MONITORING TRANSMISSION PLANNING IN THE NEW AGE OF ENERGY: CHALLENGES AND SOLUTIONS FOR AN INDEPENDENT TRANSMISSION MONITOR

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INTRODUCTION

We all take energy and electricity for granted. We turn our light switches on, and rarely do we think how it gets there. However, the question of “how it gets there” is becoming increasingly complex for transmission planning. And the more complex it becomes, the more it may cost everyone.

Since 2000, transmission infrastructure spending quadrupled.¹ On an intuitive level this spending makes sense. Traditionally, the U.S. built and

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designed generation and transmission investments in a linear framework. Electricity generators direct energy in one direction. However, now our world is more complicated: devices, batteries, distributed generation, distribution networks, and their assorted transmission systems complicate the once relatively simple public service. In addition, new demands confront the grid as these new tools require constant communication for an efficient, low-cost, reliable, and zero-carbon energy system. As a result, electricity transmission evolved from a linear framework into a more complex circular framework. These circular energy flows require new transmission infrastructure for reliability.

However, merely having more infrastructure doesn’t necessarily mean it must cost more. Perhaps more transmission means more people benefit? While this is true, accounting for benefits has already become increasingly complex. Before, transmission planning focused on cost and reliability to customers. Now, transmission assets must deal with a myriad of possibly conflicting goals. As an example, transmission must now fulfill state reliability goals as well as state decarbonization goals. Yet, the costs for all these transmission needs must be distributed to ratepayers. As a result, policymakers’ answers to the age-old questions of “who pays” and “how much” have changed drastically from 50 years ago.

I. BACKGROUND: FERC’S RULEMAKING PROPOSED AN INDEPENDENT TRANSMISSION MONITOR

In response to these developments, the Federal Energy Regulatory Commission (FERC) proposed a sweeping Advance Notice of Proposed

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3. Id.
5. See McBride, supra at note 2 (demonstrating the need for two-way communication between devices while the grid continues to develop).
6. See generally id. (demonstrating the development of communication in the electrical grid).
9. See Jonathan A. Lesser & Leonardo R. Giaccchino, FUNDAMENTALS OF ENERGY REGULATION 593 (3rd ed. 2019) (showing that in some cases intermittent generation can increase resiliency insecurity because they require expensive generators to back them up).
Rulemaking (ANOPR). FERC wanted stakeholder input on three main topics. The first topic was of cost-allocation metrics for the participant-funded interconnection process. The second was on cost allocation efficiency in the local and regional transmission infrastructure planning process. Finally, the third topic concerned infrastructure planning transparency. For this third topic, FERC wanted input on how to increase state participation in the planning process. FERC also wanted input on the establishment of an Independent Transmission Monitor (ITM). This article discusses the ITM proposal.

First, this article will briefly identify FERC’s ANOPR and the ITM concept as introduced by FERC. Then, this article will delve into a framework to analyze the scope of the ITM. This article identifies the two poles of an ITM as a Passive ITM and an Active ITM. Then, the article analyzes the legal authorities governing an ITM. Specifically, it addresses two relevant legal challenges. The first challenge discussed by commenters is the sub-delegation doctrine. The second challenge—the major questions doctrine—was not addressed by commenters; however, it is increasingly relevant in administrative law. Then, the article will identify a congressional solution to these legal quandaries: the Connecting Hard-to-reach Areas with Renewably Generated Energy (CHARGE) Act.

A. FERC’s Open-Ended Rulemaking Set the Stage for Stakeholder Input

FERC desired an open-ended ITM proposal to catch a wide variety of stakeholder input. FERC sought input on the role of an ITM, as well as FERC’s legal jurisdiction for establishing the ITM. Many stakeholders

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11. Id.
12. Id.
13. Id. at 40,271.
14. Id. at 40,267.
15. Id. at 40,294.
16. Id. at 40,291.
19. Id. at 40,291.
questioned how to answer such a broad topic; however, despite stakeholder uncertainties, FERC received many comments answering both questions.

On the role of the ITM, FERC wanted to know: should the ITM oversee local transmission spending or just regional transmission spending? Should the ITM be used solely in Independent System Operator or Regional Transmission Organizations (ISO/RTO) regions, solely in non-ISO/RTO regions, or in both? What should the ITM do with cost analyses when it oversees transmission planning? Should the ITM evaluate project cost estimates immediately before construction to compare those to pre-construction cost estimates? Should the ITM oversee and evaluate transmission planning process inputs? Should the ITM oversee disparities between localized transmission costs and regionalized transmission costs to ensure the process of regionalization is efficient? Can the ITM be used to oversee other transmission benefits like assessing the impact of non-wire alternatives, and should the ITM evaluate whether transmission planning regions are effectively considering non-wire alternatives? What should the scope of the ITM’s transparency role be? For example, will the ITM’s monitoring adequately evaluate alternative transmission projects to improve


