administrative rules, not competition; changes in reliability have not been measured or the available metrics are inconclusive; and various factors unrelated to grid expansion (including lower consumption due in part to higher prices) have helped reduce emissions.

I encourage the Committee to consider whether the old model of investor ownership has served the State of Maine well, or whether predictable responses to the stimuli of higher rate revenues have left retail electricity customers holding the bag for investments that do not provide them verifiable benefits. Pine Tree Power Company is a bold step, but it is step whose time has come.

Exhibit 1 –

Roosevelt's Portland Speech (September 21, 1932)

Roosevelt's Portland Speech

September 21, 1932

My friends, I have journeyed many times to this beautiful Pacific Coast, but I want to assure you that I have never comprehended, as I have this time, the warmth of your hospitality, the greatness of your resources and opportunities and, I want to add with all earnestness, the great importance of the problem that I am discussing tonight.

I have come, not primarily to speak but, rather, to hear; not to teach, but to learn. I want to hear of your problems, to understand them and to consider them as they bear on the larger scene of national interest.

I have strengthened the belief that I have had for a long time and that I have constantly set forth in my speeches and papers in my work as Governor of the State of New York, that the question of power, of electrical development and distribution, is primarily a national problem.

Speaking in the language of the Navy, with which I was associated for many eventful years, I want at the outset of this discussion to take my bearings, to know my destination, to chart my course. In discussing electrical power, the speaker, like a ship sailing in dangerous waters, must avoid not only unseen shoals and rocky reefs, he must also be on his guard against false lights on the shore. His only protection against all of these dangers is to set squarely and fairly before him the course that he must steer. Let me do that in a few sentences.

As I see it, the object of Government is the welfare of the people. The liberty of people to carry on their business should not be abridged unless the larger interests of the many are concerned. When the interests of the many are concerned, the interests of the few must yield. It is the purpose of the Government to see not only that the legitimate interests of the few are protected but that the welfare and rights of the many are conserved. These are the principles which we must remember in any consideration of this question. This, I take it, is sound Government — not politics. Those are the essential basic conditions under which Government can be of service.

It is scarcely necessary to tell you this out here on the Pacific Coast. In no other section of the country have there been a greater interest in Government and a more intelligent application of the principles of sound Government in its legislation in the action of the administrative authorities, and nowhere, may I add, are the people less bound by mere political factionalism than here.

When questions like these are under consideration, we are not Democrats, we are not Republicans; we are a people united in a common patriotism. This is the spirit of my entire campaign. If the spirit and the method that I am applying to public questions are in line with that of progressive citizens of parties other than my own, I invite them to join me now, as I have invited them many times before. In the face of present national emergencies we must distinguish between parties and their leaders.

When the great possessions that belong to all of us — that belong to the Nation — are at stake, we are not partisans, we are Americans.

It is, therefore, fitting that I should choose this great State of the Coast to set forth my ideas respecting the question of electrical power and to discuss it not only with you here in Portland and in Oregon, but with all of the people in all of the States to whom this subject is a concern affecting their individual lives. This subject has been discussed so much in complex language, in terms which only a lawyer can understand, or in figures which only accountants can understand, that there is need for bringing it back into the realm of simple, honest terms understood by millions of our citizens.

This is particularly true because there has not only been lack of information — and information difficult to understand — but there has been in the past few years, as the Federal Trade Commission has shown, a systematic, subtle, deliberate and unprincipled campaign of misinformation, of propaganda, and, if I may use the words, of lies and falsehoods. The spreading of this information has been bought and paid for by certain great private utility corporations. It has permeated the schools, the editorial columns of newspapers, the activities of political parties, the universities and the printed literature in our book stores. A false public policy has been spread throughout the land, through the use of every means, from the innocent school teacher down to a certainly less innocent former chairman of the Republican National Committee itself.

Let us go back to the beginning of this subject. What is a public utility? Let me take you back three hundred years to old King James of England. The reign of this king is remembered for many great events — two of them in particular. He gave us a great translation of the Bible, and, through his Lord Chancellor, a great statement of public policy. It was in the days when Shakespeare was writing Hamlet and when the English were settling Jamestown, that a public outcry rose in England from travelers who sought to cross the deeper streams and rivers by means of ferry-boats. Obviously these ferries, which were needed to connect the highway on one side with the highway on the other, were limited to specific points. They were, therefore, as you and I can understand, monopolistic in their nature. The ferry-boat operators, because of the privileged position which they held, had the chance to charge whatever the traffic would bear, and bad service and high rates had the effect of forcing much trade and travel into long detours or to the dangers of attempting to ford the streams.

The greed and avarice of some of these ferry-boat owners were made known by an outraged people to the King himself, and he invited his great judge, Lord Hale, to advise him.

The old law Lord replied that the ferrymen's business was quite different from other businesses, that the ferry business was, in fact, vested with a public character, that to charge excessive rates was to set up obstacles to public use, and that the rendering of good service was a necessary and public responsibility. "Every ferry," said Lord Hale, "ought to be under a public regulation, to-wit: that it give attendance at due time, keep a boat in due order, and take but reasonable toll."

In those simple words, my friends, Lord Hale laid down a standard which, in theory at least, has been the definition of common law with respect to the authority of Government over public utilities from that day down to this.

With the advance of civilization, many other necessities of a monopolistic character have been added to the list of public utilities, such as railroads, street railways, pipelines and, more lately, the distribution of gas and electricity.

The principle was accepted, firmly established, and became a basic part of our theory of Government long before the Declaration of Independence itself. The next problem was how to be sure that the services of this kind should be satisfactory and cheap enough while at the same time making possible the safe investment of private capital.

For more than two centuries, the protection of the public was vested in legislative action, but with the growth of the use of public utilities of all kinds in these later days, a more convenient, direct and scientific method had to be adopted — a method which you and I now know as control and regulation by public service or public utility commissions.

