Utility Mission Creep

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Pressures related to the sustainable energy transition are increasingly prompting electric utilities to enter markets where they were never intended to compete. In recent years, some utilities have started offering residential rooftop solar installations or home energy storage systems to their customers with the promise of greater monthly savings than nonutility businesses can provide. Other utilities are building and operating public electric vehicle charging stations that directly compete with stations owned by nonutility companies. A few utilities are even making aggressive forays into community solar energy markets and pushing out private solar businesses. Fixated on short-term policy goals, many utility regulators are authorizing these incursions into private competitive markets even though such activities lie outside utilities' original "mission" of providing grid-delivered electricity service. Unfortunately, allowing utilities — with their state-guaranteed rates of return, legal protections against most competition, and access to artificially low-cost capital — to enter competitive private markets is rarely cost-justifiable in the long run. Because of their state-provided advantages, utilities' presence in such markets threatens to weaken competition, decelerate innovation, and ultimately inflate prices in affected industries in ways that slow the nation's transition to a sustainable, carbon-free energy system. In light of these challenges, there is a growing need for statutory and regulatory rules that more clearly limit the scope of electric utilities' permissible activities and expressly prohibit utilities from directly or indirectly venturing into competitive nonutility markets. By keeping electric utilities within appropriate bounds, such laws would better safeguard the competitive market forces needed to continue driving the sustainable energy movement.

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INTRODUCTION

Merriam-Webster defines *mission creep* as "the gradual broadening of the original objectives of a mission or organization."[1] An entity exhibits mission creep when it pursues activities that extend beyond the discrete "mission" it was initially intended or authorized to fulfill. Most organizations display some amount of mission creep as they evolve and adapt over time, and such changes are often innocuous or even beneficial. When entities authorized and designed to perform only a narrow set of discrete functions begin indulging in mission creep, however, costly consequences can result.[2]

In response to unprecedented pressures in a rapidly changing energy industry, a growing number of electric utilities are exhibiting mission creep by offering products and services in markets where utilities were never intended to operate. Some utilities have begun installing solar panels on residential rooftops and promising homeowners higher monthly savings than are available through private solar installers. Others have started building and operating electric vehicle charging

[1] *Mission Creep*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/mission%20creep (last visited June 3, 2021) [https://perma.cc/C5EG-TRAL]. The term "mission creep" apparently traces its origins to U.S. military officials' descriptions of certain operations in the early 1990s. *See, e.g.*, John H. Cushman, Jr., *Mission in Somalia Is to Secure City*, N.Y. TIMES (Oct. 10, 1993), https://www.nytimes.com/1993/10/10/world/mission-in-somalia-is-to-secure-city.html [https://perma.cc/FY6K-J6C6] (quoting a senior military official's use of "mission creep" to describe an unintended expansion of the military's role in an operation in Somalia). In subsequent years, the phrase has been adapted for use in a wide range of other settings, from the operation of nonprofit businesses to activities at the U.S. Federal Reserve. *See* Kim Jonker & William F. Meehan III, *Mission Matters Most*, STAN. SOC. INNOVATION REV. (Feb. 19, 2014), https://ssir.org/articles/entry/mission_matters_most [https://perma.cc/8EFL-DWAU]; *see also* Greg Ip, *Mission Creep at the Fed*, WALL ST. J. (Aug. 26, 2020, 1:04 PM ET), https://www.wsj.com/articles/mission-creep-at-the-fed-11598461446 [https://perma.cc/9SB4-M22F].

[2] The United States military's widely-criticized two-decade engagement in Afghanistan, which finally came to a chaotic end in August 2021, has been cited as a quintessential example of the potential hazards of mission creep. *See, e.g.*, Dave Deptula, *Securing America's Interests over Afghanistan*, FORBES (June 23, 2021, 10:29 AM EDT), https://www.forbes.com/sites/davedeptula/2021/06/23/securing-americas-interests-over-afghanistan/?sh=42c56cce1a1a [https://perma.cc/BL89-VH6V] (arguing that the United States military's engagement in Afghanistan "shifted from a set of strategic objectives that were vital to the U.S. to a new set of objectives that were not . . . resulting in a serious case of mission creep"); Craig Whitlock, *U.S. 'Mission Creep' Led to Unwinnable War That's Still Going on*, SEATTLE TIMES, https://www.seattletimes.com/nation-world/u-s-mission-creep-in-afghanistan-led-to-unwinnable-never-ending-war-confidential-documents-show (last updated Dec. 10, 2019, 1:25 PM) [https://perma.cc/3374-6DW6] (quoting a State Department diplomat's statement that "[i]f there was ever a notion of mission creep it is Afghanistan").

stations that directly compete with established nonutility charging station companies. A few utilities are even making aggressive forays into community solar energy markets and pushing out private solar businesses.

