

ARTICLES

BUILDING THE GRID OF THE FUTURE: FERC'S AUTHORITY POST-LOPER BRIGHT

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SUMMARY

This Article explores potential impacts of the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* on the Federal Energy Regulatory Commission (FERC), focusing on FERC's efforts to mandate long-term interregional transmission planning. FERC has justified many transmission planning rules under the "just and reasonable" standard in §206 of the Federal Power Act, and its interpretation of this standard was entitled to *Chevron* deference. *Loper Bright* and the judiciary's larger shift toward skepticism of agency action and disregard for agency expertise endangers bodies like FERC that rely on broad delegations to apply their old enabling statutes to new and pressing problems. The resulting uncertainty threatens to render state climate goals impossible, raise electricity prices, exacerbate blackouts, and impede grid upgrades that are necessary for a 21st-century power system.

Electricity transmission—the process of moving electricity from the generation facilities that produce it to the distribution infrastructure that delivers it to homes and businesses—is paramount for a functioning electric grid. Transmission, especially long-distance transmission, reduces the sizable costs of grid congestion, enhances grid reliability, and ultimately lowers consumer energy bills.¹ Long-distance transmission is also necessary to enable the development of renewable energy generation crucial to reducing greenhouse gas emissions, thus comprising an integral part of any domestic climate solution.² Building regional and interregional transmission infrastructure, however, requires comprehensive planning pro-

cesses and the allocation of significant costs—often in the billions of dollars—between numerous parties.³

Current transmission planning and cost allocation processes are not leading to the investments in long-distance transmission infrastructure necessary to capture its benefits. The Federal Energy Regulatory Commission (FERC) is an independent agency tasked with regulating wholesale power sales and transfers. Its transmission planning regulations have relied on the concrete authority it is granted in §206 of the Federal Power Act (FPA).

Section 206 directs FERC, when it finds that current rates, rules, or regulations for the transmission or sale of electric energy through wholesale markets are not just and reasonable, to impose a just and reasonable replacement.⁴ The Commission has many times exercised this authority over transmission planning and cost allocation, finding that the lack of comprehensive long-term transmission planning is producing unjust and unreasonable rates.⁵ For example, on April 28, 2025, FERC issued Order No. 1920-B, defending its most recent transmission planning

1. Joshua C. Macey & Elias van Emmerick, *Towards a National Transmission Planning Authority*, 49 HARV. ENV'T L. REV. 79, 85-88 (2025).

2. *See id.* at 86 (“[T]ransmission is important because the best wind and solar is typically far from areas of the country that consume large amounts of electricity.”); Alexandra B. Klass & Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 VAND. L. REV. 1801, 1811 (2019) (emphasizing that commercially viable renewable generation remains underused because of the need for new transmission); Rich Glick & Matthew Christiansen, *FERC and Climate Change*, 40 ENERGY L.J. 1, 34-35 (2019) (explaining why transmission infrastructure is required to facilitate the interconnection of renewable energy generation); Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, 109 CALIF. L. REV. 209, 245 (2021) (same).

3. Ari Peskoe, *Is the Utility Transmission Syndicate Forever?*, 42 ENERGY L.J. 1, 58-60 (2021).

4. 18 U.S.C. §824e(a).

5. Order No. 1920, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation*, 89 Fed. Reg. 49280, 49305 (June 11, 2024) [hereinafter Order No. 1920].

rule against requests for rehearing and paving the way for judicial review.⁶

FERC's authority to regulate transmission planning, however, is hotly contested. Section 201 of the FPA grants the Commission authority to regulate "the transmission of electric energy in interstate commerce," broad language that is susceptible to numerous interpretations.⁷ But the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* overruled the long-standing doctrine of *Chevron* deference to administrative agencies, instead asserting that courts must identify the "single, best meaning" of statutes governing agency action.⁸ *Loper Bright* thus fails to recognize the context, legislative intent, and text of statutes like the FPA by insisting upon one settled understanding of plainly capacious delegations of power.

One need look no farther than FERC itself to see the impacts of *Loper Bright*. In a stark departure from FERC's commitment to nonpartisan, consensus-driven decisionmaking,⁹ two FERC commissioners responded to the decision by engaging in a public debate over its implications for Order No. 1920. Commissioner Mark Christie issued a statement noting that the overruling of *Chevron* deference, which he had previously labeled "a foundation of sand," meant Order No. 1920's chances of surviving court challenges were "slim to none."¹⁰

Then-Chair Willie Phillips disagreed, claiming that *Loper Bright* did not call into question the Commission's jurisdiction over regional transmission planning and cost allocation processes.¹¹ He noted that FERC's authority was long "recognized by bipartisan majorities of the Commission and U.S. Court of Appeals for the District of

Columbia Circuit."¹² Chair Phillips also observed that his interpretation of the FPA was the "best reading . . . exactly as *Loper Bright* requires."¹³ He concluded by arguing that Commissioner Christie's objections to Order No. 1920 were grounded in his disagreement with FERC's exercise of its regulatory authority and not in the existence of that authority itself.¹⁴

Whether or not Chair Phillips was correct in characterizing Commissioner Christie's *Loper Bright* argument as merely a vehicle to object to the policy choices made in Order No. 1920, opponents of FERC's transmission planning rules can certainly use *Loper Bright* in a similar way. Order No. 1920 and transmission policy more broadly are the subjects of significant disagreement and controversy.¹⁵ While such public debate between FERC commissioners over the extent of the agency's authority is rare, appellate courts are routinely tasked with reviewing FERC's policy choices and ensuring they remain within the bounds of the FPA.¹⁶

Loper Bright marks a significant change to the process reviewing courts will use: if they find the relevant provisions in the FPA ambiguous, they must resolve the ambiguity themselves instead of deferring to FERC.¹⁷ No longer, then, will *Chevron* constrain partisanship in judicial decisions involving agency statutory interpretations.¹⁸ In the context of a judiciary increasingly skeptical of far-reaching agency action, this shift will impede the Commission's

6. Order No. 1920-B, Building for the Future Through Electric Regional Transmission Planning and Cost Allocation, 90 Fed. Reg. 17692 (Apr. 28, 2025) (to be codified at 18 C.F.R. pt. 35) [hereinafter Order No. 1920-B].
7. 18 U.S.C. §824(a).
8. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266-67 (2024); see *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).
9. See *The Impact of Trump 2.0 on the Federal Energy Regulatory Commission: Potential Developments for Generation, Transmission, and Data Centers*, HOGAN LOVELLS (Jan. 28, 2025), <https://www.hoganlovells.com/en/publications/the-impact-of-trump-20-on-the-federal-energy-regulatory-commission-potential-developments> ("For decades, FERC has largely been a non-partisan agency that provides a relatively predictable level of regulatory certainty to a critical industry."); Jeff Turrentine, *Meet the Federal Energy Regulatory Commission*, NAT. RES. DEF. COUNCIL (May 17, 2022), <https://www.nrdc.org/stories/meet-federal-energy-regulatory-commission> (describing FERC as "apolitical" and noting that most of its decisions are unanimous); Francisco Camacho, *Trump Wants Agencies on a Short Leash. What Does That Mean for FERC?*, E&E NEWS (Dec. 10, 2024), <https://www.eenews.net/articles/trump-wants-agencies-on-a-short-leash-what-does-that-mean-for-ferc/> (citing a former FERC chair's claim that "FERC has been a beacon of stability in an otherwise volatile regulatory landscape"); cf. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 76 (2014) ("Wary of the courts, mindful of the White House, and conscious of the damage even a dysfunctional Congress can do, agencies calibrate, accommodate, and moderate their policies."); Macey & van Emmerick, *supra* note 1, at 121 ("FERC has employed its [transmission] authority conservatively, but more aggressive options are available.").
10. Mark Christie, *Statement Concerning Order No. 1920 and U.S. Supreme Court's Overruling of Chevron Deference*, FERC (June 28, 2024), <https://www.ferc.gov/news-events/news/commissioner-mark-christies-statement-concerning-order-no-1920-and-us-supreme>.
11. Willie Phillips, *Statement Concerning Order No. 1920*, FERC (July 1, 2024), <https://ferc.gov/news-events/news/chairman-willie-phillips-statement-concerning-order-no-1920>.

12. *Id.*; see *South Carolina Pub. Serv. Auth. v. Federal Energy Regul. Comm'n*, 762 F.3d 41, 58-59 (D.C. Cir. 2014) (upholding FERC's prior transmission planning rule, Order No. 1000, as consistent with FERC's §206 authority).
13. Phillips, *supra* note 11.
14. *Id.*
15. See Devin Hartman & Kent Chandler, *Eliminating the Discord Over FERC Order 1920—What's the Role for States?*, UTIL. DIVE (July 2, 2024), <https://www.utilitydive.com/news/eliminating-the-discord-over-ferc-order-1920-whats-the-role-for-states/720279/> ("Order 1920, like broader transmission policy, has become unnecessarily politicized.").
16. See Lyle D. Larson, *Beyond Chevron: The Future of FERC's Authority in a Post-Deference Era*, UTIL. DIVE (Aug. 21, 2024), <https://www.utilitydive.com/news/supreme-court-loper-bright-chevron-doctrine-ferc-transmission/724479/> (stating that the jurisdictional debate over Order No. 1920, like other major FERC orders, will eventually play out in appellate courts); see, e.g., *Federal Energy Regul. Comm'n v. Electric Power Supply Ass'n (EPSA)*, 577 U.S. 260, 282 (2016) (holding that FERC's Order No. 719, which removed barriers to the participation of demand response in wholesale electricity markets, did not impermissibly intrude on state jurisdiction over retail electricity sales under §201 of the FPA); *New York v. Federal Energy Regul. Comm'n*, 535 U.S. 1, 16-17 (2002) (same with respect to FERC's Order No. 888, which ordered the "functional unbundling" of wholesale generation and transmission services); *South Carolina*, 762 F.3d at 58-59 (upholding FERC's prior transmission planning rule, Order No. 1000, as consistent with FERC's FPA §206 authority).
17. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). The extent to which resolving such ambiguity may involve the "deference" described in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), is discussed *infra* Part III.
18. See Cass R. Sunstein, *The Consequences of Loper Bright*, 74 DUKE L.J. 1893, 1915 (2025) ("Judges who are disinclined to uphold agency interpretations—sometimes, alas, on ideological grounds—will feel strongly empowered by *Loper Bright*."); Kent Barnett et al., *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1468 (2018) (finding that the most ideologically extreme circuit judge panels agreed with politically opposed agency statutory interpretations 18% of the time without deferring under *Chevron* and more than 50% of the time when deferring under *Chevron*).

ability to effectively regulate the electric power system in response to modern challenges.¹⁹

This Article argues that following the mandate of *Loper Bright* by identifying the “single, best” interpretation of a statute as old and as broad as the FPA will be a difficult task for both FERC and the courts. I claim that the §206 “just and reasonable” standard the agency uses to justify Order No. 1920-B and other transmission planning rules is ambiguous—or at least intentionally capacious—and that *Loper Bright* has provided stakeholders insufficient guidance as to what standard reviewing courts will apply. I further contend that *Loper Bright* will make it easier for courts to substitute their conclusions about the merits of FERC’s transmission rules for the agency’s judgment, by offering their own interpretation of the FPA even when FERC’s is reasonable and based on its prodigious expertise.²⁰ I conclude that such an outcome conflicts with nearly a century of jurisprudence emphasizing the significant deference FERC should be afforded due to the technical nature of its functions, impeding the agency’s ability to tackle important national issues like transmission planning.²¹

The Article proceeds as follows. Section I.A describes FERC’s attempts to regulate transmission planning and cost allocation, with Section I.B addressing the complexity of these regulations and the difficult legal landscape FERC faces due to the FPA, the U.S. Congress, and the courts. Section II.A looks to case law to demonstrate that *Loper Bright* overlooks the complexity of regulations like transmission planning, providing insufficient guidance to courts reviewing statutory delegations of discretionary authority. Section II.B examines the spurious claim of statutes necessarily having a “single, best reading” as applied to the FPA by examining judges’ disagreements over the meaning of the FPA. Section II.C illustrates how *Chevron* step two allowed courts to respect agency expertise in light of this ambiguity, furthering the FPA’s aims by allowing FERC to respond to a dynamic power market. Part III ana-

lyzes the uncertainty facing lower courts and FERC in the wake of *Loper Bright*, claiming that the vagueness of *Skidmore* deference means it does not meaningfully constrain courts motivated to vacate the Commission’s orders. Part IV concludes.

I. The Challenging Regulatory Landscape of Transmission Planning and Cost Allocation Reform

Transmission planning and cost allocation rules are critical to a functioning electric grid, but also highly controversial and immensely complicated. While FERC’s current regulatory regime is insufficient to spur necessary investments in long-distance transmission, the agency faces numerous obstacles: statutory authority from an era before long-distance transmission was truly feasible, an absent Congress, and a judiciary critical of far-reaching regulations. *Loper Bright* adds insult to injury, further empowering courts to strike down FERC’s transmission planning rules despite their long history and indubitable importance.

A. FERC’s Existing Rules Reflect the Difficulty of Comprehensive Transmission Planning Regulation

FERC has long regulated the transmission of electricity, and for good reason. Transmission provides many benefits to consumers and to the grid, including reliability, affordability, and emissions reductions.²² These benefits are not small, since the costs of grid congestion are large and mounting. Electricity ratepayers in Oklahoma will pay an extra \$90 each year for the next 25 years because of just a few days of outages during Winter Storm Uri, highlighting the impacts of inadequate reliability.²³ The 2024 National Transmission Planning Study estimates that accelerated transmission expansion—scaling the transmission system by a factor of 2.4 to 3.5, which is necessary to meet emissions reduction goals—would save \$270-\$490 billion by 2050.²⁴

Importantly though, the benefits of transmission are mostly cabined to long-distance (i.e., regional or interregional) transmission lines.²⁵ Local transmission lines, while

19. See Thomas W. Merrill, *The Demise of Deference—and the Rise of Delegation to Interpret*, 138 HARV. L. REV. 227, 265 (2024) (noting that the current Supreme Court “appears to be skeptical of agency innovation”); Sapna Kumar, *Scientific and Technical Expertise After Loper Bright*, 74 DUKE L.J. 1749, 1769 (2025) (“The *Loper Bright* decision reflects a shift regarding the Court’s valuation of expertise.”); Nathan Richardson, *Anti-deference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 177 (2022) (characterizing the major questions doctrine as “actively hostile to agency assertions of authority”); Ari Peskoe, *Replacing the Utility Transmission Syndicate’s Control*, 44 ENERGY L.J. 547, 611 (2023) (“[F]ederal courts are increasingly unpredictable in cases about novel administrative action, and FERC may want to avoid claims about agency overreach.”).