Let me make it clear that I have no objection to the method of control through a public service commission. It is, in fact, a proper way for the people themselves to protect their interests. In practice, however, it has in many instances departed from its proper sphere of action, and, I may add, has departed from its theory of responsibility. It is an undoubted and undeniable fact that in our modern American practice the public service commissions of many States have often failed to live up to the very high purpose for which they were created. In many instances their selection has been obtained by the public utility corporations themselves. These corporations, to the prejudice of the public, have often influenced the actions of public service commissions. Moreover, some of the commissions have, either through deliberate intent or through sheer inertia, adopted a theory, a conception of their duties wholly at variance with the original object for which they were created.

Let me illustrate: When I became Governor, I found that the Public Service Commission of the State of New York had adopted the unwarranted and unsound view that its sole function was to act as an arbitrator or a court of some kind between the public on the one side and the utility corporations on the other. I thereupon laid down a principle which created horror and havoc among the Insulls and other magnates of that type.

I declared that the Public Service Commission is not a mere judicial body to act solely as umpire between complaining consumer or the complaining investor on the one hand, and the great public utility system on the other hand. I declared that, as the agent of the Legislature, the Public Service Commission had, and has, a definitely delegated authority and duty to act as the agent of the public themselves; that it is not a mere arbitrator as between the people and the public utilities, but was created for the purpose of seeing that the public utilities do two things: first, give adequate service; second, charge reasonable rates; that, in performing this function, it must act as agent of the public, upon its own initiative as well as upon petition, to investigate the acts of public utilities relative to service and rates, and to enforce adequate service and reasonable rates.

The regulating commission, my friends, must be a Tribune of the people, putting its engineering, its accounting and its legal resources into the breach for the purpose of getting the facts and doing justice to both the consumers and investors in public utilities. This means, when

that duty is properly exercised, positive and active protection of the people against private greed!

So much for the simple, clear and definite theory of regulation — a theory which today is observed more in the breach than in the observance.

Now, I come to another principle which, in spite of having been befogged and bedeviled by many utility companies — and, I am sorry to say, by many of our courts as well — is nevertheless clear and simple when you get down to the roots of it.

The ferryman of old, under King James, through regulation and control of the Government, was compelled to give fair service for a fair return on his labor and a fair return on his property. It is only in recent days that the direct descendants of the old English ferryman have in hundreds of cases found ways of paying to themselves inordinate and unreasonable profits and overcapitalizing their equipment, three, five yes, even ten times the money which they themselves have put into it.

I am not going to confuse the issue by setting forth a lot of figures, but I do ask you to remember a few simple facts which are so tremendously important in our economic life.

Our good friend, Senator Norris, of Nebraska, using the figures of the Federal Trade Commission, summarized this in a great speech in the Senate of the United States only two months ago. He pointed out the overcapitalization of many companies by name, in definite figures, and summed up the discussion by setting forth in round numbers that these main companies had been found to be overcapitalized to the extent of \$520,000,000!

This means, my friends, that the people of the United States were called upon to supply profits upon this amount of watered stock. It means that someone was deriving profits from the capitalization into which he had put no substantial capital himself. It means that the people had to pay these unjust profits through higher rates.

As Senator Norris eloquently pointed it out, on the floor of the Senate, in these words: "Just try to comprehend what that means. With the investigation only partially finished, the Federal Trade Commission has disclosed 'write-ups' (and this means water) in round numbers to the amount of five hundred and twenty million dollars upon which the poor people, the common people, must pay a profit for all times — not for a day, not for a year, but unless some change is made in public authority, it must be paid forever." And Senator Norris added this: "As I showed yesterday in the beginning, all this investigation would have been stopped (meaning the investigation by the Federal Trade Commission) if President Hoover had his way. He is opposed to it all."

These were the deliberate spoken words of Senator Norris on the floor of the United States Senate July 14, 1932, a permanent record for the benefit of the American people — uncontroverted and uncontrovertible!

Let us consider for a moment the vast importance of the American utilities in our economic life; and in this, I am not including the railroads and other transportation companies, which I have already discussed. The utility industry in 1931 collected over four billion dollars in one year

from the users of electricity, gas, telephone and telegraph. That means an average of \$133 from each and every family in the United States.

According to the figures of the industry itself, the American public has invested nearly twenty-three billions in public utilities, again excluding the railroads which account for about eleven billions more.

You will readily see that this "lusty younger child" of the United States needs to be kept very closely under the watchful eye of its parent, the people of the United States.

But these cold figures do not measure the human importance of the electric power in our present social order. Electricity is no longer a luxury. It is a definite necessity. It lights our homes, our places of work and our streets. It turns the wheels of most of our transportation and our factories. In our homes it serves not only for light, but it can become the willing servant of the family in countless ways. It can relieve the drudgery of the housewife and lift the great burden off the shoulders of the hardworking farmer.

I say "can become" because we are most certainly backward in the use of electricity in our American homes and on our farms. In Canada the average home uses twice as much electric power per family as we do in the United States.

What prevents our American people from taking full advantage of this great economic and human agency? The answer is simple. It is not because we lack undeveloped water power or unclaimed supplies of coal and oil.

The reason is that we cannot take advantage of our own possibilities. The reason is frankly and definitely that many selfish interests in control of light and power industries have not been sufficiently far-sighted to establish rates low enough to encourage widespread public use. I wish that every community in the United States could have rates as low as you have them here in Portland. The price you pay for your utility service is a determining factor in the amount you use of it.

Low prices to domestic consumers will result in their using far more electrical appliances than they do today. Again let me speak plainly. Through lack of vigilance in State capitals and in the national Government, we have allowed many utility companies to get around the common law, to capitalize themselves without regard to actual investment made in property, to pyramid capital through holding companies and, without restraint of law, to sell billions of dollars of securities which the public have been falsely led into believing were properly supervised by the Government itself.

And now for a personal word. I am speaking to you as the Governor of the State of New York, who for four years has been attacked by the propaganda of certain utility companies as a dangerous man. I have been attacked for pointing out the same plain economic facts that I state here tonight.

My answer has been, as it is tonight, to point out these plain principles that seek to protect the welfare of the people against selfish greed. If that be treason, my friends, then make the most of it!

But, I have found new converts to my treason.

The President's Federal Trade Commission has just come out with a report which, if I am not mistaken, is a last-minute effort to fall in line with the plain implication of the present understanding — the present temper — of the public of this country. Some of its conclusions bear careful reading, in the light of what the President has said on many occasions in the past.