22. ANOPR, supra note 18, at 40,293.
23. Id. at 40,293.
24. Id.
25. Id.
26. Id. at 40,291.
27. Id. at 40,292.
28. Id.; See U.S. DEP’T OF ENERGY, GRID ENHANCING TECH.: A CASE STUDY ON RATEPAYER IMPACT III, 75 (2022), https://www.energy.gov/sites/default/files/2022-04/Grid%20Enhancing%20Technologies%20%20A%20Case%20Study%20on%20Ratepayer%20Impact%20-%20February%202022%20CLEAN%20%20.pdf (non-wire alternatives include so-called Grid Enhancing Technologies (GETs) such as ambient air ratings, dynamic line ratings (DLR), and other digital monitoring techniques).
29. ANOPR, supra note 18, at 40,292.
30. Id. at 40,293.
regional transmission processes?31 And would the institution of an ITM trample or impede the oversight responsibilities given to state public utility commissions and state agencies?32 Below are some general observations on how stakeholders answered FERC.

Around 200 institutional commenters submitted comments on the ANOPR.33 Half mentioned the ITM.34 Of these 100 commenters, some ignored the role of an ITM after informing FERC of its limited legal jurisdiction and concluded that establishing an ITM exceeds FERC’s authority.35 Other commenters took a stab at addressing just a few of FERC’s questions.36 A few commenters took a more holistic view and addressed many of FERC’s ITM questions.37 From the range of responses, commenters seemed to advocate either for a limited role or a more expansive role for the ITM.38 While commenters took a freewheeling approach when responding to FERC, their responses reflected a certain role they envisioned for the ITM. Broadly, this could be referred to as either a Passive ITM or an Active ITM.

1. A Passive ITM Would Merely Monitor the Planning Process

The Passive ITM would be limited to a monitoring function. If it appeared in the stakeholder process, the Passive ITM would be on equal footing as any other participating party. The Passive ITM would provide comments on infrastructure projects and give feedback to state participants upon request. The Passive ITM would identify excessive costs in the planning process and recommend structural improvements to contain costs. The Passive ITM would also advise regional stakeholders on best practices the Passive ITM observed in other regions. It would improve stakeholder participation by helping non-technical parties, like nonprofits, broaden the scope of interests heard during the infrastructure planning process. Like any

31. Id.
32. Id. at 40,292.
34. Id.
35. Id.
36. Id.
other party, the Passive ITM could file grievances and complaints to FERC using Federal Power Act (FPA) § 206 filings if they perceive practices resulting in unjust and unreasonable rates.

2. An Active ITM Would Directly Change the Planning Process

By contrast, the Active ITM would have the additional duty to directly intervene in the transmission planning process. The Active ITM would review cost modeling and inputs in transmission planning. It would ask transmission owners for independent cost estimates. Then the Active ITM would compare project cost estimates with actual costs incurred. It would also insert non-wire alternatives when needed in the planning process. The Active ITM would take a more active role in engaging state participation and the broader public in the transmission planning process. While a Passive ITM may merely advise on best practices in other regions (which may indirectly encourage more interregional transmission), an Active ITM might mandate interregional planning. An Active ITM, if embedded into an ISO/RTO’s internal market monitor, may use its information-gathering capabilities from the energy and capacity markets to evaluate transmission projects more efficiently.

II. THE ITM’S LEGAL HURDLES: FERC’S AUTHORITY AND TWO ISSUES

Establishing either a Passive or Active ITM would be subject to FERC’s statutory authority under the FPA.\textsuperscript{39} Establishing either ITM would also be subject to case law and legal precedents governing agency action. Stakeholders brought up a variety of legal objections and support for their positions, including:

- FERC’s statutory authority to create an ITM under the FPA and whether FERC had substantial evidence as required under the FPA to remedy unjust practices;\textsuperscript{40}

\textsuperscript{39} 16 U.S.C. §§ 824d–824e.

• Whether the sub-delegation doctrine prevented FERC from establishing an ITM;\textsuperscript{41}
• Whether the ITM itself was unjust and unreasonable;\textsuperscript{42}
• That the ITM doesn’t have authority to decide what are just and reasonable rates;\textsuperscript{43}
• That an ITM would intrude on transmission owners’ statutory ability to file their own rates;\textsuperscript{44}
• That an ITM would unlawfully second-guess state regulated siting and planning processes;\textsuperscript{45}
• That an ITM is inconsistent with FERC’s requirement for independent transmission planning.\textsuperscript{46}