20. By emphasizing reasonableness, the FPA essentially codifies *Chevron* as the reviewing standard, raising questions regarding the proper application of *Loper Bright*.

21. See *Morgan Stanley Cap. Grp. Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 532 (2008) (“The statutory requirement that rates be ‘just and reasonable’ is obviously incapable of precise judicial definition.”); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968) (“[T]he breadth and complexity of the Commission’s responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties.”); *Federal Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 602 (1944) (noting that orders of the Federal Power Commission, the precursor to FERC, were “the product of expert judgment [carrying] a presumption of validity”).

22. See *supra* notes 1-2 and accompanying text.

23. Alexandra B. Klass & Gabriel Chan, *Regulating for Energy Justice*, 97 N.Y.U. L. REV. 1426, 1488 (2022).

24. *Introduction*, in U.S. DEPARTMENT OF ENERGY, NATIONAL TRANSMISSION PLANNING STUDY 1, 2-3 (2024), <https://www.energy.gov/sites/default/files/2024-10/NationalTransmissionPlanningStudy-Chapter1.pdf>.

25. See Joshua C. Macey, *Outsourcing Electricity Market Design*, 91 U. CHI. L. REV. 1243, 1295-96 (2024) (explaining that vertically integrated utilities have an incentive to build local rather than regional or interregional transmission infrastructure because the former is less effective at resolving transmission congestion, allowing those utilities to maintain market power); Freeman & Spence, *supra* note 9, at 50-52 (ascribing particular economic and technological value to interstate transmission lines); *cf.* Macey & van Emmerick, *supra* note 1, at 131 (claiming that modest reforms to existing transmission planning processes will not sufficiently incentivize investment

still important, are far less cost-effective than larger-scale transmission infrastructure.²⁶ Despite this disparity, the current regulatory scheme does not effectively incentivize long-distance transmission buildout: a significant majority of total transmission spending goes toward local lines and upgrades.²⁷ Accessing the potential benefits of long-distance transmission requires an updated approach, which is precisely why Order No. 1920 is so critical.

Transmission's importance to a functioning electric grid is made clear by its extensive history. The transmission story began in the 1920s, when utilities began to interconnect to improve efficiency and reliability.²⁸ Noting these benefits, FERC has long attempted to incentivize large-scale transmission planning, with various levels of success. FERC believed that the benefits of this voluntary coordination outweighed its anticompetitive effects even as this coordination was formalized through the creation of power pools.²⁹ By the 1970s, FERC began to more closely examine individual coordination agreements in an effort to prevent undue discrimination in-line with its FPA §206 mandate.³⁰

The anticompetitive transmission service offered by investor-owned utilities (IOUs) was a key issue driving FERC's Orders No. 888 and No. 2000. These orders required utilities to "unbundle" wholesale energy sales and transmission service by charging separate rates for those services and by separating those functions in their corporate structure.³¹ These orders also marked a shift to regulating transmission access through regional transmission organizations (RTOs) and independent system operators (ISOs), which operate IOUs' transmission infrastructure in their stead.³² Order Nos. 888 and 2000 required RTOs and IOUs alike to maintain open-access transmission tariffs comporting with the FPA's just, reasonable, and not unduly discriminatory standard.³³

While Order Nos. 888 and 2000 were important steps toward reducing the market power of IOUs, they were insufficient to produce meaningful investment in large-scale transmission infrastructure. IOUs rapidly gained significant influence over RTO decisionmaking processes, a shift that energy law scholars have chronicled in much

detail.³⁴ The resulting inefficiencies in RTO transmission planning led FERC to promulgate Order Nos. 890 and 1000, applying transparency requirements to that planning and requiring RTOs to consider non-IOU developers for project development opportunities in a nondiscriminatory manner.³⁵

The strong incentive for IOUs to restrict transmission access within their state-granted service territories, however, has limited the effectiveness of Order Nos. 890 and 1000. Transmission investment remains overwhelmingly local and isolated from competitive processes.³⁶ Further, IOUs have taken bold steps to avoid allowing competition to affect their bottom line. For instance, one utility, Entergy, hired actors to attend public utility commission meetings to oppose regional transmission infrastructure and support new generation infrastructure.³⁷ Entergy also changed its opinion on the need for transmission to fit its needs, citing reliability issues caused by transmission congestion when seeking to build new generation, but arguing that the Midcontinent Independent System Operator (MISO) does not face reliability problems when opposing new transmission development.³⁸

Unfortunately, these problems are by no means limited to Entergy: all 36 utilities that still own generation submitted comments opposing reforms to regional transmission planning, including those contained in Order No. 1920.³⁹ Sure enough, utility transmission owners in the Southwest

in the regional and interregional projects that would lead to meaningful emissions reductions or reliability improvements).

26. CLAIRE WAYNER ET AL., RMI, MIND THE REGULATORY GAP: HOW TO ENHANCE LOCAL TRANSMISSION OVERSIGHT 29-32 (2024), https://rmi.org/wp-content/uploads/dlm_uploads/2024/11/rmi_mind_the_regulatory_gap.pdf.

27. See Macey, *supra* note 25, at 1295 (noting that before Order No. 1000, local transmission spending accounted for approximately 30% of total spending, while in 2024 it accounted for 90% in some markets).

28. Peskoe, *supra* note 3, at 13.

29. *Id.* at 18-19.

30. *Id.*

31. *Id.* at 21-22; see 18 C.F.R. §§35, 385 (2000); Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21540 (May 10, 1996); Order No. 2000, Regional Transmission Organizations, 65 Fed. Reg. 810 (Jan. 6, 2000).

32. Peskoe, *supra* note 3, at 22-23. For simplicity's sake, I will refer to both RTOs and ISOs as "RTOs." See, e.g., Macey & van Emmerick, *supra* note 1.

33. Peskoe, *supra* note 3, at 22-23.

34. *Id.* at 25; see Macey, *supra* note 25, at 1295-98 (describing Entergy's persistent efforts to prevent the construction of regional transmission lines in its RTO, the Midcontinent Independent System Operator (MISO)); Welton, *supra* note 2, at 245-46 (finding that RTOs have continued to block non-incumbent transmission companies from building new transmission lines); Kristen van de Biezenbos, *The Case Against Regional Transmission Monopolies*, 101 WASH. U. L. REV. 69, 120-21 (2023) ("For decades, IOUs have refused to build [transmission] projects in the public interest, preferring to stay in their exclusive service areas and pile costs into their regulated rates."); Joel B. Eisen & Heather E. Payne, *Rebuilding Grid Governance*, 48 BYU L. REV. 1057, 1076 (2023) ("[E]xisting governance institutions enshrine utilities' power and dominance As owners of transmission lines, their voting power allows them to dominate the RTO governance process.").

35. Peskoe, *supra* note 3, at 29; see 18 C.F.R. §§35, 37 (2011); Order No. 890, Preventing Undue Discrimination and Preference in Transmission Service, 72 Fed. Reg. 12266 (Feb. 16, 2007); Order No. 1000, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49842 (Aug. 11, 2011).

36. See Peskoe, *supra* note 3, at 50-57 (observing that more than a decade after the implementation of Order No. 890, four of the nation's seven RTOs—MISO, the Southwest Power Pool (SPP), the Independent System Operator-New England (ISO-NE), and the New York Independent System Operator (NYISO)—had combined to complete just five competitive transmission solicitation processes); Macey & van Emmerick, *supra* note 1, at 82 (stating that only 3% of transmission projects across the United States are subject to competitive solicitation processes) (citing Jim Rossi, *The Costs of "Crony Capitalism" in Regional Transmission Grid Expansion*, 36 ELEC. J. art. 107335, at 3 (2023)); Macey, *supra* note 25, at 1295 (detailing the rising proportion of local transmission investment). Lacking investment in high-voltage regional and interregional transmission is resulting in historically low construction of those line miles. See FERC, *Staff Reports and Papers: Energy Infrastructure*, <https://www.ferc.gov/staff-reports-and-papers> (last updated Dec. 1, 2025) (compiling data reflecting that the years 2022, 2023, and 2024 had the lowest number of 345- or 500-kilovolt (kV) transmission line miles built since those data were collected—in 2023, that number was just 59.5 miles, compared to more than 4,000 in 2013).

37. Macey, *supra* note 25, at 1295-96.

38. *Id.* at 1297-98.

39. *Id.*

Power Pool (SPP), MISO, and the Pennsylvania-Jersey-Maryland RTO (PJM) were among the parties requesting rehearing of Order No. 1920, and their interests will be represented in the upcoming litigation at the U.S. Court of Appeals for the Fourth Circuit.⁴⁰

Order No. 1920 attempts to respond to these shortcomings, marking an important step forward. It requires transmission providers to participate in a long-term regional transmission planning process, aiming to counter transmission owners' incentives to focus on short-term local projects.⁴¹ While Order No. 1920 initially mandated the consideration of at least seven economic and reliability benefits of long-term transmission identified by FERC, this requirement was set aside on rehearing.⁴² The Commission stated that the related requirements to create long-term planning scenarios using a time horizon of at least 20 years, ensure those scenarios are "plausible" and "diverse," and develop those scenarios considering a separate list of seven categories of factors was sufficient to ensure that long-term transmission planning needs were addressed.⁴³

The other significant change to Order No. 1920 was Order No. 1920-A's move to a more active role for state regulators in transmission planning processes.⁴⁴ This shift

was key to garnering Commissioner Christie's support despite his vigorous dissent to Order No. 1920 in its initial form.⁴⁵ This move was not enough to ward off state utility commissions from arguing that the order dictated their policy outcomes and generation mixes in contravention of the FPA's balance of state and federal oversight.⁴⁶

Order No. 1920's efficacy is not yet clear, with commenters providing various perspectives on its potential to solve the deep-rooted problems plaguing current regional transmission planning.⁴⁷ Thus, the Commission's broader statutory authority, in addition to its particular justifications for promulgating Order No. 1920, may still be relevant to future efforts to regulate transmission planning, including bold proposals from energy law scholars.⁴⁸ FERC has long attempted to secure open access and competition in transmission planning, with evolving tactics from incumbent utilities and the contested nature of cost allocation discussions driving it to evolve its regulatory approaches. Yet, the powerful interests in the energy sector and the complex nature of transmission planning regulations have made this task a difficult one—and the legal landscape has not afforded FERC any relief.

40. Order No. 1920-B, *supra* note 6, at 17728 (Appendix A); see *Petition for Review, Advanced Energy United, Inc. v. Federal Energy Regul. Comm'n*, No. 24-2162 (4th Cir. Apr. 29, 2025). The opening briefs were filed in the case at the end of August. See *Joint Brief of the Consumer Petitioners, Appalachian Voices v. Federal Energy Regul. Comm'n*, No. 24-1650 (4th Cir. Aug. 29, 2025).

41. Order No. 1920-A, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation*, 89 Fed. Reg. 97174, 97221-22 (Dec. 6, 2024) [hereinafter Order No. 1920-A].

42. *Id.* at 97222; see Order No. 1920, *supra* note 5, at 49324 n.277 (listing the following seven benefits: (1) avoided or deferred reliability transmission facilities and aging transmission infrastructure replacement; (2) reduced loss of load probability or reduced planning reserve margin; (3) production cost savings; (4) reduced transmission energy losses; (5) reduced congestion due to transmission outages; (6) mitigation of extreme weather events and unexpected system conditions; and (7) capacity cost benefits from reduced peak energy losses).

43. Order No. 1920-A, *supra* note 41, at 97222; see *id.* at 97233 (rejecting requests to set aside or alter the seven required categories of factors transmission providers must incorporate into their development of long-term scenarios); Order No. 1920, *supra* note 5, at 49351, listing the following seven factor categories:

- (1) Federal, federally-recognized Tribal, state, and local laws and regulations affecting the resource mix and demand;
- (2) Federal, federally-recognized Tribal, state, and local laws and regulations on decarbonization and electrification;
- (3) state-approved integrated resource plans and expected supply obligations for load-serving entities;
- (4) trends in fuel costs and in the cost, performance, and availability of generation, electric storage resources, and building and transportation electrification technologies;
- (5) resource retirements;
- (6) generator interconnection requests and withdrawals;
- and (7) utility and corporate commitments and Federal, federally-recognized Tribal, state, and local policy goals that affect Long-Term Transmission Needs;

Presentation on Order No. 1920-A, Building for the Future Through Electric Regional Transmission Planning and Cost Allocation, FERC (Nov. 21, 2024), <https://www.ferc.gov/news-events/news/presentation-order-no-1920-building-future-through-electric-regional-transmission> (noting that Order No. 1920-A set aside the seventh factor category but maintained the rest).

44. Order No. 1920-A, *supra* note 41, at 97216; see Stephen J. Hug et al., *FERC Issues Order No. 1920-A Expanding State Oversight Over Long-Term Regional Planning and Cost Allocation*, AKIN GUMP STRAUSS HAUER & FELD LLP (Dec. 4, 2024), <https://www.akingump.com/en/insights/blogs/speaking-energy/ferc-issues-order-no-1920-a-expanding-state-oversight>

over-long-term-regional-planning-and-cost-allocation ("The most notable shift in Order No. 1920-A is the elevation of the role of state regulators [T]he result of th[is] change [] is that all commissioners participating in the decision-making process voted to approve Order No. 1920[-A].").

45. See Order No. 1920, *supra* note 5, at 49565-86 (Christie, Comm'r, dissenting).

46. Order No. 1920-A, *supra* note 41, at 97214-16.

47. See Macey & van Emmerick, *supra* note 1, at 97 ("[Order No. 1920] does not fully eliminate the core problem with transmission planning and cost allocation, which is that the existence of carveouts to regional planning requirements give incumbent transmission owners both the incentive and ability to overinvest in small local projects."); Allison Clements, *FERC Order 1920 Is a Big Step Forward on Transmission Planning, but It Is Not the End Game*, UTIL. DIVE (May 15, 2024), <https://www.utilitydive.com/news/ferc-order-1920-transmission-planning-clements/716247/> ("Considerable work remains to be done, both at the Commission and in Congress, if we are to realize the modern electricity grid on which the continued vitality of the United States' economy and security increasingly depends."); Claire Wayner, *For Transmission Planning, FERC Order 1920 Is Our Dragon*, UTIL. DIVE (Mar. 4, 2025), <https://www.utilitydive.com/news/transmission-planning-ferc-order-1920-o-1000/741558/> ("While more work remains to be done, Order 1920 is a critical first step and key opportunity to improve transmission planning"); Christine Powell & Danielle Fidler, *Strong FERC Transmission Planning Reforms Will Speed the Transition to Clean Energy*, EARTHJUSTICE (May 8, 2024), <https://earthjustice.org/experts/christine-powell/strong-ferc-transmission-planning-reforms-will-speed-the-transition-to-clean-energy> (praising Order No. 1920 overall while stressing that FERC should require planning regions to consider certain transmission benefits, since transmission owners will otherwise primarily consider benefits that allow them to select projects that maximize their profits).