Back in 1925, the then Secretary of Commerce, now the President, said: "Nothing could be more hideous extension of centralization in Federal Government than to undermine State utility commissions and State responsibility." Somewhat later he said: "The argument is sometimes used that the power situation is parallel with the railroads where Federal regulation has been found absolutely necessary. This is an illusion. It differs in several profound respects. Power has no such interstate implication as transportation. Furthermore, there has been outrageous exaggeration of the probable extent of interstate power. For economic reasons these power districts will, in but few cases, reach across State lines."

Thus spoke the present President of the United States in opposition to Federal regulation and control of any power public utilities. His statement of facts then is now contradicted by his own Federal Power Commission.

That Commission states what I have long been saying, that power has grown into interstate business of vast proportions and requires the strict regulation and control of the Federal Government. The Commission says: "Analysis of information furnished by ninety-one holding companies shows that forty-eight major projects under public utilities are subject to control by ten top companies and these ten groups serve 12,478 communities with a population of more than forty-two million people."

Let me give you an illustration, not only to show the vast extent of operations of some of these great companies, but the unsound conditions created by the policies of the Federal non-interference which the President of the United States still so valiantly maintains.

The crash of the Insull empire has given excellent point to the truth of what I have been arguing for four long years.

The great "Insull monstrosity," made up of a group of holding and investing companies, and exercising control over hundreds of thousands of operating companies, had distributed securities among hundreds of thousands of investors, and had taken their money to an amount running over one and a half billions of dollars — not millions, but billions!

That "Insull monstrosity" grew during the years of prosperity until it reached a position where it was an important factor in the lives of millions of our people. The name was magic. The investing public did not realize then, as it does now, that the methods used in building up these holding companies were wholly contrary to every sound public policy.

They did not realize that there had been arbitrary write-ups of assets and inflation of vast capital accounts. They did not realize that excessive prices had been paid for property acquired. They did not realize that the expense of financing had been capitalized. They did not realize that payments of dividends had been made out of capital. They did not realize that sound subsidiaries had been milked and milked to keep alive the weaker sisters in the great chain.

They did not realize that there had been borrowings and lendings, an interchange of assets, of liabilities and of capital between the component parts of the whole. They did not realize that all these conditions necessitated terrific overcharges for services by these corporations.

The Insull failure has done more to open the eyes of the American public to the truth than anything that has happened. It shows us that the development of these financial monstrosities was such as to compel inevitable and ultimate ruin; that practices had been indulged in that suggest the old days of railroad wild-catting; that private manipulation had outsmarted the slow-moving power of Government.

As always, the public paid and paid dearly. As always, the public is beginning to understand the need for reform after the same public has been fleeced out of millions of dollars.

I have spoken on several occasions of a "new deal" for the American people. I believe that the "new deal," as you and I know it, can be applied to a whole lot of things. It can be applied very definitely to the relationship between the electric utilities on the one side, and the consumer and the investor on the other.

True regulation is for the equal benefit of the consumer and the investor. The only man who will suffer from true regulation is the speculator, or the unscrupulous promoter who levies tribute equally from the man who buys the service and from the man who invests his savings in this great industry.

I seek to protect both the consumer and the investor. To that end I now propose and advocate, as I have proposed and advocated heretofore, the following remedies on the part of the Government for the regulation and control of public utilities engaged in the power business, and companies and corporations relating thereto:

First: Full publicity as to all capital issues of stocks, bonds and other securities; liabilities and indebtedness; capital investment; and frequent information as to gross and net earnings. In other words, let us "turn on the light!"

Second: Publicity on stock ownership of stocks and bonds and other securities, including the stock and other interest of every officer and every director in every company.

Third: Publicity with respect to all intercompany contracts and services and interchange of power. Again, "let in the light!"

Fourth: Regulation and control of holding companies by Federal Power Commission, and the same publicity with regard to such holding companies as provided for the operating companies.

Fifth: Cooperation of Federal Power Commission with Public Utilities Commissions of the several States, obtaining information and data pertaining to the regulation and control of such public utilities. I speak with experience as to this, as Governor of a State!

Sixth: Regulation and control of the issue of stocks and bonds and other securities on the principle of prudent investment only.

Seventh: This is a technical matter, but it goes to the root of the subject. Abolishing by law the so-called reproduction cost theory for rate-making, and establishing in place of it the actual money prudent-investment principle as the basis for rate-making.

Eighth: Legislation making it a crime to publish or circulate false or deceptive matter relating to public utilities, or public utility commissions anywhere, and at any time.

I come now to the other great problem of the relationship of the Government to the development through Government itself of power resources and power manufacture.

I do not hold with those who advocate Government ownership or Government operation of all utilities. I state to you categorically that as a broad general rule the development of utilities should remain, with certain exceptions, a function for private initiative and private capital.

But the exceptions are of vital importance, local, State and national, and I believe that the overwhelming majority of the people in this country agree with me.

Again we must go back to first principles: A utility is in most cases a monopoly, and it is by no means possible, in every case, for Government to insure at all times by mere inspection, supervision and regulation that the public get a fair deal — in other words, to insure adequate service and reasonable rates.

I therefore lay down the following principle: That where a community — a city or county or a district is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable basic right, as one of its functions of Government, one of its functions of home rule, to set up, after a fair referendum to its voters has been had, its own governmentally owned and operated service.

That right has been recognized in a good many of the States of the Union. Its general recognition by every State will hasten the day of better service and lower rates. It is perfectly clear to me, and to every thinking citizen, that no community which is sure that it is now being served well, and at reasonable rates by a private utility company, will seek to build or operate its own plant. But on the other hand the very fact that a community can, by vote of the electorate, create a yardstick of its own, will, in most cases, guarantee good service and low rates to its population. I might call the right of the people to own and operate their own utility something like this: a "birch rod" in the cupboard to be taken out and used only when the "child" gets beyond the point where a mere scolding does no good.

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State owned or Federal owned power sites can and should and must properly be developed by Government itself. That has been my policy in the State of New York for four years. When so developed by Government, private capital should, I believe, be given the first opportunity to transmit and distribute the power on the basis of the best service and the lowest rates to give a reasonable profit only. The right of the Federal Government and State Governments to go further and to transmit and distribute where reasonable and good service is refused by private capital, gives to Government — in other words, the people — that very same essential "birch rod" in the cupboard.