\textsuperscript{46} Midcontinent Indep. Sys. Operator Comments, supra note 45.
• That the ITM impermissibly flips the assumption that transmission owner costs are prudent under the FPA;\textsuperscript{47} and
• That the ITM violates broad utility discretion over the provision of their services or impermissibly interferes with a utility’s corporate affairs.\textsuperscript{48}

One commenter even objected to the ANOPR process itself, claiming that any future decision on an ITM based off the ANOPR would violate the Administrative Procedures Act.\textsuperscript{49}

Most stakeholder discussion revolved around only a few of these objections. The majority of the discussion addressed whether FERC had statutory authority to establish an ITM, focusing on FERC’s delegated authority under §§ 205 and 206.\textsuperscript{50} There was also robust discussion on the sub-delegation doctrine and its merits.\textsuperscript{51} This article will analyze FERC’s statutory authority under the FPA. This article will also discuss two major objections to FERC’s authority: first, one that commenters debated, the sub-delegation doctrine; and second, one that commenters did not address, the major questions doctrine. While no commenters brought up the major questions doctrine, it is an increasingly used judicial tool to block agency action.\textsuperscript{52} As conservative courts narrowly interpret statutory authority, major question analysis will become increasingly relevant to assess the legality of sweeping agency action. In this case, the legality of an ITM office turns on the scope of power granted to it; in other words, whether it would be an Active or Passive ITM.

\textsuperscript{47} Nat'l Grid Comments, supra note 43.
\textsuperscript{49} N.Y. Indep. Sys. Operator, Inc., Comments, supra note 41.
\textsuperscript{51} WIRES, supra note 41; Exelon Corp. Comments, supra 41; N.Y. Indep. Sys. Operator, Inc., Comment, supra note 17; PJM’s July 15 Comment, supra note 44; Dominion Energy Servs., Inc. Reply, supra note 38.
\textsuperscript{52} See e.g, Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (analyzing COVID eviction moratoriums under major question doctrine); Health Freedom Def. Fund, Inc. v. Biden, No: 8:21-cv-1693-KKM-AEP, 2022 U.S. Dist. LEXIS 71206, *33 (using major questions doctrine to analyze the scope of CDC’s authority for mask mandates).
A. FERC’s Statutory Authority under the FPA

The FPA established FERC’s powers. FERC uses §§ 205 and 206 of the FPA to justify regulation of electric utilities in the public service. Section 205 states “all rules and regulations affecting or pertaining to [rates for transmission of electric energy] shall be just and reasonable.” What does this mean? Section 206(a) suggests FERC’s determinations of what constitutes just and reasonable are broad in scope:

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. (emphasis added).

FERC’s jurisdiction “[extends] to rates, terms[,] and conditions” of “all facilities” of transmission, not “merely [for] transactions for such transmission service.” Indeed, “the business of transmitting . . . electric energy for ultimate distribution to the public is affected with a public interest.”

1. The FPA § 206 Grants FERC Authority to Create an ITM

Commenters in the ANOPR debated the scope of FERC’s authority under §§ 205 and 206 to identify unjust and unreasonable practices that would allow FERC to set just and reasonable rates. Commenters who argued FERC was within its authority to create an ITM asserted the current
regime was unjust and unreasonable. FERC’s duty to identify unjust "practices" could encompass an allegedly biased transmission planning process that favors RTOs and transmission operators. RTOs, as "associations of private corporations," serve the interests of their members, the transmission owners, and require independent monitoring for cost-effective transmission planning in the public’s interest. This applies even if FERC previously determined existing transmission planning processes were just and reasonable.

On the other hand, opponents of an ITM argued the scope of § 206 is narrow in several respects. For one, they argued unjust and unreasonable practices don’t encompass general process critiques. For example, merely stating in conclusory terms that the interconnection process is unfair because it costs too much for renewable generators is by itself insufficient. A specific finding of unjust or discriminatory behavior is a condition precedent for § 206 remedies, and general criticisms are not sufficient. They also argued that transmission planning is not analogous to the types of monitoring

60. New England States Reply, supra note 38 (arguing information and resource asymmetry exist in regional planning and formula rate updates); Harvard Elec. Law Initiative, Comments on the Proposed Rule of Build. for the Future Through Elec. Reg'l Trans. Plan. & Cost Alloc. & Gen. Intercon. (Oct. 12, 2021) (arguing that the burden of proof for proving imprudent costs is insurmountable and that very few instances of proven imprudent costs indicated weaknesses in the transmission planning process); see also Id. (citing Cal. Public Util. Comm’n, Brief on Exceptions of the Cal. Public Util. Comm’n under ER16-2320 (Oct. 31, 2018). See also Certain Trans. Dependent Util., Initial Comments on ANOPR of Build. for the Future Through Elec. Reg'l Trans. Planning & Cost Alloc. & Gen. Intercon. (Oct. 12, 2021) (raising broad concerns that an ITM may be required because in the aggregate, the ANOPR considers many systemic reforms. Further suggesting that due to other changes proposed by the ANOPR on cost allocation and interconnection, the ITM will be needed to monitor these changes to maintain just and reasonable rates); 61. New England States Reply, supra note 38.