48. See Macey & van Emmerick, *supra* note 1, at 105 (arguing that Order No. 1920 should prevent incumbent utilities from determining the practical extent of the immediate-needs exemption, adequately incorporate procedures by which alternative solutions that might more effectively address transmission needs can be considered, provide financial incentives to utilities to pursue more cost-effective solutions, or include penalties for utilities that misuse regional planning requirement exemptions); Peskoe, *supra* note 19, at 612-18 (advocating for FERC to promulgate and vigorously enforce new RTO governance criteria to limit transmission owners' power to block regional transmission proposals, particularly from nonincumbents).

B. Congress and the Courts Impede Comprehensive Transmission Planning Reform

FERC's efforts to regulate transmission planning and cost allocation encounter a skeptical judiciary, an old statute, and a Congress that is missing in action. Order No. 1920 is being promulgated at a time when the judiciary is somewhat unpredictable in its decisions regarding far-reaching agency action.⁴⁹ Just as the energy transition is bringing dynamic renewable resources onto the grid in unprecedented quantities, necessitating additional visibility and control from grid operators, FERC and other administrative agencies are receiving clear signs from courts that experimentation and significant rulemaking in politically charged arenas are disfavored.⁵⁰ To make matters worse, Congress has failed to pass important legislation in the energy regulatory space for decades, leaving FERC alone to answer the big questions it faces regarding the transition to competitive wholesale power markets.⁵¹ FERC has thus been forced to adapt statutory language from 1935 to its 21st-century regulations of an astoundingly complicated modern electric grid, with almost no meaningful guidance, while navigating an uncertain political and judicial landscape.⁵²

49. See *supra* note 19; Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1982-84 (2017) (discussing Congress' and agencies' reliance on *Chevron* deference and courts' "interpretive regime" more broadly and noting that recent Supreme Court administrative law decisions defy predictability and indicate a "basic distrust of an active administrative state"); Freeman & Spence, *supra* note 9, at 63 ("[W]hen agencies adopt innovative methods to adapt an old statutory scheme to new problems, their strategic choices invite judicial scrutiny.").

50. See *West Virginia v. Environmental Prot. Agency*, 142 S. Ct. 2587, 2605 (2022) (stating that statutory texts must present "clear congressional authorization" for agencies to take actions with "vast economic and political significance"); Ethan Howland, *Clean Energy Groups Push for More Interconnection Reforms Ahead of FERC Workshop*, UTIL. DIVE (Aug. 27, 2024), <https://www.utilitydive.com/news/grid-interconnection-reform-ferc-aeu/725349/> (describing interconnection processes as outdated, slow, and discriminatory against renewable energy sources); Jeff St. John, *FERC Takes a Big Step to Get More Clean Energy on the US Grid*, CANARY MEDIA (July 31, 2023), <https://www.canarymedia.com/articles/clean-energy/ferc-takes-a-big-step-to-get-more-clean-energy-on-the-us-grid> (noting that interconnection reform was just one step in a "much broader effort" needed to solve grid backlog problems caused by the large influx of renewable energy projects in interconnection queues); Carlo Drago & Andrea Gatto, *Policy, Regulation Effectiveness, and Sustainability in the Energy Sector: A Worldwide Interval-Based Composite Indicator*, 167 ENERGY POL'Y art. 112889, at 3 (2022) ("Efficient [energy] regulation is a dynamic process that allows governments to reach their growth and social targets."); cf. Welton, *supra* note 2, at 224 ("[T]he rise of climate change as a policy priority has created increasing divergence between the priorities of industry incumbents and their state and federal regulators—thus changing substantially the calculus of self-regulation.").

51. Freeman & Spence, *supra* note 9, at 46-47; cf. Shelley Welton, *Grasping for Energy Democracy*, 116 MICH. L. REV. 581 (2018) ("[R]arely do politicians pass legislation making the 'hard' decisions over which many in the energy field disagree. They often leave to energy bureaucrats decisions over how to achieve the (often-divergent) goals of abundant, affordable, and clean energy.").

52. Freeman & Spence, *supra* note 9, at 50-52, 58; see William Boyd & Ann E. Carlson, *Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law*, 63 UCLA L. REV. 810, 812 (2016) (characterizing the U.S. system of electricity regulation as "the most complex machine ever built"); cf. Heidi Marie Wernitz, *Counting on Chevron?*, 38 ENERGY L.J. 297, 308 (2017) ("Congress could hardly have envisioned [incorporating demand response into wholesale energy markets] when it passed the FPA in 1935.").

The structure of the FPA, perhaps predictably given its age, is not conducive to FERC's attempts to tackle big problems. Utilities file their tariffs with FERC under FPA §205, which requires those tariffs to meet the just and reasonable standard.⁵³ That standard is capacious, and courts have emphasized the breadth of FERC's direction within a wide "zone of reasonableness."⁵⁴ Courts require FERC to be reactive when responding to these §205 filings, "restricting itself to evaluating the confined proposal" and not proposing substantial modifications.⁵⁵ The Commission's response to §205 filings is adjudicative in nature, reflecting its position on the justness and reasonableness of a particular rate in a particular context.⁵⁶

On the other hand, to exercise its §206 authority, FERC must both find that the current rate is unjust and unreasonable and propose a just and reasonable replacement.⁵⁷ Commission rulemakings like Order No. 1920 rely on these affirmative findings. Because FERC cannot solve systemic problems in the energy sector adjudication by adjudication, FERC's ability to defend its §206 findings that current rates are unjust and unreasonable is key to its effectiveness. While there are other sources of authority in the FPA, Congress' silence on the big issues has left FERC mostly reliant on these §206 rulemakings to issue its key orders, all of which have undergone appellate review.⁵⁸

The Commission is not unaware of the challenges it faces, whether they are rooted in the legislative branch or the judicial branch. Order No. 1920, like prior Commission rulemakings affecting transmission planning, carefully responds to arguments against FERC's assertion of

53. Macey & van Emmerick, *supra* note 1, at 130; 18 U.S.C. §824d.

54. See *New York State Pub. Serv. Comm'n v. Federal Energy Regul. Comm'n*, 104 F.4th 886, 891 (D.C. Cir. 2024) ("There is not a single just and reasonable rate but rather a zone of reasonableness, bounded on one end by investor interest and on the other by the public interest against excessive rates.") (cleaned up); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 797 (1968) ("[C]ourts are without authority to set aside any rate adopted by the Commission which is within a 'zone of reasonableness.'"); *Atlantic City Elec. Co. v. Federal Energy Regul. Comm'n*, 295 F.3d 1, 9-10 (D.C. Cir. 2002) ("[S]o long as a utility's rates fit within the zone of reasonableness, FERC is obligated to approve them.").

55. *Advanced Energy Mgmt. All. v. Federal Energy Regul. Comm'n*, 860 F.3d 656, 662 (D.C. Cir. 2017); *NRG Power Mktg. v. Federal Energy Regul. Comm'n*, 862 F.3d 108, 114-15 (D.C. Cir. 2017).

56. See, e.g., Joshua Z. Rokach, *FERC's Jurisdiction Under Section 205 of the Federal Power Act*, 15 ENERGY L.J. 83, 85 (1994) (referring to FERC's "adjudication" of §205 rate cases); *Entergy Ark., LLC v. Federal Energy Regul. Comm'n*, 40 F.4th 689, 702 (D.C. Cir. 2022) (holding that where FERC exercised its §206 authority to establish its own methodology for allocating certain MISO-PJM project costs, MISO had the right to propose its own alternative method for FERC to review and potentially approve under §205).

57. Macey & van Emmerick, *supra* note 1, at 130; 18 U.S.C. §824e; see, e.g., *Public Util. Comm'n of Cal. v. Federal Energy Regul. Comm'n*, 462 F.3d 1027, 1052 (9th Cir. 2006) ("Section 206(a) of the Federal Power Act requires that before FERC can exercise its remedial power to mitigate an existing rate, it must find an existing rate 'unjust, unreasonable, unduly discriminatory or preferential.'") (citing *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956)).

58. See *New York v. Federal Energy Regul. Comm'n*, 535 U.S. 1, 11 (2002) (observing that FERC cited §§205 and 206 of the FPA in support of its Order No. 888 rather than more recent legislation governing energy regulation); *South Carolina Pub. Serv. Auth. v. Federal Energy Regul. Comm'n*, 762 F.3d 41, 55 (D.C. Cir. 2014) (same with respect to Order No. 1000); *EPSA*, 577 U.S. 260, 277 (2016) (same with respect to Order No. 719).

its §206 jurisdiction and explicitly names *Loper Bright*.⁵⁹ The Commission notes that the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit’s decision in *South Carolina Public Service Authority v. Federal Energy Regulatory Commission*, which upheld Order No. 1000, did not rely on *Chevron* when reaching its conclusion that §217(b) (4) of the FPA requires the Commission to “facilitate the planning of a reliable grid” by “seek[ing] to ensure that adequate transmission capacity is built.”⁶⁰

FERC also addressed arguments that it had not met its burden of justifying its §206 finding with substantial evidence, noting that *South Carolina* concluded it could rely on its own predictions as long as they were “at least likely enough to be within [its] authority,” and were based on “reasonable economic propositions.”⁶¹ The Commission also addressed the major questions doctrine, arguing that its FPA §206 authority was distinguishable from the provision at issue in *West Virginia v. Environmental Protection Agency*, which the Supreme Court labeled “ancillary” and a “gap-filler.”⁶² FERC emphasized that FPA §206 sets forth “core Commission regulatory authority to remedy unjust and unreasonable rates, and practices affecting rates, for the transmission of electric energy in interstate commerce.”⁶³

As FERC’s justification for Order No. 1920 reveals, however, *Loper Bright* will complicate its defense of broad rulemakings. Transmission planning and cost allocation rules are particularly vulnerable because they rely on §206 authority not only for the evidentiary finding that current rates are unjust and unreasonable, but also for the Commission’s authority to set a replacement rate and distribute costs. The leading case on the issue, *South Carolina*, relied heavily on *Chevron* when interpreting §206.⁶⁴ Additionally, *South Carolina* is not binding authority on courts like the Fourth Circuit, where the Order No. 1920 appeal will be heard.⁶⁵ *Loper Bright* thus has significant potential to alter judicial review of Order No. 1920 and other transmission rulemakings. Part II illustrates how *Loper Bright* restricts courts’ ability to credit and defer to FERC’s expertise.

II. *Loper Bright’s* Rejection of Statutory Ambiguity and Agency Expertise Is Undermined by FPA Jurisprudence

Judges have often disagreed about the legality of FERC orders, even under the *Chevron* framework, underscoring the complexity of the agency’s regulatory charge and the ambiguity of the FPA. Courts assessing FERC’s authority to promulgate its major rules have concluded both that the relevant provisions of the FPA are clear, ending their analysis at *Chevron* step one, and that the relevant provisions are ambiguous, deferring to FERC at step two. Even in cases that courts resolved at *Chevron* step one, however, judges often disagreed about the clear meaning of the statute, reflecting its ultimate ambiguity.

This uncertainty is exacerbated by the highly technical nature of the Commission’s work and the expansive nature of the just and reasonable standard. These complicating factors lead to inconsistent determinations of whether FERC actions represented interpretations of its authority subject to *Chevron* deference, or policy judgments reviewed under the more forgiving arbitrary and capricious standard. *Loper Bright* fails to recognize this uncertainty, glossing over textual ambiguity and consequently undervaluing agency expertise.

A. *Loper Bright* and *Skidmore* Are Insufficient Guideposts for Courts Reviewing FERC Orders

The key statement of *Loper Bright*, of course, was its proclamation that “*Chevron* is overruled.”⁶⁶ In discussing the validity of *Chevron*, the majority asserted that statutes always “have a single, best meaning,” explaining that this truth meant courts needed to employ all statutory interpretation tools to reach that meaning instead of deferring to “permissible” agency interpretations.⁶⁷ The *Loper Bright* decision did cite *Skidmore v. Swift & Co.* in noting that the informed judgment of the executive branch might still hold “weight” for reviewing courts.⁶⁸

However, the majority cited only some of the factors *Skidmore* listed as informing the “weight of such a judgment in a particular case”: (1) the thoroughness evident in the agency’s consideration; (2) the validity of the agency’s reasoning; (3) the interpretation’s consistency with the agency’s earlier and later pronouncements; and (4) “all those factors which give [the interpretation] power to persuade, if lacking power to control.”⁶⁹ The Supreme Court has in the past recognized additional *Skidmore* factors such as “procedural and other formality in rendering an interpretation, the longevity and contemporaneity of the agency’s interpretation with enactment, an agency’s specialized experience and expertise, and alignment between the

59. Order No. 1920-A, *supra* note 41, at 97238.

60. *Id.*; *South Carolina*, 762 F.3d at 90.

61. Order No. 1920-A, *supra* note 41, at 97187; *South Carolina*, 762 F.3d at 65; see Order No. 1920-A, *supra* note 41, at 97211 (citing *South Carolina*, 762 F.3d at 56, for the proposition that FERC’s §206 authority is “broadly stated” and not a “subtle device”).

62. 142 S. Ct. 2587, 2601, 2610 (2022); Order No. 1920-A, *supra* note 41, at 97211.

63. Order No. 1920-A, *supra* note 41, at 97211.

64. See *South Carolina*, 762 F.3d at 58-59, 75 (deferring to FERC’s conclusion that §206 authorized Order No. 1000’s transmission planning mandate and cost allocation reforms); *id.* at 75 (“Section 206 is ambiguous.”).

65. See, e.g., *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (“Under the established federal legal system the decisions of one circuit are not binding on other circuits.”).

66. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

67. *Id.* at 2266.