This Nation, through its Federal Government, has sovereignty over vast water-power resources in many parts of the United States. A very few of these are in process of development. A few more are in the blueprint stage, and many others have not even been surveyed.

We have undertaken the development of the Boulder Dam on the Colorado River. The power will be sold by the United States Government at a cost that will return the Government investment with 4 percent interest in fifty years.

Long before that, we undertook the development at Muscle Shoals, and all that we have got out of it has been a series of Presidential vetoes. We have spent millions on this project.

In contrast, let me repeat the position which I took when I was first inaugurated Governor of New York in January, 1929, and which I have maintained ever since. I said then, and I say now: "The water power of the State should belong to all the people. The title to this power must rest forever in the people. No commission — not the Legislature itself — has any right to give, for any consideration whatever, a single potential kilowatt in virtual perpetuity to any person or corporation whatever. It is the duty of our representative bodies to see that this power is transferred into usable electrical energy and distributed at the lowest possible cost. It is our power — and no inordinate profits must be allowed to those who act as the people's agent in bringing this power to their homes and workshops."

We have, as all of you in this section of the country know, the vast possibilities of power development on the Columbia River. And I state, in definite and certain terms, that the next great hydro-electric development to be undertaken by the Federal Government must be that on the Columbia River.

This vast water power can be of incalculable value to this whole section of the country. It means cheap manufacturing production, economy and comfort on the farm and in the household. Your problem with regard to this great power is similar to our problem in the State of New York with regard to the power development of the St. Lawrence River.

Here you have the clear picture of four great Government power developments in the United States — the St. Lawrence River in the Northeast, Muscle Shoals in the Southeast, the Boulder Dam project in the Southwest, and finally, but by no means the least of them, the Columbia River in the Northwest. Each one of these, in each of the four quarters of the United States, will be forever a national yardstick to prevent extortion against the public and to encourage the wider use of that servant of the people — electric power.

Although the President, in his acceptance speech, recommends the Federal regulation of interstate power, he has in the past, and as Secretary of Commerce in the Harding and Coolidge Cabinets, opposed Federal regulation of interstate holding and transmission companies. He has been silent on the non-enforcement of the Federal Water Power Act. He has been evasive on valuation methods and high rates and is apparently satisfied with the present type of forty-eight different varieties of State regulation.

Since 1928 the distinguished gentleman who is running against me has done nothing to enforce the regulatory sections of the Federal Water Power Act. He has done nothing to block the financial operations incident to the great post-war power development as planned by its

promoters. The history of the Federal Power Commission, prior to the creation of a full-time commission under the Couzens bill after a Congressional investigation, the character of the appointments made when this Commission took office, the Muscle Shoals veto, and the closing of the White House doors to the public interest in the St. Lawrence project — all demonstrate that the policy of the present Republican leadership is dominated by private rather than public interest.

In 1925 Secretary Hoover said that while there was a considerable amount of speculation going on, especially in the stocks of holding companies, he wished to make it clear that with an intelligent State regulation neither watered capital nor speculation could affect the rates paid by consumers and that there was no need for Federal control.

While President Hoover now urges Federal control, no administration bill has been introduced in Congress in the past four years.

My distinguished opponent is against giving the Federal Government in any case the right to operate its own power business. I favor giving the people this right where and when it is essential to protect them against inefficient service or exorbitant charges.

As an important part of this policy the natural hydro-electric power resources belonging to the people of the United States, or the several States, shall remain forever in their possession. To the people of this country I have but one answer on this subject. Judge me by the enemies I have made. Judge me by the selfish purposes of these utility leaders who have talked of radicalism while they were selling watered stock to the people and using our schools to deceive the coming generation.

My friends, my policy is as radical as American liberty. My policy is as radical as the Constitution of the United States.

I promise you this: Never shall the Federal Government part with its sovereignty or with its control over its power resources, while I am President of the United States.

Exhibit 2 –

L. Peters, *Shareholders v. Ratepayers in New England*
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Shareholders v. ratepayers in New England

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ABSTRACT

This paper reviews claims by the Independent System Operator-New England and regional transmission owners that billions of dollars invested in transmission infrastructure over the last two decades are justified by more competitive markets, higher reliability, and lower emissions. Absent evidence for these claims, the paper concludes that the Federal Energy Regulatory Commission has instead opted to transfer economic rent from ratepayers to shareholders of transmission companies.

1. Introduction

Prior to the divestiture of generation and the formation of ISOs and RTOs, transmission investments by vertically-integrated utilities were subject to review by state regulators, who could, at least in some cases, deny recovery of “imprudent” costs by excluding them from rate base.¹ Investments in transmission infrastructure within ISOs and RTOs are now nominally subject to oversight by the Federal Energy Regulatory Commission (FERC or the Commission) under the Federal Power Act. In practice, FERC (a) does not conduct *ex ante* reviews of investment plans or *ex post* prudence reviews of incurred costs by transmission owners within ISOs and RTOs; (b) allows incumbent transmission owners to hold “rights of first refusal” that block competitive entry; and (c) encourages over-building by authorizing returns-on-equity (ROEs) that assume dysfunctional capital markets. Anecdotal evidence suggests that investments in transmission capacity

by incumbents are essentially free of regulatory scrutiny, eliminating the risk of investments being declared imprudent.² In its reliance on the umbrella of ISO and RTO foundational agreements, the Commission assumes that RTO/ISO processes yield solutions that simultaneously reward shareholders, protect consumers, and create a cleaner environment, based in part on the assertions of ISOs and transmission owners, without evidence, that environmental and economic benefits result from new transmission capacity. This note checks these assumptions and assertions.³

The ISO in New England (ISO-NE) reports over \$11 billion in investments from 2002 through part of 2020, with another \$1 billion under construction, planned or proposed for 2021–23.⁴ This growth in transmission rate base and related expenses, combined with FERC-approved ROEs and capital structures, has led to a significant increase in transmission rates. The ISO’s Regional Network Service (RNS) rate has risen accordingly; this charge is passed through to retail customers

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¹ Sidak and Spulber (1997), *passim*.