63. New England States Reply, supra note 38.

64. See Cal. ISO Comments, supra note 48 (arguing that mere “increased transmission development and costs” don’t warrant the creation of ITMs).

65. Id.

66. Dominion Energy Servs., Inc. Reply, supra note 38 (citing Trans. Access Pol’y Study Grp. v. FERC, 225 F.3d 667, 688 (D.C. Cir. 2000) (citing Wis. Gas Co. v. FERC, 770 F.2d 1144, 1158 (D.C. Cir. 1985))); Emera Maine v. FERC, 854 F.3d 9, 27 (stating “A bare conclusion that an existing rate is ‘unjust and unreasonable’ is nothing more than ‘a talismanic phrase that does not advance reasoned decision making.’” (citing TransCanada Power Mktg. Ltd. v. FERC, 811 F.3d 1, 12-13 (D.C. Cir 2015)).

done in energy and capacity markets.\textsuperscript{68} Therefore, while Internal Market Monitors (IMMs) may be a valid use of § 206 remedies, a similar monitoring mechanism for transmission would be unwarranted.\textsuperscript{69} And because previous orders have established a process for maintaining just and reasonable rates, § 206 remedies are not needed in any case.\textsuperscript{70} Previous orders required that FERC approve Open Access Transmission Tariffs (OATTs), RTO/ISOs, and market rates.\textsuperscript{71} By approving them, FERC found that these are just and reasonable. Therefore, if FERC now finds the present processes insufficient, FERC should directly adapt OATTs, RTO/ISOs, or market rates until they are just and reasonable.\textsuperscript{72}

In this case, the proponents of the ITM accurately state the scope of FERC’s authority. FERC would probably have the authority to create ITMs or embed them in existing market monitors in RTO regions. FERC’s jurisdiction “extends” to rates, terms[,] and conditions” of “all [transmission] facilities” so the scope of the FPA is broader than mere policing of energy market transactions.\textsuperscript{73} Likewise, the scope of FERC’s administrative remedies is quite broad as well. Courts found that FERC “must have considerable latitude in developing a methodology responsive to its regulatory challenge . . . .”\textsuperscript{74} To ensure this, “[FERC] has relatively broader authority” over electricity transmission as opposed to sales.\textsuperscript{75} Therefore, FERC would have the authority to adapt an unjust transmission planning process if needed.

However, ITM proponents also accurately state FERC’s authority for another reason. Transparency and market power mitigation measures have

\textsuperscript{68} Contra Jonathan A. Lesser & Leonardo R. Giachnino, FUNDAMENTALS OF ENERGY REGULATION 489 (3rd ed. 2019) (exemplifying by implication how FERC’s traditional evaluations of horizontal and vertical market power in looking at market manipulation or concentration could extend to an ITM as a transmission monitor would look at inputs and transmission planning which are fundamentally different than the transactional processes used to monitor markets. While competitive bids are used for some transmission projects, transmission planning is a stakeholder driven process distinguished from a traditional market, therefore the rules that govern market monitoring do not apply in transmission “markets.”).

\textsuperscript{69} Id.

\textsuperscript{70} Edison Elec. Inst. Initial Comments, supra note 42.

\textsuperscript{71} See id. (arguing that Order 890 and 1000 built a sufficient transparency framework).

\textsuperscript{72} See Ari Peskoe, Is the Utility Transmission Syndicate Forever?, 42 ENERGY L. J. 1, 11 (showing FERC required all IOUs to file OATTs that contain specified terms and conditions, therefore it can do so again).

\textsuperscript{73} PJM’s Nov. 1 Comment, supra note 40; New England States Comm. on Elec., supra note 38 (citing S.C. Pub. Serv. Auth. v. Fed. Energy Regul. Comm’n, 762 F.3d 41, 56 (D.C. Cir. 2014) (affirming in connection with finding Order No. 1000 lawful as “[t]he authority and obligation that Congress vested in the Commission to remedy certain practices is broadly stated.”)).


\textsuperscript{75} S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41, 63 (D.C. Cir. 2014).
traditionally been upheld as consistent with § 206 authority. For example, FERC requires market monitoring to fulfill its role maintaining just and reasonable rates in the energy and capacity markets. FERC could extend this role to the transmission planning space to mitigate practices that unjustly increase the cost of transmission.