Permitting electric utilities — with their state-guaranteed rates of return, legal protections against most competition, and access to artificially low-cost capital — to enter competitive private markets in these ways is rarely justifiable as a matter of public policy. As beneficial as such utility involvement may sometimes seem in the short run, such activities lie outside utilities' original "mission" of providing grid-supplied electricity service. Utilities' presence in such markets can weaken competition, decelerate innovation, and inflate long-term prices in ways that could ultimately slow the nation's transition to sustainable, carbon-free energy.

Because of their unique status as state-protected monopolies, utilities have less freedom than ordinary businesses to adapt over time by offering new products or services. Many nonutility companies, such as DuPont and Apple, Inc., have thrived and grown over the years by proactively adjusting their organizational missions to incorporate emerging technologies.[3] By contrast, numerous other corporations, such as Borders Books and Yahoo, have suffered major setbacks for reacting too slowly to market shifts.[4] As the electricity industry undergoes a historic transformation, utilities are understandably seeking to be forward-looking and embrace new technologies to avoid being left behind. Unfortunately, as creatures of state law purposefully fashioned to serve specific purposes, utilities were never intended to freely reshape their missions with the changing times — especially when doing so pits them against nonutility companies in competitive product and service markets. Allowing such *utility mission creep* not

[3] *See, e.g.*, Dave Roos, *12 Companies that Completely Reinvented Themselves*, HOWSTUFFWORKS, https://money.howstuffworks.com/10-companies-reinvented-themselves.htm (last updated Feb. 18, 2022) [https://perma.cc/YSU2-98YU] (highlighting how Apple and other specific companies have nimbly adapted to market changes across time); Stephen D. Simpson, *5 of the Most Adaptive Companies*, INVESTOPEDIA, https://www.investopedia.com/financial-edge/0311/5-of-the-most-adaptive-companies.aspx (last updated June 25, 2019) [https://perma.cc/875V-7BFF] (listing DuPont and Apple as two of the five most adaptive companies and explaining how they have effectively adapted over time).

[4] *See* Elizabeth Dwoskin, *Behind Yahoo's Downfall: Bad Bets and Failure to Adapt*, CHI. TRIB. (Apr. 20, 2016, 10:06 AM), https://www.chicagotribune.com/business/blue-sky/ct-behind-yahoos-downfall-20160420-story.html [https://perma.cc/ZD3A-UF23]; Annie Lowrey, *Readers Without Borders*, SLATE (July 20, 2011, 5:56 PM), https://slate.com/business/2011/07/borders-bankruptcy-done-in-by-its-own-stupidity-not-the-internet.html [https://perma.cc/27YP-JC2C].

only threatens consumer welfare; it can also threaten important long-term environmental policy goals.

This Article highlights the growing problem of utility mission creep, outlines its potential dangers, and identifies policy strategies for combatting it. Part I of this Article describes electric utilities' statutorily defined "mission" and how the limited scope of that mission benefits electricity customers and broader society. Part II spotlights multiple recent examples of utility mission creep and its potential to adversely impact electricity customers and the sustainable energy movement. Part III outlines specific policy changes that, if adopted, could help to curb utility mission creep and thereby better promote the nation's rapid transition to a carbon-free, sustainable energy system.

I. ELECTRIC UTILITIES' NARROW "MISSION" AND WHY IT EXISTS

For nearly a century, state-protected private monopolies have been the primary providers of electricity service in the United States. These utilities operate under an elaborate regulatory structure that shields them from competition and assures them reasonable investment returns, but also oversees nearly everything they do. This costly, cumbersome structure is commonly viewed as necessary to govern an industry uniquely prone to major inefficiencies.

A longstanding feature of today's intrusive utility regulatory framework is the principle that state-chartered electric utilities may legally engage in only a narrow set of activities — a purposefully limited "mission" of sorts — directly related to their delivery of grid-supplied electricity service to the public.[5] Activities that venture beyond the