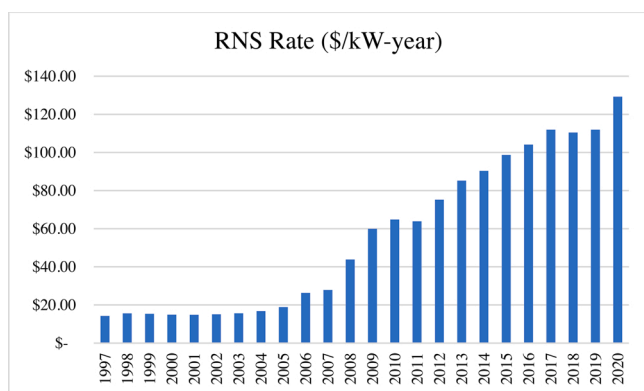
² Huntoon (2015).

³ For some other ISO operations, see Anaya and Pollitt (2017).

⁴ Transmission investments are summarized at <https://www.iso-ne.com/about/key-stats/transmission>.

<https://doi.org/10.1016/j.tej.2020.106905>

by state and local regulators.⁵



From 2007–2020, the RNS rate grew by more than 460 percent, a simple annual growth rate of more than 35 percent.⁶

According to ISO-NE, investments in the regional grid have been good for both consumers and the environment.

[C]ooperative regional investment. . . not only *improves reliability* but also *enables the competitive markets* to work as designed. Transmission. . . upgrades allow the ISO to *dispatch the most economic resources throughout the region, allow less-efficient resources to retire, and enable the interconnection of power plants with lower emissions.*⁷

Given the magnitude of the costs, there should be some evidence of verifiable benefits in three areas: (a) more competitive markets, (b) higher reliability (due to fewer service interruptions), and (c) lower emissions (due to new lower-emitting fossil-fueled plants and renewable resources). There should also be evidence of causal relationships: that the investments led to the claimed benefits, net of the influence of other factors. Finally, there should be evidence that the value received and expected due to the investments both is and will be greater than or equal to the costs to consumers.⁸

2. Has market power declined?

Divestiture of generation beginning in the 1990s led to “administered markets” in New England, which use auctions, contracts, price floors, and bid mitigation rules to set payments for energy and capacity. One concern in designing auctions is the potential exercise of market power by generators, especially in “load pockets” surrounded by transmission constraints that limit the ability of imports to put competitive

⁵ The RNS rates are assembled from <https://www.slideserve.com/katen/rns-rate-effective-june-1-2013> (for 1997–2013), and <https://www.iso-ne.com/markets-operations/settlements/tariff-rates> (“section2-rate-summary-2020-v1.xls”, for 2013–20). The two sources overlap and show different rates for 2013; this note uses the later source.

⁶ If loads have fallen due to the higher price of delivered energy, environmental benefits are driven by lower consumption, less generation and lower emissions. A tax on consumption could have yielded these emission reductions without diverting scarce resources to the construction of transmission plant in the region.

⁷ <https://www.iso-ne.com/about/key-stats/transmission>; emphases added.

⁸ Because these investments have long service lives, benefits should continue into the future. See FERC Docket No. EL16–64 (testimony of Quackenbush and Bowes). Bowes put forward a true conundrum: reliability benefits are “not readily quantifiable” but are “of vital importance”.

pressure on prices.⁹ In areas such as Boston and southwestern Connecticut, where loads may exceed local resources, generators may have the ability to manipulate the prices of energy and capacity, and mitigation of market power may be needed to protect consumers. Infrastructure investments can theoretically increase competition across the region, allowing more lower-cost resources to displace higher-cost supplies. Reports of the ISO’s Internal Market Monitor (IMM) help assess claims that transmission investments have mitigated market power and thus benefited consumers by moving energy prices closer to competitive levels.

The question here is not whether ISO-NE markets are or have been “reasonably competitive”, but whether the growth in transmission capacity has helped move markets *toward* being more competitive, as alleged by the ISO and incumbent transmission owners. The simple theory of competitive markets concludes that spot market prices should track the marginal cost of production, and the ISO has regularly calculated the Lerner index for spot market energy: the ratio of prices to marginal costs.¹⁰ Although the ISO has changed its methodology over time, mainly in the interest of increased accuracy, all but one of the Internal Market Monitor (IMM) reports since 2002 have used a version of the Lerner index to conclude that regional energy markets have been competitive.¹¹ The following chart shows two Lerner ratios published by the ISO’s IMM for 2002–19; higher values indicate less competitive market conditions.¹²

The 2004–09 period showed *rising* Lerner values, implying *less* competitive spot markets for energy. Since then, and after considerable investments in the grid, the Lerner index has varied within a range of four to ten percent with no obvious trend. This data contradicts claims that markets have become *more* competitive due to the more robust infrastructure.¹³

3. Have congestion costs and reliability payments fallen?

In support of reliability requirements given physical constraints on the grid, consumers pay for congestion costs (recovered separately from payments to generators at the relevant locational marginal price), short-