68. *Id.* at 2247; see *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

69. *Skidmore*, 323 U.S. at 140; *Loper Bright*, 144 S. Ct. at 2247.

agency interpretation and statutory purpose.”⁷⁰ The *Loper Bright* decision did not change the fact that the Supreme Court has never provided a comprehensive list of *Skidmore* factors or any guidance on weighing them.⁷¹

The majority in *Loper Bright* did acknowledge that the “single, best meaning” of a statute might be that it granted the agency some discretion.⁷² It specifically noted that the best reading of a statute containing terms or phrases like “appropriate” or “reasonable” might be that the statute delegates discretionary authority to an agency.⁷³ It further observed that in such cases, the role of the reviewing court under the Administrative Procedure Act (APA), the statute that governs review of agency actions, was to recognize constitutional delegations and decide only whether the agency’s decisionmaking was “reasoned” and within the boundaries of its authority as determined independently by the court.⁷⁴

However, as Justice Elena Kagan’s dissent points out, this statute-by-statute evaluation of the bounds of such capacious terms as “reasonable” generates uncertainty and “involves complexities of its own.”⁷⁵ Justice Kagan was unimpressed with the majority’s invocation of *Skidmore* as sufficient “aid” for courts confronting broad statutes: “If the majority thinks that the same judges who argue today about where ‘ambiguity’ resides are not going to argue tomorrow about what ‘respect’ requires, I fear it will be gravely disappointed.”⁷⁶

How *Loper Bright* will affect FERC’s authority, both over transmission and more broadly, is thus unclear: notably, the few courts that have evaluated FERC’s decisionmaking since *Loper Bright* have disagreed over its application. For example, in *NextEra Energy Resources, LLC v. Federal Energy Regulatory Commission*, the court declined to clarify whether the “*Chevron*-like” deference it afforded to FERC’s interpretations of tariffs and contracts survived *Loper Bright*.⁷⁷ The court justified this avoidance by concluding that FERC’s interpretation was correct.⁷⁸ However, in reaching that conclusion, the *NextEra* majority considered statutory and regulatory purpose, asserting that “courts should prefer textually permissible readings

that would advance statutory or regulatory goals over ones that would frustrate them.”⁷⁹

In a vigorous dissent, Judge Neomi Rao accused the majority of “revert[ing] to a *Chevron*-like framework,” arguing that its interpretation was “certainly not the best” and emphasizing *Loper Bright*’s declaration that if an interpretation “is not the best, it is not permissible.”⁸⁰ What is clear, though, is that *Loper Bright* creates uncertainty by further empowering the judiciary. Applying *Loper Bright*’s mandate to a statute as old and as broad as the FPA presents serious challenges for courts, casting doubt on FERC’s ability to regulate the interstate transmission infrastructure that is so essential to the modern electric grid.

B. Courts Often Disagree When Interpreting Even Supposedly Clear Sections of the FPA

Courts both before and after *Loper Bright* have declared certain sections of the FPA clear, but these interpretations are often contested, revealing underlying ambiguity. In *Federal Energy Regularity Commission v. Electric Power Supply Ass’n (EPSA)*, the Supreme Court was unanimous in its holding that §§205 and 206 of the FPA grant FERC the authority to regulate practices directly affecting wholesale rates.⁸¹ The practice at issue, demand response, involves wholesale market operators compensating electricity consumers for their commitments to refrain from using power at certain times.⁸² FERC was defending its Order No. 745, which “requir[es] market operators to appropriately compensate demand response providers.”⁸³ In FERC’s view, demand response achieved its §206 mandate to ensure just and reasonable rates by reducing market operators’ need to compensate uneconomic power plants heavily during times of high demand.⁸⁴

The Court’s disagreement over what practices “directly affect[]” wholesale rates reflects the complicated and technical nature of FERC’s jurisdiction itself. The majority held that because FERC’s authority was clear, it did not need to address whether the Commission was entitled to *Chevron* deference.⁸⁵ In dissent, Justice Antonin Scalia agreed that the statute was clear and thus that *Chevron* deference was unwarranted; however, he argued that the majority “misconstrue[d] the primary statutory limit.”⁸⁶ The dissent claimed FERC’s jurisdiction was further limited to sales of electric energy that are “demonstrably” wholesale, contrasting this position with the majority’s view that FERC could regulate sales of electric energy unless they were “demonstrably” retail.⁸⁷

70. Patrick Jacobi & Gabriella Mickel, *Skidmore in the Post-Loper Bright Era of Environmental Law*, 55 ENV’T L. 449, 453 (2025) (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 180 (1980); *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001); *Morton v. Ruiz*, 415 U.S. 199, 237 (1974)).

71. *Id.* at 458.

72. *Loper Bright*, 144 S. Ct. at 2263.

73. *Id.*

74. *Id.* (citing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)); 5 U.S.C. §§551-559.

75. *Loper Bright*, 144 S. Ct. at 2309-10 (Kagan, J., dissenting).

76. *Id.* at 2309 (Kagan, J., dissenting).

77. 118 F.4th 361, 368 (D.C. Cir. 2024). The D.C. Circuit again declined to answer this question in July 2025. See *Michigan Elec. Transmission Co. v. Federal Energy Regul. Comm’n*, 141 F.4th 1296, 1303 (D.C. Cir. 2025) (“We need not decide whether [*Chevron*-like] principles survive the overruling of *Chevron* in *Loper Bright Enterprises v. Raimondo* because ‘[the Commission’s] interpretation of the disputed provisions of the [relevant agreements] are in fact correct.’”) (quoting *NextEra*, 118 F.4th at 368).

78. *Id.*

79. *Id.* at 371.

80. *Id.* at 376 (Rao, J., dissenting); *Loper Bright*, 144 S. Ct. at 2266.

81. *EPSA*, 577 U.S. 260, 277 (2016); *id.* at 296-97 (Scalia, J., dissenting).

82. *Id.* at 265.

83. *Id.* at 273; see Order No. 745, Demand Response Compensation in Organized Wholesale Energy Markets, 76 Fed. Reg. 16658 (Mar. 24, 2011).

84. *EPSA*, 577 U.S. at 273-74.

85. *Id.* at 277 n.5.

86. *Id.* at 297 (Scalia, J., dissenting).

87. *Id.* at 298 (Scalia, J., dissenting).

The significant discrepancy between these two positions makes the Court's assuredness that the statute is unambiguous surprising.⁸⁸ As the majority's and dissent's conflicting interpretations suggest, demand response in truth likely falls somewhere in the middle of wholesale and retail transactions. The majority is correct that wholesale market operators administer the program and wholesale purchasers fund the payments based on the wholesale marginal price.⁸⁹

However, the dissent is also correct that demand response participants are almost entirely retail power users who, to the extent they are truly involved in a "sale of electric energy," are not doing so with the intention to resell anything.⁹⁰ *Loper Bright's* exhortation that complicated statutes necessarily have a "single, best meaning" is thus dissatisfying, particularly in the complicated energy regulatory context.⁹¹ This lack of a bright line is especially relevant to statutes like the FPA that were enacted at a time when Congress did not anticipate the technological developments of the 21st century.

In *Piedmont Environmental Council v. Federal Energy Regulatory Commission*, a court again held that the relevant statutory provision was clear despite a dissent advancing a different interpretation.⁹² The Energy Policy Act of 2005 added §216 to the FPA, which granted FERC the authority to issue permits for the construction or modification of transmission facilities in "national interest electric transmission corridors" as designated by the Secretary of Energy.⁹³ This authority was limited to certain instances, however, one of which was when a state institution with siting authority "withheld approval for more than 1 year after the filing of an application for a permit."⁹⁴

FERC contended that when states denied a permit within one year, they were "withholding approval" and thus granting it permitting jurisdiction.⁹⁵ The *Piedmont* majority struck down this interpretation as "contrary to the plain meaning of the statute," concluding that §216 granted FERC permitting authority only when a state failed to act on an application for at least a full year.⁹⁶ Judge William Traxler dissented to that part of the opinion, finding that the relevant language "is susceptible to only one interpretation, the one that FERC adopted."⁹⁷

The contested provision of §216 analyzed in *Piedmont* is not remotely technical, was added to the FPA in 2005, and was analyzed using similar textualist approaches by

both the majority and dissenting judges.⁹⁸ Nevertheless, it was interpreted quite differently. Whether due to the inevitable failings of language or the political motivations of the judges, this outcome belies the simplistic narrative embraced in *Loper Bright*.⁹⁹

Broader and older sections of the FPA present additional challenges, blurring the line between principles inherent to the statute—which must be part of a "single, best" interpretation—and those adopted by the agency in response to its perceived mandate, which no longer receive deference unless under *Skidmore*. The just and reasonable standard outlined in §§205 and 206 of the FPA has long been understood to incorporate a cost-causation principle under which "the rates charged for electricity should reflect the costs of providing it."¹⁰⁰ The correct application of this principle is vigorously debated in the transmission planning context, since the costs being allocated are often in the billions of dollars.¹⁰¹ Courts and the Commission alike have embraced the cost-causation principle, explicitly stating that it is incorporated in the statutory text supplying the just and reasonable standard.¹⁰² If the cost-causation principle is statutory in nature, courts are charged with determining its meaning under *Loper Bright*.¹⁰³

This change in the law will give credence to jurisdictional arguments more fairly characterized as dissatisfaction with FERC's cost allocation decisions. Challengers have frequently argued that the cost-causation principle imbued in §§205 and 206 of the FPA limits the agency's jurisdiction, preventing these entities from being assigned costs they view as "not fairly attributable" to their operations.¹⁰⁴ While many precedents have emphasized FERC's expertise in the complex technical and economic task of assigning costs fairly, *Loper Bright* calls into question whether skeptical courts must still apply deferential principles of review to FERC's cost allocation decisions.¹⁰⁵ In

88. Wernitz, *supra* note 52, at 308.

89. *EPSA*, 577 U.S. at 282.

90. *Id.* at 298 (Scalia, J., dissenting).

91. See Robert R. Nordhaus, *The Hazy "Bright Line" Defining Federal and State Regulation of Today's Electric Grid*, 36 ENERGY L.J. 203, 206-10 (2015) (noting that recent technological developments have greatly complicated the FPA's original concept of federal versus state jurisdiction over energy transactions).

92. 558 F.3d 304, 315 (4th Cir. 2009).

93. 16 U.S.C. §824p(a).

94. *Id.* §824p(b)(1)(C)(i); *Piedmont Env't Council*, 558 F.3d at 310.

95. *Piedmont Env't Council*, 558 F.3d at 310; Order No. 689, Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69440, 69445 (Dec. 1, 2006).

96. *Piedmont Env't Council*, 558 F.3d at 313.

97. *Id.* at 321 (Traxler, J., dissenting).

98. Wernitz, *supra* note 52, at 310.

99. *Id.*

100. *Old Dominion Elec. Coop. v. Federal Energy Regul. Comm'n*, 898 F.3d 1254, 1255 (D.C. Cir. 2018).

101. See NATHAN SHREVE ET AL., AMERICANS FOR A CLEAN ENERGY GRID & GRID STRATEGIES, FEWER NEW MILES: THE U.S. TRANSMISSION GRID IN THE 2020s (2024), https://cleanenergygrid.org/wp-content/uploads/2024/07/GS_ACEG-Fewer-New-Miles-Report-July-2024.pdf (stating that annual transmission spending totals more than \$25 billion per year); Order No. 1920, *supra* note 5, at 49569 (Christie, Comm'r, dissenting) (describing Order No. 1920's cost allocation provisions as "pointing a regulatory gun at states' heads redolent of *The Godfather*").

102. *Tenaska Clear Creek Wind, LLC v. Federal Energy Regul. Comm'n*, 108 F.4th 858, 868 (D.C. Cir. 2024); see *Old Dominion*, 898 F.3d at 1255-56 ("This cost-causation principle 'add[s] flesh to [the] bare statutory bones' of the just-and-reasonable rate requirement.") (citing *K N Energy, Inc. v. Federal Energy Regul. Comm'n*, 968 F.2d 1295, 1300 (D.C. Cir. 1992)). See generally Joshua Macey & Jacob Mays, *The Law and Economics of Transmission Planning and Cost Allocation*, 45 ENERGY L.J. 209 (2024).

103. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024).

104. See, e.g., *Constellation Mystic Power, LLC v. Federal Energy Regul. Comm'n*, 45 F.4th 1028, 1048 (D.C. Cir. 2022).

105. See *Morgan Stanley Cap. Grp. Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 532 (2008) ("we afford great deference to the Commission in its rate decisions"); *Entergy Ark., LLC v. Federal Energy Regul. Comm'n*, 40 F.4th 689, 701-02 (D.C. Cir. 2022) ("FERC is not required to choose the best solution, only a reasonable one." It is not our job to determine that "FERC made the better call," rather, "our important but limited role is to ensure that the Commission engaged in reasoned decision-

particular, reviewing courts dissatisfied with the result of FERC's analysis may begin to characterize these decisions as beyond FERC's jurisdiction, a position that would have been difficult to justify under *Chevron* deference. That is because characterizing the application of cost causation in practice as unambiguous is a fool's errand—attempts to micromanage FERC's discretion over this technical, fact-specific process are nothing less than judicial hubris.

Despite this truth, many courts have viewed the Commission's cost allocation orders with suspicion. When FERC has regulated cost allocation, it has aimed to prevent free ridership, when entities that benefit from a new transmission line are not required to cover its costs.¹⁰⁶ In practice, however, identifying the beneficiaries of transmission lines is incredibly difficult, because the benefits of increased reliability and reduced transmission congestion are diffuse. As the cases analyzed below demonstrate, FERC's assumptions regarding the beneficiaries of various transmission projects have been highly scrutinized despite the immense difficulty of its task.