[5] *See, e.g.*, N.J. STAT. ANN. § 48:2-13 (2022) (defining "public utility" as any entity that may "own, operate, manage or control within this State any . . . electricity distribution . . . plant or equipment for public use"); N.J. ADMIN. CODE § 14:5-1.2 (2022) (defining "electric distribution company" as "a company that has an electric distribution system and meets the [statutory] definition of a public utility"). In non-deregulated states, an investor-owned utility's ("IOU") mission may include ownership or operation of public-facing electric generation or transmission facilities as well. *See, e.g.*, FLA. STAT. § 366.02(4) (2022) (defining "electric utility" as an entity that "owns, maintains, or operates an electric generation, transmission, or distribution system within the state"); 66 PA. CONS. STAT. § 102 (2022) (defining "public utility" as any "person or corporations . . . owning or operating in this Commonwealth equipment or facilities for . . . [p]roducing, generating, transmitting, distributing or furnishing . . . electricity . . . to or for the public for compensation"). An even narrower utility mission applies in those U.S. states that have adopted a "restructured" utility regulatory model, which gives retail customers some choice among electricity providers but still requires that they receive delivery of electric power across rate-regulated distribution lines. *See* William Boyd & Ann E. Carlson, *Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law*, 63 UCLA L. REV. 810, 837-39 (2016). The examples of

scope of this basic mission are generally off limits. For instance, electric utilities cannot commercially sell table lamps or disposable alkaline batteries even though both involve electric energy. As this Part explains, the pioneers of modern utility law placed these legal constraints on electric utilities' activities for important policy reasons that remain relevant today.

A. Utility Regulation's Highly Intrusive Approach

Although the nation's first electricity companies were largely unregulated, state legislatures soon replaced that laissez-faire approach with today's much more intrusive utility regulatory model. This model of state-protected monopolies has generally promoted stability and efficiency in U.S. electricity distribution markets, but its attendant costs and distortive effects make it decidedly ill-suited for use in most other market settings.

Energy law scholars tend to proffer two main explanations for the electricity industry's century-long reliance on extraordinarily heavy regulation. The more prominent of these two theories characterizes modern utility regulation as a necessary evil — a costly yet justifiable means of addressing market failures in a critically important industry.[6] A second, alternative theory posits that politically-powerful electricity companies pushed for and continue to favor modern utility regulation primarily to safeguard their own profitability and monopoly position.[7] Under either theory, the growing incidence of utility mission creep is troubling and warrants greater policy attention.

1. The History and Basics of Rate Regulation

The historical setting from which modern electricity regulation emerged featured basic tensions between public and private interests that are similar to those still affecting electricity markets today. Soon after Thomas Edison's Pearl Street Station generated its first coal-fired

utility mission creep set forth in this Article are applicable to utilities in traditionally-regulated and restructured states.

[6] A detailed description of this economics-based theory of utility regulation follows below. *See infra* text accompanying notes 23–28.

[7] Other energy law scholars have emphasized these two factors' impact on the move to utility rate regulation. *See, e.g.*, Joseph P. Tomain, *The Past and Future of Electricity Regulation*, 32 ENV'T L. 435, 444-45 (2002) (distinguishing the "public interest" theory of the emergence of cost-of-service regulation from the "public choice" theory and arguing that utility rate regulation is a product of "mixed political and economic motives").

electric power and illuminated hundreds of lamps in Manhattan's Financial District in 1882, local electricity distribution grids started appearing in affluent urban neighborhoods across the U.S.[8] Ownership interests in these small grids were initially as decentralized as the grids themselves, but within decades much of that ownership was consolidated in a few large and powerful private firms.[9] Hoping to leverage economies of scale to lower their costs and grow their customer base, these early industry pioneers set out to build enormous centralized power plants and greatly expand their electricity distribution networks.[10] However, they increasingly encountered rivalry in those efforts from municipal electric utilities — public entities whose privileged access to low-cost capital often gave them a distinct competitive advantage.[11]

As competition from municipal utilities mounted in the early nineteenth century, private electric companies responded in an atypical way: they urged state governments to more heavily regulate their market.[12] Most notably, Chicago utilities magnate, Samuel Insull, famously began advocating in the late 1890s for an entirely new utility regulatory model that would shield privately-owned electric companies from competitive threats and ensure their profitability for decades into the future.[13] Asserting that municipal utilities were prone to corruption and that allowing companies to build multiple networks of competing power lines was a waste of resources, Insull and his allies called on states to grant exclusive franchises to private companies to provide electricity

[8] *See* MATTHEW JOSEPHSON, EDISON: A BIOGRAPHY 255 (1959); Alison Gocke, *Nodal Governance of the U.S. Electricity Grid*, 29 DUKE ENV'T L. & POL'Y F. 205, 214-15 (2019).

[9] *See* Gocke, *supra* note 8, at 215-17 (noting that the initial "wild state of numerous small-scale grids" in the U.S. "was quickly followed by consolidation at the hands of a few big players in the electricity field" and that "[b]y the . . . 1920s, ten electric utility holding companies controlled three quarters of the electricity industry" in the U.S. (citing GRETCHEN BAKKE, THE GRID: THE FRAYING WIRES BETWEEN AMERICANS AND OUR ENERGY FUTURE 69-70 (2016))).