The legal rationale for this authority lies in FERC's “continuous” responsibility to maintain just rates. FERC's establishing just and reasonable rates once does not prevent the agency from implementing improved measures later. Even if FERC has the statutory authority to “on [its] own initiative” adapt OATTs this does not prevent FERC from taking further corrective measures, like enforcing market monitors.

2. Is there “Substantial Evidence” Deserving § 206 Remedies?

Many stakeholders raised a secondary issue. Assuming FERC has statutory authority to create an ITM, does current evidence reveal unjust or unreasonable rates that require an ITM remedy? FERC has a statutory duty to fact-find with “substantial evidence” for findings to be considered conclusive. FERC cannot claim mere conclusory statements to justify its actions. While courts have held that FERC can use theoretical evidence, courts require “reasonable economic propositions” undergirding FERC’s decisions. Courts will vacate the Commission's orders if the “allocation of costs [is] either unreasonable or inadequately explained.”

Harvard Electricity Law Initiative collected a series of around 20 stakeholder statements describing weaknesses in the current planning processes due to lack of oversight. Problems included escalating transmission

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76. See Healey, supra note 40 (“The Commission has long exercised its statutory authority to, for example, approve the establishment of independent market monitors, require market monitoring, approve market power mitigation measures and market monitoring plans, and require RTOs/ISOs to publish data about their operations.”).
79. Elec. Trans. Competition Coal., supra note 38 (arguing that internal market monitors could carry these functions).
80. N.Y. Indep. Sys. Operator, Inc. Comments, supra note 17 (explaining that the Commission can only create an ITM if it is necessary and beneficial); New England States Comm. on Elec., supra note 38 (showing that the Commission must first demonstrate that agreements are unjust and unreasonable without ITMs).
82. TransCanada Power Mktg. Ltd. v. FERC, 811 F.3d 1, 12–13 (D.C. Cir. 2015).
83. See S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41, 70 (D.C. Cir. 2014) (showing the examples of theoretical evidence relied on by the Commission).
costs and an overall reduction in cost containment by pushing infrastructure investments into local unmonitored projects. In this case, many of the Harvard stakeholder comments would satisfy court requirements because they are not conclusory and based in reasonable economic propositions.

B. The First ITM Legal Hurdle: the Sub-delegation Doctrine

The sub-delegation doctrine is “the general proposition that when Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor.” This “private actor” language would encompass a non-profit or third-party ITM. “The relevant inquiry in any delegation challenge is whether Congress intended to permit the delegatee to delegate the authority conferred by Congress.” Proponents of the ITM argued the doctrine was not applicable to the ITM because the case law and the substance of the ANOPR are distinguished.

Citing the D.C. Circuit, the California Public Utility Commission said “a federal agency may turn to an outside entity for advice and policy recommendations, provided the agency makes the final decisions . . . .” Case law identified sub-delegation as an issue when the Washington D.C. Control Board sub-delegated governance powers to a private Board of Trustees. However, FERC would not be a mere “rubber stamp” of the ITM. The ITM advisory role distinguishes it from the sub-delegation in the D.C.


88. New England States Comm. on Elec., supra note 38 (citing Perot v. FEC, 97 F.3d 553, 559 (D.C. Cir. 1996)).

89. See Perot v. FEC, 97 F.3d 553, 555 (D.C. Cir. 1996) (disallowing delegation to the Commission on Presidential Debates, a private, non-profit corporation); See also Nat’l Park & Conservation Ass’n v. Stanton, 54 F. Supp. 2d 7, 18 (D.D.C. 1999) (showing that even an advisory committee created by Congress can be unlawfully delegated authority).


91. Harvard Elec. L. Initiative, supra note 86.


Control Board case. The New England States Committee on Electricity (NESCOE) expands on this concept by saying that the ITM as proposed does not shift FERC’s statutory authority; the ITM merely allows FERC another means to ensure its statutory authority that rates are just and reasonable. In addition, similar complaints were given about lMMs during previous FERC rulemakings. FERC reiterated that mere detection of market power abuse to rectify unjust rates is separate from actually remedying the unjust rates, so sub-delegation is not an issue.

This analysis demonstrates FERC would probably not violate the sub-delegation doctrine if FERC established a Passive ITM. However, if FERC were to adopt an Active ITM, it may be vulnerable to attack. While FERC may have broad authority to remedy unjust rates, courts may be skeptical of what they perceive as FERC impermissibly shifting its authority to determine and remedy unjust rates in transmission service. Courts may object if FERC presents no evidence that Congress intended to delegate this authority to another body.

C. The Second ITM Legal Hurdle: the Major Questions Doctrine

Courts are likely to view the major questions doctrine in a similar light to the sub-delegation doctrine: it depends on the scope of the ITM. The major questions doctrine is an exception to Chevron deference. The exception to Chevron states that, in the absence of clear congressional intent, courts do not need to defer to an agency’s reasonable interpretation of its statutory authority when that authority impacts issues of “deep economic and political significance . . . .” The assumption of this doctrine is that Congress would answer major questions of deep significance and not delegate them to agencies.