Past decisions vacating FERC's cost allocation decisions reveal how characterizing the cost-causation principle as statutory allows skeptical courts to bypass the deference they are required to afford FERC in its factual and technical capacity. In *El Paso Electric Co. v. Federal Energy Regulatory Commission*, the U.S. Court of Appeals for the Fifth Circuit heard plaintiff utilities' challenge to FERC orders implementing the transmission planning requirements of Order No. 1000 *nine years* after the initial petition for review was filed challenging FERC's rejection of a settlement agreement.¹⁰⁷ The court appropriately summarized the agency's ample discretion, noting that it "need not 'utilize a particular formula'" nor "allocate costs with exacting precision."¹⁰⁸ It proceeded, however, to ignore that discussion, claiming that "neither of the statutory mandates ['just' and 'reasonable'] served by the cost-causation principle can be sacrificed for the other or for some separate policy interest."¹⁰⁹

Independent of its subsequent determination that the challenged orders were arbitrary and capricious, the *El Paso* court held that FERC's orders could not "be considered 'just and reasonable' and [thus] violate[d] the Federal Power Act's cost-causation requirement *as a matter of law*."¹¹⁰ Unlike in *Old Dominion Electric Cooperative v. Federal Energy Regulatory Commission*, then, the *El Paso* court framed its vacatur as a result of FERC exercising authority it did not have—and *Chevron* and *Skidmore* were nowhere to be found. FERC's interpretation of which rates were "just and reasonable" and thus its duty to fix them was not afforded any deference, much less respect, despite the

making.") (first quoting *Petal Gas Storage, LLC v. Federal Energy Regul. Comm'n*, 496 F.3d 695, 703 (D.C. Cir. 2007); then quoting *EPSA*, 577 U.S. 260, 295 (2016)).

106. Macey & Mays, *supra* note 102, at 214.

107. 76 F.4th 352, 358-59 (5th Cir. 2023).

108. *Id.* at 357 (citing *Old Dominion Elec. Coop. v. Federal Energy Regul. Comm'n*, 898 F.3d 1254, 1260 (D.C. Cir. 2018)).

109. *Id.* at 361.

110. *Id.* at 363 (emphasis added) (citing *Old Dominion*, 898 F.3d at 1261).

complicated factual disputes inherent in the high-voltage transmission cost allocation decisions in question.

A strong dissent from Judge Leslie Southwick criticized the *El Paso* majority's flippant disregard for FERC's expertise. The dissent emphasized what courts had long recognized: the FPA and APA limit courts evaluating FERC decisions to determining whether the agency offered a reasonable explanation for its actions.¹¹¹ He added the Supreme Court's observation that "nowhere is this more true than in a technical area like electricity rate design."¹¹²

Judge Southwick then observed that cost allocation represented a matter within FERC's expertise that required "predictive judgment," entitling the agency to "particularly deferential review."¹¹³ While he acknowledged that the lack of empirical evidence to support FERC's assumptions was dissatisfying, he emphasized that the project of transmission cost allocation necessarily involves guesswork.¹¹⁴ Judge Southwick astutely grounded this observation in *South Carolina's* holding that agencies lacking empirical evidence are permitted to make "reasonable predictions rooted in basic economic principles."¹¹⁵

Most importantly, Judge Southwick detailed the consequences of striking down FERC's action as beyond its just and reasonable rate authority. He noted that if "reallocation of costs and benefits under Order 1000 [was] a *per se* violation of the cost causation principle as a matter of law, *no explanation from FERC could have sufficed*."¹¹⁶ This statement underscores an important point: contrary to the majority's assertion that "the validity of Order 1000 [was] not at issue," FERC's policy choice to leave non-jurisdictional utilities out of its cost allocation process—central to the order's compromise between fairness and feasibility—was effectively overturned.¹¹⁷ Seven years after the first *El Paso* court remanded the orders implementing Order No. 1000 to the agency for further explanation and fact-finding, it was clear that FERC's task was impossible.¹¹⁸ As the dissenting judge in that prior opinion noted, "[a]ll plans have drawbacks"—nonetheless, the decision of how to weigh those drawbacks with the benefits of a given regulatory approach should have been left to FERC.¹¹⁹

Another pair of high-voltage transmission cost allocation cases, this time from the U.S. Court of Appeals for

111. *Id.* at 367 (Southwick, J., dissenting) (citing *EPSA*, 577 U.S. 260, 292 (2016)); *see id.* at 371 (Southwick, J., dissenting) ("[I]ssues of rate design are fairly technical, and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission.") (quotation marks and citation omitted) (quoting *Louisiana Pub. Serv. Comm'n v. Federal Energy Regul. Comm'n*, 771 F.3d 903, 910 (5th Cir. 2014)).

112. *Id.* at 367 (Southwick, J., dissenting) (citing *EPSA*, 577 U.S. at 292).

113. *Id.* (Southwick, J., dissenting) (citing *Fresno Mobile Radio, Inc. v. Federal Comm'n's Comm'n*, 165 F.3d 965, 971 (5th Cir. 2021)).

114. *Id.* at 369 (Southwick, J., dissenting).

115. *Id.* (Southwick, J., dissenting) (citing *South Carolina Pub. Serv. Auth. v. Federal Energy Regul. Comm'n*, 762 F.3d 41, 76 (D.C. Cir. 2014)).

116. *Id.* at 370 (Southwick, J., dissenting) (emphasis added).

117. *Id.* at 359 n.2.

118. *El Paso Elec. Co. v. Federal Energy Regul. Comm'n*, 832 F.3d 495, 510 (5th Cir. 2016); *see id.* at 511 (Reavley, J., dissenting) ("The Majority errs . . . deeply . . . by failing to accord FERC's policy decision appropriate deference.")

119. *Id.* at 512 (Reavley, J., dissenting).

the Seventh Circuit, further illustrates the complexity of the issues and thus the importance of deference. In *Illinois Commerce Commission v. Federal Energy Regulatory Commission*, the court remanded FERC orders allocating costs for new transmission lines in PJM at or above 500 kilovolts (kV) back to the agency, holding that its decisions were not based upon substantial evidence in the record because they failed to quantify the benefits of the new lines.¹²⁰ Writing for the majority, Judge Richard Posner characterized FERC's lawyer as "rather desperately" reminding the court of the agency's "great deal of experience with issues of reliability and network needs," describing the resultant ask as "tak[ing] the soundness of [FERC's] decision on faith."¹²¹ The majority claimed it was not requiring the Commission to calculate benefits even "to the last million or ten million or perhaps hundred million dollars."¹²² However, high-voltage transmission lines often have multibillion dollar price tags and distribute benefits over a vast geographic scope, exemplifying the "uncertainty inherent in long-term transmission planning" that makes cost allocation difficult.¹²³

The importance and complexity of long-distance, high-voltage transmission was appropriately recognized by Judge Richard Cudahy in dissent. He observed then, as is truer now, that the nation was engaging "in an urgent project" to upgrade its inadequate transmission grid in the face of expanded renewable energy generation and major new loads entering the grid.¹²⁴ Judge Cudahy also noted that PJM's members were "broadly in agreement" that the rate structure should be designed to share the costs of the proposed lines, which provided systemwide benefits.¹²⁵ Because of those geographically dispersed benefits, the dissent recognized that "an unbending devotion to [the cost-causation principle] in every instance can only ignite controversy, sustain arguments and discourage construction while the nation suffers from inadequate and unreliable transmission."¹²⁶

Judge Cudahy stressed FERC's appropriate presumption, supported by the courts, that reliability upgrades benefit the entire system.¹²⁷ He concluded by acknowledging the practical importance of the agency's discretion: "FERC may be in a better position to implement a policy leading to prompt improvement in a deficient transmission grid than this court, focused as it is on the inevitable

complaints of utilities demanding more for their money."¹²⁸ Judge Cudahy's experience as a member and chairman of the Wisconsin Public Service Commission gave him the necessary expertise not to come to his own conclusion on FERC's policy judgment, but to defer to the agency's resolution of highly technical issues.¹²⁹

Five years later, FERC's order on remand was back at the Seventh Circuit for review, underscoring the difficulty of its task. In response to the initial *Illinois* decision, FERC had developed a "postage-stamp" method that allocated costs for the 500-kV-and-above lines in proportion to each regional utility's respective sales.¹³⁰ Again writing for the majority, Judge Posner criticized FERC for "hand-wringing" over the difficulty of estimating the benefits of such high-voltage transmission.¹³¹ He furthered that FERC had "given up the struggle" of quantifying reliability benefits "prematurely," even citing his own book when asserting, over FERC's objection, that a specific cost-benefit analysis was possible.¹³² Contrary to the opinion of experts in engineering, energy science, economics, and more, Judge Posner claimed that the grid-wide benefits of the 500-kV lines at issue were merely "incidental."¹³³

Judge Cudahy again dissented "emphatically," drawing upon his experience as an energy regulator to emphasize many inaccuracies in the majority opinion.¹³⁴ He observed the majority's apparent belief that "somehow[,] there is a mathematical solution to this problem," and noted that this belief was "a complete illusion."¹³⁵ The dissent accurately characterized "[c]ost allocation, particularly at such high voltages, [a]s far from a precise science . . ." ¹³⁶ He stressed the need for deference to FERC's technical analysis, remarking that the majority's notions of cost causation and other technical concepts were informed by "judicial precedents involving radically distinguishable arrangements" that were therefore "dubious guides" when deciding the case at hand.¹³⁷

Judge Cudahy also criticized the majority for statements that were "vast oversimplification[s]" and went "far beyond the proper scope of judicial review," noting that it

120. 576 F.3d 470, 477-78 (7th Cir. 2009).

121. *Id.* at 477.

122. *Id.*

123. Macey & Mays, *supra* note 102, at 229; see Jeffrey Tomich, *Midwest Grid Signs Off on Record \$21B Transmission "Backbone,"* E&E NEWS (Dec. 13, 2024), <https://www.eenews.net/articles/midwest-grid-signs-off-on-record-21b-transmission-backbone/> (noting the \$21.8-billion price tag for two dozen new regional high-voltage transmission lines in MISO).

124. *Illinois Com. Comm'n*, 576 F.3d at 478 (Cudahy, J., dissenting).

125. *Id.* at 479 (Cudahy, J., dissenting).

126. *Id.* (Cudahy, J., dissenting). I will continue to use the term "cost-causation" although the *Illinois* judges used the term "beneficiary pays" to refer to the same principle. See Macey & Mays, *supra* note 102, at 245 ("The phrases have become synonymous. Regulators and courts use both interchangeably.").

127. *Illinois Com. Comm'n*, 576 F.3d at 480 (Cudahy, J., dissenting) (citing *K N Energy, Inc. v. Federal Energy Regul. Comm'n*, 968 F.2d 1295, 1300 (D.C. Cir. 1992)).

128. *Id.* at 482 (Cudahy, J., dissenting).

129. See Kate Marshall Dole, *Richard Dickson Cudahy, Judge for U.S. Court in Illinois, Dies at 89*, CHI. TRIB. (Aug. 19, 2019), <https://www.chicagotribune.com/2015/10/02/richard-dickson-cudahy-judge-for-us-court-in-illinois-dies-at-89/> (noting Judge Cudahy's service on the Wisconsin Public Service Commission).

130. *Illinois Com. Comm'n v. Federal Energy Regul. Comm'n (Illinois II)*, 756 F.3d 556, 559 (7th Cir. 2014).

131. *Id.*

132. *Id.* at 561.

133. *Id.* at 564; see *supra* notes 1-2 and accompanying text; *supra* notes 23-26 and accompanying text; SOUTHWEST POWER TOOL, THE BENEFITS OF A "TRANSMISSION SUPERHIGHWAY" (2009), https://www.spp.org/documents/10047/benefits_of_robust_transmission_grid.pdf (listing numerous ways in which "a robust transmission grid benefits everyone"); cf. Christina Hayes, *Don't Be Fooled: Transmission Benefits Are Clearer Than They Appear*, UTIL. DIVE (Oct. 12, 2023), <https://www.utilitydive.com/news/transmission-benefits-are-clear-FERC-NOPR/696412/> (noting that Order No. 1000 and Order No. 1920, at least initially, listed numerous systemwide benefits of long-distance transmission, and describing those benefits as "fundamentally clear").

134. *Illinois II*, 756 F.3d at 565 (Cudahy, J., dissenting).

135. *Id.* (Cudahy, J., dissenting).

136. *Id.* (Cudahy, J., dissenting).

137. *Id.* (Cudahy, J., dissenting).

“manufactur[ed] its own ‘evidence’” and seemed to “feel free to second guess the Commission.”¹³⁸ By contrast, the dissent expressed sympathy and respect for the Commission in light of the “incommensurable forces and conditions” it was addressing “as skillfully and honestly as it [could].”¹³⁹ Finally, Judge Cudahy observed that FERC’s only option on remand was to present “an approach that superficially conforms to various radically distinguishable judicial precedents,” characterizing this restriction as “unfortunate” given his belief that courts “should allow the FERC to be creative in addressing these unprecedented problems.”¹⁴⁰

These cases illustrate that courts have been willing to vacate FERC’s cost allocation decisions where they do not substantially conform, in the courts’ view, to the cost-causation principle and thus the just and reasonable standard. Although Order No. 1920 responds to these cases by adopting an approach Joshua Macey and Jacob Mays find “consistent with decades of judicial precedent,” it is by no means immune from judicial scrutiny.¹⁴¹ The *El Paso* decisions, in finding FERC’s orders not merely arbitrary and capricious but beyond its authority under the FPA, suggest that courts disagreeing with FERC’s cost allocation decisions will have a much easier time vacating its orders post-*Loper Bright*.

Rather than needing to find that FERC’s orders lack substantial evidence, do not constitute reasoned decision-making, or are otherwise arbitrary and capricious despite the deference given to FERC’s technical decisions, future courts need not defer to FERC at all if they characterize its decision as inconsistent with the best reading of §§205 and 206 of the FPA. The *Illinois* decisions further indicate that courts have been willing to find FERC orders arbitrary and capricious despite the immensely technical and speculative nature of cost allocation for high-voltage transmission lines.

Prior to *Loper Bright*, courts finding that standard was not met were constrained by *Chevron* deference given the plainly ambiguous nature of “just and reasonable.” They are now free to hold FERC’s actions inconsistent with their new “single, best reading” of those terms as applied to the extremely complex cost allocation disputes they will undoubtedly review, endangering FERC’s ability to meaningfully and consistently support transmission planning across diverse geographic regions. The long duration of these complex cases further restricts FERC, since its attempts to justify its orders to reviewing courts often fail more than a decade after its original action.

To put a fine point on the complexity of cost allocation, consider Commissioner Christie’s dissent to Order No. 1920. His concern was that states without clean energy goals were funding the costs of transmission investments

spurred by states with those goals.¹⁴² This concern led him to endorse a “siloe[d]” cost allocation approach for all new transmission lines, under which states without clean energy goals would not contribute to new regional and interregional projects.¹⁴³ However, states without clean energy goals are free to pass laws expressing their energy preferences, laws that would be accounted for under Order No. 1920’s methodology just the same as clean energy bills.¹⁴⁴ Additionally, one of the key benefits of transmission is increased reliability, which reduces the need for expensive new generation.¹⁴⁵

Of course, states with large fossil fuel economies are happy with the status quo—their influential utilities use RTO governance processes to block long-distance transmission lines, thereby inflating the need for new generation on which they earn a return.¹⁴⁶ Thus, as FERC itself has recognized, “transmission planning that ignores state policies can be expected both to cause total costs to increase and force states that have adopted clean energy policies to subsidize states that have not.”¹⁴⁷ When the technical experts and commissioners at FERC themselves disagree over cost allocation, their democratic decisionmaking process—not the whims or policy preferences of generalist judges—should decide the result.