[10] *See* Gocke, *supra* note 8, at 215.

[11] *See* RICHARD MUNSON, THE POWER MAKERS: THE INSIDE STORY OF AMERICA'S BIGGEST BUSINESS . . . AND ITS STRUGGLE TO CONTROL TOMORROW'S ELECTRICITY 60-61 (1985) (noting that municipal utilities grew "from 400 in 1896 to more than 1,250 a decade later" — a much faster pace of growth than private utilities experienced during that time) (cited in Hon. Richard D. Cudahy & William D. Henderson, *From Insull to Enron: Corporate (Re)Regulation After the Rise and Fall of Two Energy Icons*, 26 ENERGY L.J. 35, 49 (2005)).

[12] *See* Boyd & Carlson, *supra* note 5, at 822 ("Utilities and their advocates pushed for state [utility] regulation by independent commissions . . . .").

[13] *See* Cudahy & Henderson, *supra* note 11, at 46.

service within prescribed geographic areas.[14] Under this approach, which is often labeled the utility "regulatory compact" and largely continues in much of the country today, state-chartered private utilities agree to provide price-regulated electricity service to all paying retail customers within specified service territories.[15] In return, states vow to shield state-chartered utilities from competition in their sale of electricity service within those defined areas. States also ensure that utilities earn reasonable returns on their authorized investments in power plants, transmission lines, and other electricity infrastructure.[16]

By 1930, almost every state government in the country had embraced Insull's vision for electric utility regulation and had formed a public utility commission ("PUC") to implement it at the state level.[17] Nearly a century later, state PUCs throughout most of the U.S. still protect utilities against competition, approve their major capital expenditures, and regulate retail electricity rates.[18] Although a handful of "restructured" states now allow market forces to drive retail electricity pricing, a majority of states still use cost-based rate-setting rules — also known as "cost-of-service regulation" — to determine retail rates.[19]

[14] *See id.* at 46-51.

[15] *See* Jersey Cent. Power & Light Co. v. FERC, 810 F.2d 1168, 1189 (D.C. Cir. 1987) (Starr, J., concurring) (describing utility regulation as "a compact of sorts; a monopoly on service in a particular geographical area . . . in exchange for a regime of intensive regulation" and adding that "[e]ach party to the compact gets something in the bargain. . . . [U]tility investors are provided a level of stability in earnings and value less likely to be attained in the unregulated or moderately regulated sector; in turn, ratepayers are afforded universal, non-discriminatory service and protection from monopolistic profits through political control over an economic enterprise"); KARL MCDERMOTT, COST OF SERVICE REGULATION IN THE INVESTOR-OWNED ELECTRIC UTILITY INDUSTRY: A HISTORY OF ADAPTATION 5-8 (2012), https://www.ourenergypolicy.org/wp-content/uploads/2012/09/COSR_history_final.pdf [https://perma.cc/T2ML-LR9W]; Emily Hammond & David B. Spence, *The Regulatory Contract in the Marketplace*, 69 VAND. L. REV. 141, 142 (2016) (describing the regulatory "contract" as a model "under which an entity 'clothed with the public interest' assumes basic duties and submits to price regulation in exchange for a monopoly franchise"). For a critique of the "regulatory compact" view of electric utility regulation, see Ari Peskoe, *Unjust, Unreasonable, and Unduly Discriminatory: Electric Utility Rates and the Campaign Against Rooftop Solar*, 11 TEX. J. OIL, GAS, & ENERGY L. 101, 177 (2016) (characterizing the regulatory compact theory as a misleading myth that is lacking a "historical or legal basis").

[16] *See* Hammond & Spence, *supra* note 15, at 141-53.

[17] *See* Gocke, *supra* note 8, at 216.

[18] *See* Hammond & Spence, *supra* note 15, at 143-44.

[19] As of 2016, 32 U.S. states still used cost-of-service methods to set retail electricity rates under traditional or "hybrid" rate regulation models. For details on the main regulatory differences among traditional, restructured, and hybrid states, and on which states adhere to each approach, see generally Boyd & Carlson, *supra* note 5, at 837-39.