Currently, courts are debating the definition of “deep economic and political significance.” However, recent cases outline the contours of major questions analysis. Courts begin by looking at the plain language of the

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96. Id.
98. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (citing Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 ADMIN. L. REV. 363, 370 (1986)). (“A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.”).
99. Id.
statute. They also look at the scope of an agency’s claimed authority and the length of time the agency asserted its claimed authority, as well as the age of the statute. If the statute was enacted long ago, courts are unlikely to assume Congress hid profound new powers only recently discovered today. If the agency has regulated the disputed activity for a long time, the courts will probably agree that Congress intended the agency to regulate this area in a similar manner today. Courts also look to associated congressional activity in the disputed area. If Congress repeatedly rejected attempts to grant an agency certain authority, the agency likely doesn’t have that authority now. Finally, if the area is traditionally one that states regulate, the courts are unlikely to find that a federal agency now has jurisdiction.

While “deep economic and political significance” is ambiguous, courts are narrowing in on qualifying criteria. King v. Burwell defined the criteria as “tax credits . . . involving billions of dollars in spending each year and affecting the price of health insurance for millions of people.”

100. Id. at 132.
101. See Mass. Bldg. Trades Council v. U.S. Dep’t of Labor (In re MCP No. 165), 21 F.4th 357, 373 (6th Cir. 2021) (showing the “scope or degree” of agency power is one consideration in the major questions doctrine); See also Health Freedom Def. Fund, supra note 52, at 32–33 (noting that the major questions analysis analyzed the PHSA, a statute enacted in 1944. (42 U.S.C.S. § 264(a))); See also Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (noting that the FDA “has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy” after not claiming this power since its inception (emphasis added)).
103. See Mass. Bldg. Trades Council, 21 F.4th 372–373 (noting OSHA workplace ETS on disease prevention has been used since 1970); But see Health Freedom Def. Fund, Inc. v. Biden, No. 8:21-CV-1693-KKM-AEP, F. Supp. 3d at 33 (M.D. Fla. Apr. 18, 2022) (noting that “this provision has ‘rarely been invoked—and never before to justify’ a mandate that travelers on every form of commercialized travel wear masks” (citing Ala. As’n of Realtors v. Dep’t of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021)).
104. See Mass. Bldg. Trades Council, 21 F.4th 372–373 (noting OSHA workplace ETS on disease prevention has been used since 1970); But see Health Freedom Def. Fund, Inc. v. Biden, No. 8:21-CV-1693-KKM-AEP, F. Supp. 3d at 33 (M.D. Fla. Apr. 18, 2022) (noting that “this provision has ‘rarely been invoked—and never before to justify’ a mandate that travelers on every form of commercialized travel wear masks” (citing Ala. As’n of Realtors v. Dep’t of Health & Hum. Servs., 141 S. Ct. 2485, 2487 (2021))).
106. See Food & Drug Admin., 529 U.S. at 159–60 (“Congress . . . squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area.”).
Brown elaborated by including “hardly ordinary” regulations covering a “significant portion of the American economy.” In 2021, the COVID eviction moratorium was considered a major question because it impacted up to “80% of the country, including between 6–17 million tenants,” and up to $50 billion in financial impacts. The use of civil and criminal penalties to enforce these provisions may also play into this “significance” analysis, though courts have explicitly added this to a major questions analysis.

To analyze the ITM proposal using the major questions doctrine, it is necessary to identify that the FPA is a long extant statute. There is a consensus among stakeholders that the ANOPR is significant because of the scope of future infrastructure spending. Even proponents of the ITM expect this to be the case; indeed, the scope of spending is one argument many use to advocate the need for closer scrutiny on infrastructure spending. The ITM clearly dwarfs the $50 billion price tag in the COVID eviction moratorium case. The ITM’s participation therein would impact far more than 6–17 million people. Therefore, the scope of the ITM would most certainly fall under significant political or economic questions that courts would expect Congress to address in statutes.

If establishing an ITM would be significant enough to be considered a major question, then how will courts address an ITM? This depends on two factors: 1) the scope of an ITM’s authority and 2) if it would trample long-held state-governed issues. In this case, if there was an Active ITM with authority to directly change the planning criteria in the infrastructure planning process, this kind of authority would violate the major questions doctrine. The Active ITM would directly impact significant areas of the economy that Congress would have specifically spoken to. Courts would also object because Congress directly addressed the method of identifying unjust rates in the FPA. Therefore, if an ITM were to take an active role in policing transmission planning, it would probably violate major questions reserved for clear congressional mandates. To avoid major questions, an ITM

108. Food & Drug Admin., 529 U.S. at 159.
112. Dominion Reply, supra note 55; W IRES Comment, supra note 54.
113. New England States Reply, supra note 38; Healey Reply, supra note 38.
would have to play a passive role. Establishing an information gathering or advisory service is clearly within the realm of FERC’s duty to maintain just and reasonable rates.