There are many good reasons for that conclusion, rooted in democratic theory and governance, separation of powers, and more.¹⁴⁸ Chief among them is the fact that courts simply do not have the expertise to make such technical and policy-laden decisions. If experts who have spent their lives working on energy issues still sometimes misunderstand and disagree about cost allocation principles, judges are unlikely to fare better. Because recent Supreme Court decisions tend toward judicial hubris instead of judicial humility when reviewing agency actions, FERC’s ability to effectively allocate the costs of long-distance transmission will be hampered.¹⁴⁹ Without successful cost alloca-

138. *Id.* at 565, 567 (Cudahy, J., dissenting).
 139. *Id.* at 566 (Cudahy, J., dissenting).
 140. *Id.* at 569 (Cudahy, J., dissenting).
 141. Macey & Mays, *supra* note 102, at 248.

142. Order No. 1920, *supra* note 5, at 49582 (Christie, Comm’r, dissenting); Macey & Mays, *supra* note 102, at 229.
 143. Order No. 1920, *supra* note 5, at 49582 (Christie, Comm’r, dissenting); Macey & Mays, *supra* note 102, at 229.
 144. Macey & Mays, *supra* note 102, at 230. Wyoming, for instance, has proposed to fine utilities that transmit to customers energy generated by wind or solar facilities. Mead Gruver, *Wyoming Proposal Would Require Utilities to Use Fossil Fuels*, AP News (Jan. 25, 2017), <https://apnews.com/general-news-41ac788ff8434142903a0d9bd96b89c7>.
 145. See *supra* notes 1-2 and accompanying text; *supra* note 23.
 146. See *supra* note 34; see also Dasom Ham et al., *Power Flows, Part 2: Transmission Lowers US Generation Costs, but Generator Incentives Are Not Aligned* 1 (Resources for the Future, Working Paper No. 25-10, 2025), https://media.rff.org/documents/WP_25-10_kFRJaAE.pdf (documenting \$5.8-\$7.1 billion lost to regional transmission congestion in MISO and SPP in 2022 alone). See generally Pescoe, *supra* note 3.
 147. Macey & Mays, *supra* note 102, at 230; see *id.* at 233 (discussing FERC’s analysis of free ridership).
 148. See *West Virginia v. Environmental Prot. Agency*, 142 S. Ct. 2587, 2644 (2022) (Kagan, J., dissenting) (“The Court [today] appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening.”). See generally Katharine Jackson, *The Public Trust: Administrative Legitimacy and Democratic Lawmaking*, 56 CONN. L. REV. 1 (2023).
 149. See *supra* notes 19-21 and accompanying text; compare *Ohio v. Environmental Prot. Agency*, 144 S. Ct. 2040, 2070 (2024) (Barrett, J., dissenting) (arguing that the Court should proceed more cautiously in cases “with voluminous, technical records and thorny legal questions,” particularly in

tion, these highly beneficial projects will never get off the ground, condemning the power grid to obsolescence.

C. Chevron Allowed Courts to Effectuate the Purpose Behind Energy Statutes While Deferring to FERC's Expertise

Where courts deferred to FERC at *Chevron* step two, they appropriately recognized the staggering complexity of FERC's regulatory task, its expertise, and the reasonability of its interpretation. That respect is lost under *Loper Bright*. Both cases discussed in this part relied on deference to FERC under *Chevron* and were or will be reevaluated.¹⁵⁰ Despite *Loper Bright's* assurance that the holdings of cases decided under *Chevron* would not be disturbed, questions like cost allocation necessitate constructing a new "single, best" interpretation of the just and reasonable standard in specific contexts, necessarily affecting FERC's jurisdiction moving forward. This disruption raises thorny questions about the Commission's implementation of cost allocation for projects developed under Order No. 1000's methodology.¹⁵¹

Chevron step two has allowed courts to respect technological developments by deferring to FERC's appropriate interpretive shifts. In *Solar Energy Industries Ass'n v. Federal Energy Regulatory Commission (SEIA I)*, the D.C. Circuit considered the meanings of "facility" and "power production capacity" in the Public Utility Regulatory Policies Act of 1978 (PURPA).¹⁵² PURPA directed FERC to facilitate the effective market participation of "qualifying small power production facilities," which FERC accomplished by requiring utilities to purchase the power produced by those facilities.¹⁵³ To be a qualifying facility, a particular entity must use "biomass, waste, renewable resources, geothermal resources, or any combination thereof" to produce energy and have a total power production capacity not greater than 80 megawatts (MW).¹⁵⁴

The facility in question, Broadview, applied to FERC for a certification that it was a qualifying facility.¹⁵⁵ Despite its 160-MW solar array and 50-MW battery storage system, Broadview noted that the inverters needed to convert the direct current (DC) power those generators produced to alternating current (AC), facilitating its sale, had a total net capacity of 80 MW.¹⁵⁶ After initially denying Broadview its certification, FERC reversed course, concluding that measuring the power production capacity of a facility should hinge on its maximum capacity to send power out to the grid at any one time, which in Broadview's case was 80 MW.¹⁵⁷ The Commission observed on rehearing that it was returning to its longstanding interpretation of the statute.¹⁵⁸

The *SEIA I* court spent only a few sentences analyzing the statute at *Chevron* step one, noting that the statute does not define "facility" or "power production capacity" before concluding that it is ambiguous and moving to step two.¹⁵⁹ At step two, it noted that FERC's interpretation was consistent with PURPA's purpose of encouraging the development of small power production facilities and promoting the use of alternative energy sources.¹⁶⁰ The court added that for a solar facility to operate like Broadview made sense, since its intermittent nature would prevent it from consistently selling 80 MW of power without a higher peak capacity and battery storage.¹⁶¹

Judge Justin Walker dissented on the *Chevron* holding, accusing the majority and the circuit as a whole of unmitigated "*Chevron* maximalism," Justice Neil Gorsuch's term for courts using perfunctory step one analyses to race to step two and defer to agencies.¹⁶² The dissent concluded that Broadview's true capacity was 130 MW, since it would deliver 80 MW of AC power to the grid while charging its battery with 50 MW of DC power to use during times of low productivity.¹⁶³

While the majority's step one analysis in *SEIA I* was admittedly less than disciplined, deferring to FERC's construction of PURPA is proper given the technical nature of the question. The agency appropriately considered not just the text of the statute, but its undeniable purpose of encouraging small solar facilities to enter the grid, and gave credence to that purpose in its interpretation. The *SEIA I* dissent conflates FERC's acknowledgment that the language of the statute is plain and not particularly technical with a mandate to substitute its judgment for the agency's.¹⁶⁴

FERC rightly noted that the term "power production capacity" in particular is ambiguous, and its interpretation of this term relied on its experience administering

its emergency docket), and *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2294 (2024) (Kagan, J., dissenting) ("In recent years, this Court has too often taken for itself decision-making authority Congress assigned to agencies."), with *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983) ("[A] reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. . . . [In such cases], a reviewing court must generally be at its most deferential."), and *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968) ("Surely the Commission's broad responsibilities . . . demand a generous construction of its statutory authority.").

150. *South Carolina Pub. Serv. Auth. v. Federal Energy Regul. Comm'n*, 762 F.3d 41 (D.C. Cir. 2014); *Solar Energy Indus. Ass'n v. Federal Energy Regul. Comm'n (SEIA I)*, 59 F.4th 1287 (D.C. Cir. 2023), *vacated and remanded*, *Edison Elec. Inst. v. Federal Energy Regul. Comm'n*, 144 S. Ct. 2705 (2024); see *Solar Energy Indus. Ass'n v. FERC (SEIA II)*, 154 F.4th 863 (D.C. Cir. 2025).

151. See *Loper Bright*, 144 S. Ct. at 2273 (stating that the holdings of cases establishing the lawfulness of specific agency actions under *Chevron* are subject to statutory *stare decisis*).

152. 59 F.4th at 1292.

153. 18 C.F.R. §292.303(a).

154. 18 U.S.C. §796(17)(A)(i)-(ii).

155. *SEIA I*, 59 F.4th at 1290.

156. *Id.*

157. *Id.* at 1291.

158. *SEIA II*, 154 F.4th 870 (D.C. Cir. 2025).

159. *SEIA I*, 59 F.4th at 1292.

160. *Id.* at 1293.

161. *Id.*

162. *Id.* at 1297-98 (Walker, J., dissenting in part).

163. *Id.* at 1301 (Walker, J., dissenting in part).

164. *Id.* at 1298 (Walker, J., dissenting in part).

PURPA and its deep understanding of the electric grid.¹⁶⁵ As the *SEIA I* majority stated, FERC correctly observed that Broadview can only ever send 80 MW of power to the grid and that PURPA's mandatory purchasing requirement applies only to grid-usable AC power.¹⁶⁶ This observation was consistent with its experience in the subject matter of the statute, given its previous finding that smaller facilities were commonly composed of components with "individual capabilities significantly exceeding the overall facility capabilities."¹⁶⁷

The meaning of simple terms like "capacity" and "facility" differs by context, and FERC as the expert agency is the best equipped to make determinations about their specific application. That is the core logic of *Chevron*.¹⁶⁸ FERC's *SEIA I* interpretation did not substitute its judgment for that of Congress. Regardless, under *Chevron*, courts were still free to either find the statute clear at step one or FERC's interpretation unreasonable at step two.

Under *Loper Bright*, courts must instead identify the "single, best meaning" of statutory provisions like the one at issue in *SEIA I*, which become surprisingly complex when applied to specific fact patterns.¹⁶⁹ Those "best" interpretations will have consequences that the judges writing them could not possibly predict given the diverse situations to which they are applied and those judges' lack of experience in the field. While the simplicity that accompanies such rules has value, it ought not be weaponized to obscure the true complexity of the world—and of the electric grid in particular.¹⁷⁰

The transmission planning and cost allocation rules so fundamental to the U.S. electric grid are significantly more complicated and speculative than the PURPA regulations at issue in *SEIA I*, only heightening the need for deference. The *South Carolina* court acknowledged this difficulty, citing the Supreme Court's language in *Morgan Stanley and Permian Basin* regarding the heightened deference afforded to the Commission on rate-related matters.¹⁷¹ It deferred to FERC under step two in concluding that "the Commission reasonably interpreted section 206 to authorize [Order No. 1000's] planning mandate," finding that the agency did not "leap" in forcing utilities to conduct the "practice" of planning in which their self-interest had thus far prevented their meaningful engagement.¹⁷²

As applied to Order No. 1000's elimination of rights of first refusal for utilities, the court concluded that §206

was ambiguous because it said nothing about rights of first refusal or how to determine which practices affect rates.¹⁷³ It proceeded to again defer to the Commission, noting that economic principles supported the conclusion that barriers to entry like rights of first refusal would have a direct effect on the costs of transmission facilities.¹⁷⁴

On the cost allocation requirements of Order No. 1000, the question was similarly whether the area regulated, now cost allocation, constituted a "practice affecting rates" under §206.¹⁷⁵ The *South Carolina* court found the statutory text ambiguous in this context as well, proceeding to defer to the Commission at *Chevron* step two because the cost-causation principle it employed was "wholly reasonable."¹⁷⁶ The court frequently employed language emphasizing FERC's expertise and experience in regulating interstate transmission, highlighting the reasoning for its deferential posture.¹⁷⁷ It also assigned the burden of demonstrating that §206 disallowed FERC from issuing Order No. 1000 to the petitioners, correctly approaching the case from the position that the FPA's broad language and significant delegation of power to FERC means that its assertion of jurisdiction should be treated with respect, not suspicion.¹⁷⁸

Fully explaining the *South Carolina* opinion, which at 26,500 words is significantly longer than this Article, would be impractical. And that is exactly the point. FERC is promulgating incredibly complicated rules regulating the numerous and powerful players in a multibillion dollar industry. Its best judgment is that doing so responds to Congress' 1935 mandate to ensure the justness and reasonableness of rates, including regulating "any . . . practice . . . [directly] affecting such rate[s]."¹⁷⁹

This expansive regulatory project does not mean that courts should simply roll over and allow the Commission to regulate however it pleases. It does, however, counsel that deference to the agency's reasonable interpretation of an ambiguous and extraordinarily broad statute—which relies almost entirely on its technical understanding of the electric grid and associated markets—is appropriate.¹⁸⁰ As discussed below, *Loper Bright* interferes with this deference, forcing or at least encouraging courts lacking expertise to interpret §206 of the FPA in ways that will constitute judicial policymaking.

165. *Id.* at 1293-94.

166. *Id.* at 1292-93.

167. Occidental Geothermal, Inc., 17 FERC ¶ 61231, 61445 (1983).

168. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2294-96 (2024) (Kagan, J., dissenting) (arguing that *Chevron's* presumption that agencies should fill ambiguities in regulatory statutes is correct given agencies' technical expertise, experience administering their programs, and accountability relative to courts).

169. See *id.* at 2296-97 (Kagan, J., dissenting) (discussing examples of ambiguous terms in technical statutes because "abstract analysis can only go so far; indeed, it may obscure what matters most").

170. See *Boyd & Carlson*, *supra* note 52.

171. *South Carolina Pub. Serv. Auth. v. Federal Energy Regul. Comm'n*, 762 F.3d 41, 54-55 (D.C. Cir. 2014); see *supra* note 21.

172. *South Carolina*, 762 F.3d at 57, 59.

173. *Id.* at 74.

174. *Id.*

175. *Id.* at 84.

176. *Id.* at 85.

177. See, e.g., *id.* at 67 ("Based on its expertise and experience, the Commission's determination that the current planning and cost allocation practices were unjust or unreasonable 'warrants substantial deference from this court.'") (citing *Cities of Bethany et al. v. Federal Energy Regul. Comm'n*, 727 F.2d 1131, 1137 (D.C. Cir. 1984)).

178. See, e.g., *id.* at 75 ("Petitioners' argument [concerning rights of first refusal] is unconvincing and certainly does not demonstrate that Section 206 unambiguously precludes the Commission's assertion of authority.")