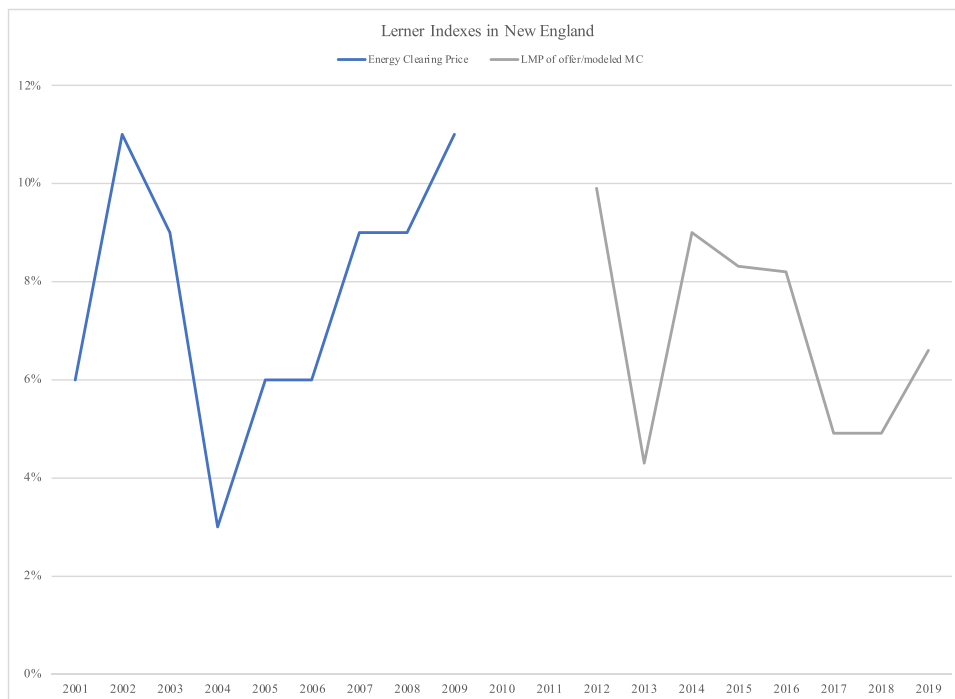
⁹ “Load pockets are areas of the system that require local generation to meet demand because the transfer capability of the transmission system is insufficient to serve the load in the area.” See the Internal Market Monitor’s (IMM) report on 2012 at 10, footnote 21. Load pockets change over time depending on local loads, local generation, and transmission constraints, but have not disappeared entirely due to investment in infrastructure. See the IMM report on 2018 at 90, discussing the Hartford pocket. All IMM and External Market Monitor (EMM) reports are posted at <https://www.iso-ne.com/markets-operations/market-monitoring-mitigation>.

¹⁰ The IMM has reported on other indices, such as Residual Supplier, but changes over time in grid topography and the introduction of new capacity markets complicate longitudinal comparisons with these other indices and make conclusions difficult.

¹¹ See the IMM and EMM market monitoring reports.

¹² The ratios compare prices and marginal costs in different ways; because of changes in methodology over time, two indexes are shown. LMP mean Locational Marginal Price. No Lerner values have been reported for 2010–2011, hence the gap in the time series. See the IMM reports for definitions of these ratios.

¹³ A counterfactual exercise might test the hypothesis that the *absence* of grid investments would have made the index even higher, but the construction of the counterfactual would be complex and subject to interpretation. Forward capacity markets (FCMs) have unit-specific administered price floors, market-wide price floors and multiple mitigation rules, and changing definitions of local capacity zones; the competitive state of FCMs is unclear at best. For example, see the IMM report for 2010 (at 106) and the IMM report for 2015 (Table 6–2 and section 6.1.).



run net commitment period compensation payments (NCPC), and long-run reliability must-run contract payments (RMR). Reductions in these costs are beneficial to consumers, and expansion of grid capacity should help reduce all three: more low-cost generation displacing high-cost generation reduces congestion, grid upgrades substituting for RMR contracts, and imports into load pockets reducing the need to pay generators to remain committed to serving load.

The ISO's External Market Monitor (EMM) report for 2019 affirms that congestion costs have fallen, while noting the trade-off in the form of higher transmission rates to consumers.

ISO-NE experiences far less congestion than other RTOs. On a per MWh of load basis, the average congestion cost in New England has been less than \$0.40 in the last four years, which was one-tenth to one-fifth of the congestion levels in other RTO markets. This reflects that large transmission investments have been made over the past decade, resulting in transmission service cost of more than \$17 per MWh – well more than double the average rates in other RTO markets.¹⁴

The ISO has reported that all of these costs declined over time, but has also recognized that multiple factors are at work.

Transmission system upgrades have nearly eliminated congestion costs in the New England energy market and, with the aid of low natural gas prices and other factors, have helped drive down and mitigate “uplift” payments to run specific generators to meet local reliability needs.¹⁵

The separable impact of grid investments on NCPC and RMR payments is not clear because of the role of other factors, such as reforms of market rules that eliminated or reduced the exercise of market power and thus payments to generators that may have been unjust and unreasonable. It is at least possible, if not likely, that excessive NCPC and RMR payments to generators were replaced by excessive costs for transmission service.

According to the EMM, local reliability payments did not necessarily result from competitive pressures, but the exercise of market power:

[i]n previous years, we found that frequent supplemental commitment [for local reliability] encouraged some generators to raise their offers above competitive levels (i.e., above marginal cost). This was because generators committed for local reliability often do not face meaningful competition and may have local market power.¹⁶

In the 2009 docket that approved capacity markets as a replacement for reliability payments, the ISO/NEPOOL stated that then-current “NCPC mitigation thresholds provide market participants with *inappropriate incentives to place inflexible operating limits on their resources, which have adverse consequences on prices and system operation.*” (Emphasis added.) The thresholds allowed “NCPC mitigation [to be] imposed if . . . the amount of NCPC [i.e., the sum of the start-up fee, the no-load fee and the energy price] exceeds twice the resource’s Reference Level [the sum of fuel and variable O&M costs].”¹⁷ That is, generators were allowed to receive payments up to twice the level of their variable costs, arguably aimed to cover fixed costs, before risking mitigation (i.e., reduction) of their bids, whether or not those payments were actually higher than necessary for reliability standards.¹⁸ At the time, the ISO asserted that “all market participants have *incentives to maximize NCPC payments.*”¹⁹ Reforms of market rules reduced and almost eliminated NCPC payments *before* the grid investments made after 2010. Lastly, Reliability Must-Run (RMR) agreements are essentially long-term versions of NCPC arrangements. RMR contracts were largely phased out by the end of 2010 as well, due to the development of new forward capacity markets (FCMs).²⁰

¹⁶ See the EMM report for 2009 at ix (footnotes omitted).

¹⁷ See *Order Conditionally Accepting Market Rule 1 Revisions*, Docket No. ER09–1546-000 (2009) at 2.

¹⁸ These higher-than-necessary payments were economic rents: transfers from consumers to producers not needed to elicit the desired supply. Rent transfers do not enhance social welfare, but only create winners and losers.

¹⁹ See *Order Conditionally Accepting Market Rule 1 Revisions*, Docket No. ER09–1546-000 (2009) at 7 and note 14 above.