Courts would also find fault with an ITM because it would violate long-standing state-regulated areas. The FPA is federalist in structure, drawing bright lines between federal and state jurisdictions. The FPA’s declaration of policy defines FERC jurisdiction as “extend[ing] only to those matters which are not subject to regulation by the States.” In addition, states have historically been given control of infrastructure siting authority under the Natural Gas Act. Some stakeholders in vertically-integrated states identified the federalism conflicts an ITM would pose with state-led and state-overseen Integrated Resource Plans (IRP). While some states ceded transmission planning and dispatch authority to RTO/ISOs, and thus became subject to FERC oversight, other states did not. Although the RTO/ISO public utilities would fall directly under FERC regulation, and could be subject to ITM monitoring, states that refused to cede authority to RTO/ISOs could be unlawfully impacted by a proactive ITM. For example, an Active ITM might indirectly affect state siting policies that are already approved by a state-led IRP process. Courts would likely find this encroachment to be an overreach not intended by the drafters of the FPA.

In a case that may be a harbinger of analysis to come, the mask mandate considered in Health Freedom Defense Fund v. Biden increased the scope of the major questions doctrine. The Court defined “significance” in part by evaluating whether a rule is a “major rule” under the Congressional Review Act or whether a rule is an “economically significant regulatory action.” In turn, the court defined an “economically significant regulatory action” as: an annual effect of $100 million on the economy, a major increase in consumer prices, or significant adverse effects on the economy. This may

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118. Miso Transmission Owners v. FERC, 819 F.3d 329, 336 (7th Cir. 2016).
121. See Sophie Reardon, Justice Department Appeals Mask Ruling After CDC Says Mandate “remains necessary for the public health,” CBS News (April 21, 2022, 8:03 AM), https://www.cbsnews.com/news/mask-mandate-cdc-justice-department-appeal/ (stating that the Biden Administration is currently appealing the case).
122. Id.
apply to an ITM. Many stakeholders worry that the participation of any ITM might slow the transmission planning process.\textsuperscript{124} If transmission projects are delayed then the overall cost of transmission would increase, resulting in increased prices for ratepayers.\textsuperscript{125} Therefore, if the scope of the major questions doctrine encompasses even a mere increase in consumer prices, it would be harder for FERC to legally justify adjusting the transmission planning process.

The major questions doctrine would probably limit an ITM to a passive role in transmission planning. The major questions doctrine would also limit the ITM’s role to one akin to other stakeholders, as a transparency monitor. Finally, the major questions doctrine would limit the ITM’s application to RTO/ISO regions—not to vertically integrated states—because of FERC’s explicit statutory federalism limits and its probable intrusion into areas traditionally regulated by states.

\textbf{D. The CHARGE Act Contains a Congressional Solution that Would Dodge the Legal Pitfalls of a FERC Rulemaking}

The discussion above assumes Congress will remain silent while courts interpret FERC’s authorities under the FPA. However, recent action in Congress indicates it may decide to wade into the energy transmission debate.\textsuperscript{126} Senator Markey proposed legislation called the CHARGE Act of 2022 (the Bill).\textsuperscript{127} The Bill requires FERC to promulgate certain rules and requires certain policies be incorporated into those rules.\textsuperscript{128} For example, the Bill includes factors such as: interregional planning considerations; access to neighboring region resources; accomplishing state renewable energy and decarbonization goals; enhancing the ability of renewables to connect into the grid; and the integration of grid-enhancing technologies (GETs).\textsuperscript{129} The Bill establishes a national Office of Transmission appointed by the FERC chair.\textsuperscript{130} This office would review transmission plans in regional and interregional planning, review GET deployments and other innovations, and