179. 18 U.S.C. §824e(a).

180. Cf. Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783, 1848-49 (2016) (emphasizing FERC's "broad authority" under the FPA and praising FERC's assertions of jurisdiction over RTOs and wholesale markets as both consistent with the FPA and important adaptations to the modern electric grid).

III. Skidmore Offers Little Meaningful Protection for FERC

Skidmore's doctrine of optional “deference” is a prime counterargument to claims that many courts will not adequately respect FERC’s highly technical expertise. However, *Skidmore's* indeterminate nature and inherently normative analysis renders it ineffective as a barrier to courts doubting FERC’s authority. *Skidmore* was an important aspect of the *Loper Bright* decision, with the majority responding to the claim that courts should further respect agency expertise in two key ways. First, *Loper Bright* emphasized that courts, not agencies, possess expertise in the field of statutory interpretation, implying that expertise in other fields is not particularly important when determining the bounds of agency authority.¹⁸¹ Second, the majority stressed that “[c]areful attention to the judgment of the Executive Branch may help inform” courts’ inquiry into whether an agency’s action comports with its statutory authority.¹⁸²

Neither of these arguments is convincing as applied to FERC’s §206 authority, which is necessary for its transmission planning and cost allocation rules. In the context of regulations as technical and complex as Order No. 1000 and Order No. 1920, interpreting the two words “just” and “reasonable” or determining what is included in “any practice that [directly] affects rates” is a formidable task. Doing so without technical expertise causes serious errors.¹⁸³ Further, *Loper Bright's* discussion of *Skidmore* was woefully incomplete and often conflicted with its other pronouncements, leaving courts little guidance on how to apply its mandate.

Loper Bright's discussion of *Skidmore* is insufficient to clarify its 80-year-old instructions as applied to the modern administrative state, especially in light of *Loper Bright's* exhortation that statutes have a “single, best meaning.”¹⁸⁴ The *Loper Bright* majority “made it abundantly clear that statutory ‘ambiguity’ . . . will no longer be the operative concept” when interpreting statutes granting authority to administrative agencies.¹⁸⁵ It instead addressed the fact that statutes often contain broad delegations of power to agencies by observing that the correct interpretation of a statute could constitute Congress delegating authority to the agency to interpret a statutory provision or fill in the contents of a standard like reasonableness.¹⁸⁶

At the same time, it emphasized that “when the ambiguity is about the scope of an agency’s own power . . . abdi-

cation in favor of the agency is *least* appropriate.”¹⁸⁷ Such language empowers judges anxious to join the “substantial minority” of courts of appeals that have regarded the application of the *Skidmore* factors as optional.¹⁸⁸ Additionally, because the *Loper Bright* Court did not clarify the murky distinction between questions of law and mixed questions of law and fact, these cases in which agency interpretations supposedly deserve the least respect will constitute a substantial majority of administrative cases.¹⁸⁹

FERC’s use of *Skidmore* deference when briefing *SEIA II* illustrates that to courts skeptical of agency action, *Skidmore* provides little if any protection. FERC understandably first argued that the *SEIA I* court “independently assessed [PURPA]’s text, structure, purpose, and legislative history” consistent with *Loper Bright*.¹⁹⁰ The agency then argued in the alternative that its interpretation had the “power to persuade” under *Skidmore*.¹⁹¹

Perhaps in part because the *SEIA I* court’s analysis did not seem truly “independent,”¹⁹² FERC spent much of its brief addressing its view that the petitioners improperly relied on generic dictionary definitions of terms like “capacity,” when appropriate statutory interpretation would have taken note of those terms’ technical meanings.¹⁹³ When it turned to *Skidmore*, it listed only the four factors quoted in *Loper Bright*, despite the Supreme Court’s prior recognition of additional potential considerations.¹⁹⁴ FERC emphasized the age and consistency of its interpretation, its subject matter expertise, and the validity of its reasoning.¹⁹⁵ Notably, the agency was forced to respond to the petitioners’ ludicrous contention that it had no “specialized experience,” explaining the origin of its interpretation in “its technical knowledge of generation facilities’ operations.”¹⁹⁶

181. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

182. *Id.*; see *id.* at 2267 (“Congress expects courts to handle technical statutory questions . . . Courts, after all, do not decide such questions blindly. The parties and amici in such cases are steeped in the subject matter, and reviewing courts have the benefit of their perspectives.”).

183. *Cf. id.* at 2301 (Kagan, J., dissenting) (“Answering [questions of statutory interpretation in technical contexts] right does not mainly demand the interpretive skills courts possess. Instead, it demands one or more of: subject-matter expertise, long engagement with a regulatory scheme, and policy choice.”).

184. *Id.* at 2266-67.

185. Merrill, *supra* note 19, at 260.

186. *Id.* at 261; *Loper Bright*, 144 S. Ct. at 2263.

187. *Loper Bright*, 144 S. Ct. at 2266.

188. Merrill, *supra* note 19, at 260. It is also worth noting that scholarship assessing the positions of courts of appeals on whether applying the *Skidmore* factors is optional has only queried whether courts “assessed at least one *Skidmore* factor.” Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1271 (2007). Because many of the *Skidmore* factors simply reflect the persuasiveness of the agency’s interpretation to a reviewing court, many opinions Hickman and Krueger claim endorse the “sliding-scale model”—which concludes that applying at least one *Skidmore* factor is necessary—are merely paying lip service to the idea of true “deference.” This complication obscures the number of appellate courts that *meaningfully* apply *Skidmore*. In addition, it remains to be seen in more detail how courts of appeals will react to *Loper Bright* itself; at least some of them construe it as obviating the need to apply *Skidmore* at all. See *infra* notes 198-212 and accompanying text.

189. Merrill, *supra* note 19, at 256 n.6; see *Loper Bright*, 144 S. Ct. at 2305-06 (Kagan, J., dissenting) (“[T]he distinction the majority offers [between pure legal questions and mixed questions of law and fact] makes no real-world (or even theoretical) sense.”); *cf.* *City of Arlington v. Federal Comm’n’s Comm’n*, 569 U.S. 290, 297 (2013) (“[T]he distinction between ‘jurisdictional’ interpretations and ‘nonjurisdictional’ interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*”).

190. Supplemental Brief of Respondent at 2-3, *Solar Energy Indus. Ass’n v. Federal Energy Regul. Comm’n*, No. 21-1126 (D.C. Cir. Jan. 15, 2025).

191. *Id.*

192. See *supra* notes 159-61 and accompanying text.

193. Supplemental Brief of Respondent, *supra* note 190, at 9-13.

194. See *supra* notes 69-71 and accompanying text.

195. Supplemental Brief of Respondent, *supra* note 190, at 21-26.

196. *Id.* at 24-25.

On remand, the D.C. Circuit agreed with FERC, holding that Broadview was indeed a qualifying facility under PURPA.¹⁹⁷ *Skidmore* was nowhere to be found, rendering five pages of FERC’s brief superfluous and highlighting the challenge it faces. The court’s choice to value FERC’s interpretation while comporting with the mandate to reach a “single, best meaning” through its “independent judgment” was its own. And its choice not to apply *Skidmore* seems to have resulted from its decision that FERC’s interpretation was correct. FERC’s interpretation of the FPA only had the “power to persuade” because the *SEIA II* court agreed that it was best. This circular reasoning demonstrates that *Skidmore* is largely meaningless.

Scholars and courts have often agreed, both before and after *Loper Bright*, that *Skidmore* deference is unimpactful because courts decide administrative cases by exercising their independent judgment. To begin with the judiciary, Judge John Nalbandian’s concurrence in *Dayton Power & Light Co. v. Federal Energy Regulatory Commission* indicates his belief that the *Skidmore* doctrine is more accurately described as “respect,” not “deference.”¹⁹⁸ Justice Scalia derided *Skidmore* as “an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers.”¹⁹⁹

During the oral argument in *Loper Bright*, Justice Kagan claimed that “*Skidmore* has always meant nothing.”²⁰⁰ And the Fifth Circuit’s decision in *Mayfield v. U.S. Department of Labor*, albeit in dicta, posed the question of “what work *Skidmore* deference can do” after *Loper Bright*, noting that the Supreme Court suggested “that either the agency’s interpretation is the best interpretation (in which case no deference is needed) or the agency’s interpretation is not best (in which case it lacks persuasive force and is not owed deference).”²⁰¹ Ultimately, since courts must now independently decide which interpretation is best, and because if an interpretation “is not the best, it is not permissible,” *Skidmore* does little more than provide additional support for courts already inclined to agree with the agency.²⁰²

Even courts purporting to apply *Skidmore* deference often seem to invoke it after deciding upon their preferred interpretation of the statute at issue, reflecting *Skidmore*’s irrelevance. In *Lopez v. Garland*, the U.S. Court of Appeals for the Ninth Circuit’s efforts “to construe the statute independently” led to its agreement with the Board of Immigration Appeals (BIA) regarding multiple provisions of

the Immigration and Nationality Act (INA).²⁰³ The court claimed it was applying *Skidmore*:

Given the plain words of the statute, we not only agree with the BIA’s application of *Matter of Nolan* to this case and afford it *Skidmore* deference, but also independently conclude, based on our own statutory analysis, that the pardon waiver does not require availability of a pardon to find a conviction to be a proper basis for removal.²⁰⁴

If the court here is indeed “afford[ing the agency] *Skidmore* deference,” the doctrine has little meaning.²⁰⁵ The court “agrees” with the BIA’s interpretation first based upon its thoroughness, quality of reasoning, and alignment with judicial precedent—in other words, its correctness—and only then affords the agency deference.²⁰⁶ The court skids by the BIA’s about-face on the issue, weighing *Skidmore*’s “correctness” factors above consistency or age.²⁰⁷ I sympathize with the plight of courts that are bound to tackle the interpretation of complex statutes while making sense of the unclear standards they receive from the Supreme Court. Nevertheless, it seems that in *Lopez*, *Skidmore* deference is present in name only.

The U.S. Court of Appeals for the Eleventh Circuit spilled still less ink when weighing the *Skidmore* factors in *Perez v. Owl, Inc.*, concluding that because the U.S. Department of Labor’s position was persuasive and had remained the same for 80 years, it was entitled to *Skidmore* deference.²⁰⁸ In doing so, the *Perez* court cited *Loper Bright*’s statement that “interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute’s meaning.”²⁰⁹ But it then essentially granted *Chevron* deference to the agency, spending much less time interpreting the statute independently than it did discussing the agency’s interpretation.²¹⁰ The *Perez* decision thus illustrates the tension between *Loper Bright*’s emphasis on independence and the reality that statutory interpretation as applied to complex regulatory schemes is inextricable from detailed factual records, technical expertise, and the ultimate persuasiveness of the agency’s interpretation.

One final example of *Skidmore*’s inefficacy: In *Moctezuma-Reyes v. Garland*, the U.S. Court of Appeals for the Sixth Circuit interpreted a different provision of the INA, the “exceptional and extremely unusual hardship” standard that immigrants applying for a cancellation of their removal must meet to have their application approved.²¹¹ The majority emphasized that the BIA was not entitled to deference because the statute did not contain language

197. *SEIA II*, 154 F.4th 863, 868 (D.C. Cir. 2025).

198. 126 F.4th 1107, 1135 (6th Cir. 2025) (Nalbandian, J., concurring). *But see Doe v. Leavitt*, 552 F.3d 75, 81 (1st Cir. 2009) (“[*Skidmore*] must mean something more than that deference is due only when an inquiring court is itself persuaded that the agency got it right. Otherwise, *Skidmore* deference would not be deference at all.”).

199. *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J., dissenting).

200. Transcript of Oral Argument at 32, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024) (No. 22-451), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-451_114p.pdf.

201. 117 F.4th 611, 619 (5th Cir. 2024).

202. *Loper Bright*, 144 S. Ct. at 2266; *see supra* notes 79-80 and accompanying text.

203. 116 F.4th 1032, 1042-44 (9th Cir. 2024).

204. *Id.* at 1044.

205. *Id.*

206. *Id.* at 1040, 1044.

207. *Id.* at 1040.

208. 110 F.4th 1296, 1307-08 (11th Cir. 2024).

209. *Id.* at 1308 (citing *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262 (2024)).

210. *Id.* at 1306-09.

211. 124 F.4th 416, 420 (6th Cir. 2024).

delegating the interpretation of this “broad language” to the agency’s “judgment,” “opinion,” or “finding.”²¹² It defended its failure to cite *Skidmore* by arguing that *Loper Bright* “is not a mandate to look to or defer to the agency’s interpretation.”²¹³ The court’s willingness to upend the BIA’s long-standing interpretation—which was (1) not directly raised by the litigants, (2) enforced by the Supreme Court as recently as 2024, and (3) affirmed by numerous Sixth Circuit precedents that *Loper Bright* “expressly disclaimed any intention” of upending—is worrying for agencies like FERC, which rely on stability in judicial interpretations of statutory language.²¹⁴

Moctezuma-Reyes is notable because it reflects uncertainty as to whether considering *Skidmore* deference or even looking to the agency’s statutory interpretation whatsoever is required under *Loper Bright*. This confusion over *Loper Bright*’s directive will afford courts the opportunity to selectively evaluate agency interpretations and defer to agencies only when they wish to do so.²¹⁵ Thus, *Loper Bright* seems likely to reverse *Chevron*’s constraining effect on partisanship in judicial decisions.²¹⁶

Much of the scholarly commentary agrees that *Skidmore* has limited meaning, characterizing it as Justice Scalia did: merely describing what smart decisionmaking looks like, namely, considering the informed arguments of third parties.²¹⁷ To the extent courts will apply *Skidmore* after *Loper Bright*, scholars generally agree that the *Loper Bright* Court emphasized the importance of the “consistency with earlier and later pronouncements” factor, and the cases I have reviewed above reflect this emphasis.²¹⁸ However, *Loper*

Bright did not comprehensively list factors relevant to the *Skidmore* inquiry or provide guidance on weighing them, further limiting the extent to which agencies can rely on courts at least considering the various *Skidmore* factors when exercising their authority.²¹⁹ The result is significant uncertainty for agencies, which, due to gridlock in Congress, are increasingly left to develop and implement complicated regulatory schemes with outdated guidance.²²⁰

As applied to FERC, the *Loper Bright* Court’s emphasis on consistency in agency interpretations is severely limiting. Solving even just the transmission planning and cost allocation problems facing the modern electric grid, not to mention the numerous other challenges emerging technologies and electrification pose to energy markets, requires the agency to adapt and creatively apply its authority under an old statute to these new problems.²²¹ Further, as FERC’s independence is threatened, its consensus-based rulemaking approach may shift, problematizing future regulations that rely on departures from consistent interpretations of the FPA.²²²

To take just one example, the cost-causation principle courts have found to be directly implicated in the statutory language of §206 is understood differently by scholars, FERC commissioners, and courts.²²³ If the technical experts at FERC decide through the Commission’s democratic, consensus-driven process that achieving just and reasonable rates requires altering its understanding of cost causation as applied to interregional transmission planning—which, to some extent, it is already doing²²⁴—the FPA mandates that it do so.²²⁵ *Loper Bright* would counsel a reviewing court to view such a change skeptically, prioritizing consistency in its *Skidmore* analysis.