²⁰ See the EMM report for 2010, at xi. RMR contracts continue depending on local conditions. See the IMM report for 2018 at 157.

¹⁴ See the EMM report for 2019 at vi.

¹⁵ See <https://www.iso-ne.com/about/key-stats/transmission>. This public acknowledgement contrasts with arguments at FERC arguing for ROEs intended to encourage more investment in transmission.

Market reforms and new auctions are not transmission infrastructure, nor did the decision to introduce FCMS require prior or subsequent investments in transmission capacity.²¹ Counting lower NCPC and RMR payments as a benefit that justifies grid investments ignores history.

4. Has reliability improved?

Aside from NCPC and RMR payments, which generated explicit costs to consumers for maintaining reliability, investments in transmission capacity may have also made the grid physically more robust, less vulnerable to forced outages, and quicker to restore service. However, evidence of higher reliability is not readily available. One limited source is data submitted to FERC by ISO-NE, which shows that unplanned high-voltage outages (> 200 kV) as a share of total outages rose during 2005–09 to about 22.5 percent, then fell into and stayed within the range of 10–15 percent during 2010–14.²² If we assume that at least some unplanned outages, such as those caused by storms, are likely to affect high- and low-voltage plant similarly, this metric does not demonstrate an increase in even *relative* resilience at the high-voltage level due to investments. The ISO also reported an increase during 2010–14 in the share of planned outages that gave at least one month's notice to the ISO; without providing an estimate of the potential benefits of more notice.²³ However, more notice does not require more infrastructure, but is driven instead by better coordination, planning, communications, and maintenance practices. At this point, there is no evidence that the reliability of the high-voltage grid increased with capital investments in New England, let alone that such investments *caused* any change in reliability. In any event, arguments for a monocausal relationship ignore other reasons for unplanned outages.

5. Have emissions fallen?

As noted above, ISO-NE and regional transmission owners have claimed that more transmission capacity has been beneficial for the environment, enabling a shift away from higher-emission generation to renewables and new, lower-emission gas-fired plants. As with reliability, this assertion distracts attention from other causes of environmental improvement. First, during the last two decades, state policies aimed at carbon reduction have clearly changed, *requiring* emission reductions, which suggests that the ISO is simply enabling state policies that ultimately cause environmental improvements.²⁴ Without state policies, would the ISO have planned for less carbon? Second, in some cases, new plants with lower emissions have been located where old plants with higher emissions have retired; to the extent that transmission assets were “recycled” to the new lower-emission plants, the ISO is overstating its case. Third, new capacity markets have reduced the region's reliance on slow-moving, high-inertia fossil-fuel plants for regulation and frequency control, thus increasing reliance on low-inertia, but also lower emission, gas plants.²⁵ This is another example of market design, not infrastructure, causing environmental benefits. Fourth, falling total annual consumption in the region means that less total generation is required, which reduces emissions without new transmission infrastructure.²⁶ Fifth, generators have invested in emission control equipment because of the Clean Air Interstate Rule approved by the

²¹ RMR contracts are themselves a potential source of market power. See Macey and Salovaara (2020).

²² See Docket Nos. AD10–5 and AD14–15. In Docket No. AD19–16, the Commission revised FERC-922 and eliminated this metric for the period after 2014.

²³ The specific metric was the “percentage of >200 kV Planned Outages of Five Days or More Submitted to ISONE at Least One Month Before the Outage Commencement Date”, which rose from 82.4% to 98.3% in this period.

²⁴ See D'Antonio (2019).

²⁵ Buchsbaum et al. (2020).

²⁶ For example, total annual energy sales in New England were lower on average in 2018–19 than they were in 2000. <https://www.eia.gov/electricity/data.php>.

Environmental Protection Agency in 2005.²⁷ Proponents of the infrastructure theory implicitly and completely discount all of these other factors, leading to the false conclusion that transmission investments were and are justified by observed emission reductions.

6. Capital-intensity Bias at the ISO and FERC

Given that the available evidence does not support the claims of the ISO and incumbent transmission owners, what accounts for the continued growth in rate base? The Commission's statutory obligation under “[s]ection 205(a) of the Federal Power Act ... [is] that all electric rates subject to the jurisdiction of the Commission be ‘just and reasonable.’ In the exercise of this statutory responsibility, the Commission seeks to set rates of return on common equity that are fair to both ratepayers and stockholders”, but this principle is almost certainly honored more in the breach than the observance: there is “too much” transmission plant.²⁸ Not every possible investment can meet the just and reasonable standard, or we would not need to regulate monopolies. Economic theory has long recognized the risk that investments in fixed assets, such as transmission, may likely be excessive due to the Averch-Johnson capital bias: regulated monopolies have an incentive to make uneconomic and inefficient capital-intensive investments due to the ability to charge consumers an ROE greater than the cost of capital.²⁹ Alternatives to investments by transmission owners do not yield authorized ROEs for shareholders or rewards to corporate officers based on earnings, so transmission owners have a weak incentive to find, analyze and advocate for solutions that minimize costs to ratepayers rather than maximizing dividends shareholders and bonuses, and the Commission has accepted, without challenge, arguments that transmission investments yield unquantified (and unquantifiable) benefits to consumers and the environment.

The Averch-Johnson bias toward capital is reinforced by the governing structure of the ISO, which defers to transmission owners, and the deference of FERC to the ISO. According to James et al., ISO-NE uses an “advisory-only” form of stakeholder governance.

In advisory-only stakeholder processes (ISO-NE, MISO and SPP) the stakeholders serve in an advisory role to the RTO's board of directors. Importantly, advisory-only stakeholder-governance structures send market-rule and tariff changes through the stakeholder process to receive input. However, the board of directors generally retains the Section 205 filing rights. For this reason, the board ultimately has authority to control which market-rule changes are submitted to FERC. However, stakeholders may still comment on or protest the proposal during the FERC proceeding.³⁰

FERC has elected to rely on hypothetical competition and a modicum of regulatory oversight. As the ISO has argued, citing Commission precedent,

[t]he Transmission Planning Improvements are submitted pursuant to Section 205 of the FPA, which “gives a utility the right to file rates and terms for services rendered with its assets.” Under Section 205, the Commission “plays ‘an essentially passive and reactive’ role” whereby it “can reject [a filing] *only if* it finds that the changes proposed by the public utility are *not just and reasonable.*” The Commission limits this

²⁷ Holland et al. (2020) and Andaloussi (2018).