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\item \textsuperscript{124} N.Y. Indep. Sys. Operator, Inc. Comments, \textit{supra} note 41; Dominion Reply, \textit{supra} note 40.
\item \textsuperscript{125} Dominion Reply, \textit{supra} note 40.
\item \textsuperscript{126} CHARGE Act, S.3879, 117th Cong. (2022).
\item \textsuperscript{127} \textit{Id}.
\item \textsuperscript{128} \textit{Id}.
\item \textsuperscript{129} \textit{Id.} § 4(a)(1)(F) (rulemaking requiring FERC to take certain factors into consideration); \textit{Id.} § 4 (a)(2) ("requir[ing] that regional and interregional cost methodologies allocate costs on the basis of multiple benefits,"); \textit{Id.} § 4(a)(7) ("prioritiz[ing] interregional cost-benefit considerations over regional cost-benefit considerations" and "prevent[ing] transmission providers from using cost-allocation methodologies that—(A) discourage distributed generation, energy efficiency, demand response, or storage if more economic than transmission; (B) are constrained by consideration only of benefits that are easy to allocate,").
\item \textsuperscript{130} \textit{Id.} § 9(a)–(b).
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provide oversight of interregional transmission planning processes.\textsuperscript{131} The Bill also mandates FERC to require that transmission planning regions create an ITM to “monitor the planning and operation of transmission facilities in [each] transmission planning region.”\textsuperscript{132} These CHARGE Act-ITMs would review transmission planning regions for inefficiencies and practices leading to unjust and unreasonable rates.\textsuperscript{133} In addition, they would review the costs of transmission facilities, including identifying inefficiencies among local, regional, and interregional planning.\textsuperscript{134} The Bill also establishes an RTO/ISO Advisory Committee.\textsuperscript{135} This Committee would oversee RTO/ISO governance and recommend improvements.\textsuperscript{136} The Committee would also establish stakeholder best practices and recommend transparency improvements for non-RTO regions.\textsuperscript{137}

These congressionally defined institutions provide benefits that would not exist through the current ANOPR-defined ITMs. The Bill would give direction to FERC and define Congress’s intent on transmission planning.\textsuperscript{138} Because Congress would directly speak to these significant economic and political issues, FERC rulemakings subject to the Bill would not violate the major questions doctrine. In addition, the Bill would not violate the sub-delegation doctrine. The presumption of invalid sub-delegations of agency authority would not apply because the FERC chair would appoint the director of the Office of Transmission.\textsuperscript{139}

These three institutions—the national Office of Transmission, the CHARGE Act-ITMs, and the RTO/ISO Advisory Committee—seem to divide the Active–Passive ITM activities among themselves. In the Bill, the ITMs and the Advisory Committee contain the Passive ITM’s duties. The CHARGE Act-ITMs seem limited to: reviewing the transmission planning process; analyzing project costs; and identifying non-wire, interregional, or other alternatives that current transmission processes ignore.\textsuperscript{140} This seems to be a more technical analysis and review process. However, the Advisory Committee appears to provide a non-technical path for nonprofits and other

\begin{itemize}
\item \textsuperscript{131} Id. § 9(c).
\item \textsuperscript{132} Id. § 11(a)(1)(A).
\item \textsuperscript{133} Id. § 11(b)(1)–(5).
\item \textsuperscript{134} Id. § 11(b)(3).
\item \textsuperscript{135} Id. § 12(a).
\item \textsuperscript{136} Id. § 12(a)(1).
\item \textsuperscript{137} Id. § 12(a)(2)–(3).
\item \textsuperscript{138} Id. § 12(a)(2)(B).
\item \textsuperscript{139} See U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004) (showing the distinction between an agency subordinate and an outside party).
\item \textsuperscript{140} S.3879 § 11(b); id. § 12(b).
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non-traditional stakeholders to gain access to and influence an infrastructure planning process that may be weighed against them.\textsuperscript{141}

While the ITM and Advisory Committee in the Bill encompass the duties of a \textit{Passive ITM}, the Office of Transmission seems to take on some duties of an \textit{Active ITM} role. Notably, the Bill does not give the Office of Transmission the explicit power to modify the infrastructure planning process. However, because the ITM is contained within FERC, the Office of Transmission would undoubtedly coordinate with FERC when the Commission seeks to modify tariffs or respond to unjust rates. The Bill could also enable a full-time inquiry into the transmission process instead of an ad hoc one. In practice, this process could be used to police transmission planning as much as an \textit{Active ITM} might.

\textbf{CONCLUSION}

This article outlined the debates surrounding the transmission planning process; in particular, the role of an \textit{Active or Passive ITM}. In addition, this article discussed some of the legal challenges an ITM might face, as well as one pending solution to those legal challenges through congressional action. Following the ANOPR issued in 2021, FERC issued a Notice of Proposed Rulemaking in April 2022.\textsuperscript{142} The 2022 Notice made no mention of an ITM, suggesting a transmission monitor is on the backburner for now.\textsuperscript{143} Despite this, the legal and policy debates mentioned in this article—as well as the \textit{Active–Passive} Framework of infrastructure monitoring—will remain relevant.

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\item \textsuperscript{141} See \textit{id.} § 12(b) (showing that RTO/ISO and transmission representation on the committee is at least 3 out of 15 stakeholders, a relatively small portion of the committee).
\item \textsuperscript{142} ANOPR, \textit{supra} note 10, at 26,605.
\item \textsuperscript{143} \textit{Id.}
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