But the very structure of §206 of the FPA directs FERC to change course when necessary: it must continuously review the justness and reasonableness of rates and intervene when it finds those rates are no longer just and reasonable, with no further prescription on how it should revise them.²²⁶ As the Supreme Court has stated, “[T]he purpose of the power given the Commission by §206(a) is the protection of the public interest.”²²⁷ The expertise of the Commission makes it the best actor to decide how to achieve this purpose. *Loper Bright*’s incomplete analysis of how and when courts should recognize Congress’ intent for agencies to fill in the meaning of statutory terms will allow courts

212. *Id.* at 420-21.

213. *Id.* at 423; *see id.* at 424-25 (Stranch, J., concurring in the judgment):

[E]ven were we to disregard our past precedent . . . and determine the meaning of “exceptional and extremely unusual hardship” anew, *Loper Bright* instructs us to treat the statutory interpretations of agencies as ‘especially informative’ and persuasive. . . . [The majority] impermissibly conducts its own independent statutory interpretation without any discussion of longstanding agency precedent.

214. *Id.* at 424 (Stranch, J., concurring in the judgment); *Loper Bright*, 144 S. Ct. at 2273.

215. *See also* *Restaurant L. Ctr. v. U.S. Dep’t of Lab.*, 115 F.4th 396, 407 (5th Cir. 2024) (overturning a Department of Labor rulemaking based on a view held consistently by the agency since 1988 without evaluating any *Skidmore* factors, stating only that the agency’s view was unpersuasive); *In re MCP No. 185*, 124 F.4th 993, 998 (6th Cir. 2025) (setting aside a Federal Communications Commission order reimposing net neutrality requirements on broadband Internet providers without citing *Skidmore* or considering deference whatsoever).

216. *See supra* note 18.

217. *See, e.g.*, David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 227 n.98 (observing that even if *Skidmore* means something more than saying “we will defer to the agency if the agency is right,” its application “depends so much on context and circumstance . . . as to preclude an agency from relying on it”); Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1901 (2016) (“*Skidmore* just describes the attitude of any minimally sensible decisionmaker, who listens to any relevant arguments of well-informed parties when deciding what to do.”); *cf.* Kumar, *supra* note 19, at 1771 (reading *Loper Bright* as tasking judges with “somehow isolat[ing] agencies’ scientific and technical know-how and provid[ing] it with a weak form of *Skidmore* deference, while independently assessing everything else”).

218. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see supra* notes 208, 213, and accompanying text; *Lopez v. Garland*, 116 F.4th 1032, 1040 (9th Cir. 2024) (stating that although the BIA’s interpretation was inconsistent with earlier pronouncements, the agency “carefully explained” why its new interpretation was “nonetheless consistent with the agency’s

longstanding distinction . . . between reprehensible and non-reprehensible criminal conduct”).

219. Merrill, *supra* note 19, at 267; *see supra* notes 69-71 and accompanying text.

220. Jacobi & Mickel, *supra* note 70, at 18; *see* Sunstein, *supra* note 18; *supra* notes 49-52 and accompanying text.

221. *See generally* Freeman & Spence, *supra* note 9; *see also supra* notes 47-52 and accompanying text.

222. *See supra* note 9.

223. *See supra* Section II.A.

224. *See supra* notes 116-19 and accompanying text.

225. 18 U.S.C. §824e(a).

226. *Id.*

227. *Federal Power Comm’n v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956).

skeptical of FERC's actions to avoid acknowledging the purpose of the FPA.²²⁸

The confusion regarding *Skidmore's* application post-*Loper Bright* is especially concerning for agencies like FERC that make consequential and controversial decisions in immensely technical areas. For these agencies, judicial interpretations of technical statutes made without the benefit of subject matter expertise are particularly dangerous. FERC's brief in *SEIA II* is instructive. As the Commission noted, the *SEIA I* dissent's supposedly "best" reading of FPA §3(17) was not shared by the other panel judges or any of the parties.²²⁹ FERC explained that the dissent's reading was incorrect because it "confuse[d] electric generation with power production capacity," thus double counting the Broadview facility's production when, as a technical matter, its 80-MW production "includes both power generated at the solar array and power stored in the battery."²³⁰

The correct interpretation of FPA §3(17) as applied to Broadview is thus a "mixed question" of law and fact that agency expertise is a valuable aid in answering. As Justice Kagan noted in her *Loper Bright* dissent, these questions are often the ones by which "the scope of statutory terms is established and their meaning defined."²³¹ Yet *Loper Bright* treats these mixed questions the same as pure legal ones, claiming that courts are better equipped than agencies to decide them.²³²

The Supreme Court alone has made many technical errors in administrative cases in recent years, often in environmental science, and these mistakes will become more frequent under *Loper Bright*.²³³ These errors are significant not only because they have substantive consequences for the rules being reviewed, but also because they will now constitute judicial statutory interpretations that bind agencies moving forward.²³⁴ Under *Loper Bright*, "[w]ell-worn

principle[s]" of administrative law are now potential obstacles to cogent agency decisionmaking.²³⁵

Take the "well-established" principle that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself."²³⁶ What happens when a court agrees with an agency that its action is within the bounds of its statutory authority, but disagrees with the agency on the correct interpretation of that authority? More importantly, how should agencies respond to diverging interpretations of frequently litigated statutory provisions like FPA §206?

These questions are not theoretical. In *Pacific Gas & Electric Co. v. Federal Energy Regulatory Commission*, a panel of the D.C. Circuit unanimously held that FERC's interpretation of a "grandfathering provision" in the FPA was "contrary to law." The *Pacific Gas* court remanded the interpretation of the clause as applied to the agency, noting its expertise in the "factual premises" that would guide that application.²³⁷ It discarded FERC's concerns that an interpretation "opposite" to the one it adopted was "unfair" and "ha[d] results Congress could not have intended," noting that "policy concerns cannot override the text of a statutory provision."²³⁸ Judge Florence Pan, however, unlike the other two judges on the panel, wrote a concurrence outlining her "view of the best reading of the statute."²³⁹

It is unclear how FERC should respond given this one view of the best reading, which might or might not be shared by the other two panel members. As Judge Pan notes, the content of the best reading FERC chooses in this case will be crucial to its statutory duty of ensuring that rules and practices affecting wholesale rates are just and reasonable.²⁴⁰ For the Commission though, the possibility of a future panel disagreeing with Judge Pan's interpretation, expressed in the nonbinding form of a concurrence, is real. Further, there is tension between the *Pacific Gas* court's holding and that of the *NextEra* court, which enthusiastically endorsed the "bedrock principle[] of statutory interpretation" counseling in favor of "textually permissible readings that would advance statutory or regulatory goals."²⁴¹ These are among the first few FERC cases decided by the D.C. Circuit post-*Loper Bright*, yet they already reflect the difficult position the agency is placed in, needing to conform to the "best" readings of different judges instead of being able to fall back on the reasonableness of its own interpretations.

Agencies like FERC necessarily "adopt innovative methods to adapt an old statutory scheme to new problems . . .

228. See Kristin E. Hickman, *Anticipating a New Modern Skidmore Standard*, 74 DUKE L.J. ONLINE 111, 133 (2025) ("The Court in *Loper Bright* offered little guidance for how a reviewing court might decide that a statute is best read as delegating policymaking discretion to an agency, other than making clear that 'ambiguity' is not the indicator."); Jacobi & Mickel, *supra* note 70, at 2 ("[L]ower courts are left to struggle through the post-*Loper* role of *Skidmore* in statutory interpretation."); Sunstein, *supra* note 18, at 12 ("[U]nder *Loper Bright*, ideological differences within the courts of appeals will increase in cases involving agency interpretations of law."); cf. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2310 (2024) (Kagan, J., dissenting) ("Courts motivated to overrule an old *Chevron*-based decision can always come up with something to label a 'special justification.' . . . All a court need do is look to today's opinion to see how it is done.")

229. Supplemental Brief of Respondent, *supra* note 190, at 17 & n.2.

230. *Id.* at 17, 19.

231. *Loper Bright*, 144 S. Ct. at 2306 (Kagan, J., dissenting).

232. Cf. *id.* (Kagan, J., dissenting) (concluding that the majority likely did not intend to confine its holding to pure questions of law because doing so "would preserve *Chevron* in a substantial part of its current domain"); Robin Kundis Craig, *The Impact of Loper Bright v. Raimondo: An Empirical Review of the First Six Months*, 109 MINN. L. REV. 2671, 2712-13 (2025) (noting that the impact of *Loper Bright* on arbitrary and capricious review of mixed questions of law and fact is unclear).

233. See Kumar, *supra* note 19, at 1750-51 (describing the Court's confusion between nitrogen oxide and nitrous oxide in *Ohio v. Environmental Protection Agency*, 144 S. Ct. 2040 (2024), and its unscientific definition of "waters of the United States" in *Sackett v. Environmental Protection Agency*, 143 S. Ct. 1322 (2023)).

234. See *id.* at 1781 ("Once a court interprets an ambiguous statutory term, *Skidmore* locks in that interpretation, preventing the agency from changing its

interpretation in the future. . . . For environmental law . . . generalist judged statutory interpretation poses a substantial threat.")

235. Wernitz, *supra* note 52, at 335.

236. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (citing *Securities & Exch. Comm'n v. Chenery*, 332 U.S. 194, 196 (1947)).

237. *Pacific Gas & Elec. Co. v. Federal Energy Regul. Comm'n*, 113 F.4th 943, 951 (D.C. Cir. 2024).

238. *Id.* at 950.

239. *Id.* at 951 (Pan, J., concurring).

240. *Id.* at 956 (Pan, J., concurring) (citing 16 U.S.C. §§824d, 824e).

241. *NextEra Energy Res., LLC v. Federal Energy Regul. Comm'n*, 118 F.4th 361, 371 (D.C. Cir. 2024); see *supra* notes 79-80 and accompanying text.

[thus] invit[ing] judicial scrutiny.”²⁴² Under *Loper Bright*, the scope of that scrutiny is greatly expanded, and its bounds remain unclear.²⁴³ This ambiguity is the kind that prevents agencies from acting meaningfully.²⁴⁴ Statutory ambiguity, on the other hand, is key to agencies’ ability to adapt to changing circumstances. *Loper Bright*’s marked rejection of the very concept of statutory ambiguity problematizes nearly all of FERC’s major regulations, which rely on broad standards like “just and reasonable” and the expertise of agency staff to fill in the details.²⁴⁵

Such broad delegations are not unique to FERC, with other agencies like the National Labor Relations Board facing important questions about whether the significant deference they have long been afforded will survive.²⁴⁶ And *Loper Bright* is not the only recent development in the law troubling administrative agencies: the Supreme Court’s decisions in *Jarkesy* and *Corner Post*, as well as the phenomena of universal vacatur and forum shopping, all work together to inhibit agency innovation and authority.²⁴⁷ *Loper Bright* thus affects not only FERC’s ability to wield broad authority to solve what its expertise leads it to believe are serious problems facing the energy sector, but all agencies delegated expansive but ambiguous powers.

IV. Conclusion

As Jody Freeman and David Spence astutely observe, “invalidating an agency’s adaptive plan and leaving matters to Congress is not neutral; it restores a status quo that over time might prove very costly to society.”²⁴⁸ In few areas are those costs greater than transmission. While many of the issues described in this Article are highly technical, their consequences are anything but: the nation’s inadequate interregional transmission system costs ratepayers billions of dollars per year and exacerbates reliability problems. This insufficient system also frustrates national priorities like combatting climate change, bolstering national security, developing and operating new technologies like artificial intelligence, and more.

FERC is attempting to facilitate the transformative investment that will build the transmission grid of the future, but it is hamstrung by a hostile judiciary. *Loper Bright* worsens matters for the agency, generating uncertainty and subjugating its expertise at precisely the wrong time. Onlookers can only hope that FERC is up to the challenge.

242. Freeman & Spence, *supra* note 9, at 63.

243. See Craig, *supra* note 232, at 2734 (“*Loper Bright* licenses the federal courts to thoroughly examine a federal agency’s basic statutory authority, not just its statutory interpretations.”).

244. Cf. Anya Bernstein & Cristina Rodriguez, *Working With Statutes*, 103 TEX. L. REV. 921, 978-79 (2025) (quoting interviews with officials from 11 different agencies describing *Chevron* as mitigating litigation risk and thus enabling them to pursue the statutory purposes of their respective agencies).

245. See Craig, *supra* note 232, at 2724 (“Indeed, *Loper Bright* goes beyond overturning *Chevron* deference by allowing federal courts to also eliminate ambiguity, discretion, and the ability of statutory regimes to evolve independently of congressional intervention and amendment.”).

246. See Fred B. Jacob & Anne Marie Lofaso, *Beyond Loper Bright: Iterative Construction at the National Labor Relations Board*, 77 U.C.L.J. (forthcoming 2026) (manuscript at 41) (on file with author), <https://papers.ssrn.com/sol3/Delivery.cfm/5129926.pdf?abstractid=5129926&mirid=1> (“*Loper Bright*’s *de novo* domain” does not extend to the National Labor Relations Act because it “conveys [a] broad grant[] of authority to [a] federal agenc[y].”).

247. *Securities & Exch. Comm’n v. Jarkesy*, 144 S. Ct. 2117 (2024); *Corner Post, Inc. v. Board of Governors of the Fed. Rsv. Sys.*, 144 S. Ct. 2440 (2024); see Renee Farmer & Daniel G. Aaron, *Loper Bright’s Deregulatory Synergies*, 55 SETON HALL L. REV. 1697, 1716 (2025) (“*Loper Bright*, universal vacatur, and forum shopping work in tandem to give circuit courts extensive authority over what agency rules will survive judicial review.”).

248. Freeman & Spence, *supra* note 9, at 75.