²⁸ See *Generic Determination of Rate of Return on Common Equity for Public Utilities*, Order 420, FERC Stats. & Regs. ¶ 30,644 at 31,336 (1985) (footnote omitted).

²⁹ Averch and Johnson (1962). FERC has exacerbated this bias by authorizing ROEs that have not tracked the market cost of capital as the latter has fallen over the last few decades. See the testimony of Peters in FERC Docket No. EL16–64.

³⁰ James et al. (2017) at 4 also point to a “jump ball” rule in New England that allows a majority vote of the Participants Committee to compel the ISO to file competing market rules under section 205 of the Federal Power Act. See <https://www.iso-ne.com/participate/filings-orders/ferc-orders/>. FERC has declared that it does not have to consider competing proposals. See *Order Accepting Tariff Revisions*, 169 FERC ¶61,195, December 10, 2019.

inquiry “into whether the rates proposed by a utility are reasonable – and [this inquiry does not] extend to determining whether a proposed rate schedule is more or less reasonable than alternative rate designs.” The Transmission Planning Improvements filed herein “need not be the only reasonable methodology, or even the most accurate.” As a result, even if an intervenor or the Commission develops an alternate proposal, the Commission must accept this Section 205 filing if it is just and reasonable.³¹

Nor does *ex post* prudence review play a role:

[u]nlike transmission investments made by state-regulated utilities, which are subject to prudence review by state commissions, there is no effective FERC prudence review over RTO and ISO transmission investment to assure costs are not excessive. Instead, FERC has chosen to rely on competition to police excessive RTO and ISO transmission costs, rather than prudence review.³²

Transmission owners in New England have stated that the ISO follows a rigorous internal review of “needs and solutions”, relies on competitive solicitations of the latter, and complies with Order 1000 regarding transmission planning, claims contradicted in part by Joskow.³³ A persisting shield against competitive pressure is the declaration of a “time-sensitive” need: projects required in the next three years. In the 2019 transmission system plan, the ISO discussed only one non-time-sensitive need, for certain peak load conditions in Boston.³⁴ According to Joskow (2020), New England stands alone among ISOs and RTOs in not issuing competitive solicitations until recently. See Docket Nos. EL19-90, EL19-91, EL19-92, and 171 FERC 61,211. The Commission has agreed that time-sensitivity trumps competition:

the criteria for the immediate need reliability exemption adopted by the Commission appropriately maintain the balance between reliability and competition and ensure that immediate need reliability projects continue to be designated as an exception that should only be used in limited circumstances.³⁵

The ISO did not issue the first RFP for competitive transmission procurement until December 2019, almost a decade after Order 1000, and the ISO still reserves “near-term reliability projects” for incumbents, with FERC’s approval.³⁶ Perhaps not surprisingly, most transmission projects are deemed to be necessary for “near-term reliability” needs. Two decades of coordinated planning and investments have, implausibly, left the ISO in a situation where almost all grid investments are time-sensitive. This suggests (a) a uniquely unpredictable regional power grid, (b) a unique failure of the planning process, (c) the continuing need for repair of a uniquely weak grid inherited two decades ago, and/or (d) a decision to protect incumbents from competitive pressures and regulatory review. In New England, the reliability exception has proven to be the norm.

³¹ See Docket No. ER20–92-000, ISO submission of Oct. 11, 2019, at 5 (emphases added, footnotes deleted). The Commission accepted the filing without modification, ruling that all protests were “out of scope”. Such a procedural deflection leaves protestants without recourse at FERC. See *Order Accepting Tariff Revisions*, 169 FERC ¶61,195, December 10, 2019.

³² Letter from Kelliher, J.T., NextEra Energy, Inc. to Walker, B.J., Department of Energy, October 24, 2018, regarding the procedures for congestion studies published at 83 Fed. Reg. 42,647, August 23, 2018 (emphasis added).

³³ Joskow (2020) at 292.

³⁴ See ISO-NE, *2019 Regional System Plan*, October 2019, at 7, 9, and 86–87; *Order Instituting Section 206 Proceedings*, EL19–90-000, EL19–91-000, and EL19–92-000, October 17, 2019; *Order on Section 206 Investigation*, EL19–90-000, June 18, 2020, 171 FERC ¶61,211.

³⁵ See 171 FERC ¶61,211 at ¶63 (emphasis added).

³⁶ For the planning process, see <https://www.iso-ne.com/system-planning/transmission-planning/competitive-transmission-projects>. For the first RFP for “competitively-selected transmission solutions”, see https://www.iso-ne.com/static-assets/documents/2019/12/boston_2028_rfp_announcement.pdf.

7. Conclusions

Do the benefits of more infrastructure justify the costs to consumers? The simplest and most accurate answer is that no one really knows, including FERC. As we have seen, the ISO’s system-wide energy market has not obviously become more competitive; local capacity markets are structurally bound by multiple administrative rules, not competition; changes in reliability have not been measured or the available metrics are inconclusive; and various factors unrelated to grid expansion (including lower consumption due in part to higher prices) have helped reduce emissions. On the other hand, congestion costs have fallen, so part of the increase in RNS costs may be justified. The Commission has, however, determined that the ISO may continue to use its open-access tariff to protect incumbents by declaring needs to be “time-sensitive”.³⁷ Given the Commission’s deference to the ISO and regional transmission owners, consumers in New England cannot rely on either competitive markets or regulatory pressure to ensure that the transmission component of their retail rates is just and reasonable.³⁸

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Declaration of Competing Interest

The authors report no declarations of interest.

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³⁷ See Docket Nos. EL19–90 and ER20–92, discussed above.

³⁸ The Commission has also endorsed contradictory theories of U.S. capital markets, concluding that they are simultaneously “efficient”, i.e., amenable to standard quantitative comparisons to set the range of just and reasonable ROEs, but also “anomalous”, i.e., requiring authorized ROEs in an upper quantile of that range.