These complex rules seek to ensure that utilities recover their operating expenses and earn fair returns on state-approved capital expenditures while charging only "just and reasonable" rates.[20] Among other things, cost-based rate regulation requires utilities to routinely report their revenues and expenditures to state regulators and to seek formal PUC approval before making major capital investments or adjusting retail electricity prices.[21]

2. A Necessary Evil?

The predominant rationale for modern state utility regulation is that — despite its hefty administrative and other costs — it is the best available means of addressing natural monopoly problems within electricity distribution markets. For decades, legal scholars have bemoaned the inefficiencies of utility regulation, suggesting it is cost-justifiable only in a small handful of market settings.[22] In ordinary markets, nonutility producers compete against each other on price, quality, and selection in ways that benefit consumers and promote product innovation. By contrast, state utility regulation grants an exclusive franchise to a single company within an area and then dictates that company's pricing structure, stifling market forces and forfeiting most of the public policy benefits of competitive markets. Utility rate regulation eliminates consumer choice, weakens providers' incentives to innovate or enhance their quality of service, and prohibits price

[20] The prevailing principles for balancing the interests of utilities and their customers in the ratemaking context trace their origins to a landmark 1944 U.S. Supreme Court case. *See* Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 603 (1944); Pennsylvania Elec. Co. v. Pennsylvania Pub. Util. Comm'n, 502 A.2d 130, 134-35 (Pa. 1985); *see also* Walter Pond, *The Law Governing the Fixing of Public Utility Rates: A Response to Recent Judicial and Academic Misconceptions*, 41 ADMIN. L. REV. 1, 28-29 (1989).

[21] *See* Boyd & Carlson, *supra* note 5, at 827.

[22] *See, e.g.*, Bernard S. Black & Richard J. Pierce, Jr., *The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry*, 93 COLUM. L. REV. 1339, 1344-45 (1993) (finding "considerable evidence that cost-of-service regulation failed at its basic task of limiting utilities to a normal return on invested capital" and adding that electric utilities were "plagued by the same inefficiencies and bloated costs that characterized firms in all other industries where we formerly relied on rate regulation of legal monopolies"); Steven C. Carlson, *A Historical, Economic, and Legal Analysis of Municipal Ownership of the Information Highway*, 25 RUTGERS COMPUT. & TECH. L.J. 1, 28-29 (1999) (asserting that cost-based rate regulation "reduces the efficiency" of private utilities by "insulat[ing]" them "from the buffeting forces of competition and assur[ing] them of profits"); Richard A. Posner, *Natural Monopoly and Its Regulatio*n, 21 STAN. L. REV. 548, 635 (1968) (arguing that public utility law "costs a great deal").

competition.[23] Even worse, the cost-based rate-setting formulae employed in many states can incentivize utilities to waste resources by "gold plating" or overbuilding capital infrastructure to secure higher profits.[24]

Although cost-based rate regulation has many downsides, it may still be justifiable in a small number of essential industries — including the electricity distribution industry — that are uniquely vulnerable to natural monopoly problems. Because nearly every aspect of modern society depends on electric power, companies providing grid-supplied electricity service are decidedly "clothed with a public interest" and thus more subjectable to intrusive regulation than most other businesses.[25] Moreover, after a company incurs the enormous up-front costs required to build an electricity distribution network across a community, the marginal costs of serving additional area customers become very low.[26] This combination of high up-front costs followed by very low marginal costs makes it extremely difficult for others to enter and compete once a single electricity service provider spreads a distribution grid across a city or town.[27] First movers in these markets thus tend to acquire a "natural monopoly," which enables them to restrict output, raise prices, and reap large profits without jeopardizing their monopoly position.[28]

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[23] *See* Joshua C. Macey & Jackson Salovaara, *Rate Regulation Redux*, 168 U. PA. L. REV. 1181, 1198-200 (2020) (explaining why "rate regulation makes firms hesitant to innovate" and "limits consumer choice"); Joseph P. Tomain, *Traditionally-Structured Electric Utilities in a Distributed Generation World*, 38 NOVA L. REV. 473, 511 (2014).

[24] *See* Harvey Averch & Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. 1052, 1052 (1962) (arguing that cost-based rate regulation leads to excessive capital investment); Macey & Salovaara, *supra* note 23, at 1197-98 (describing "gold-plating," also known as the "Averch-Johnson effect").

[25] Munn v. Illinois, 94 U.S. 113, 126 (1876). *Munn* is frequently cited within utility law as support for the notion that the electricity industry — like the Chicago grain elevator industry in that case — is clothed with a public interest and thus eligible for heavier regulation. *See, e.g.*, Amy L. Stein, *Distributed Reliability*, 87 U. COLO. L. REV. 887 (2016) (noting that the *Munn* holding "open[ed] the floodgates of state regulation of utilities that are 'clothed [in the] public interest'").

[26] *See* Peskoe, *supra* note 15, at 117-18 (outlining the conventional "economic justification" for the utility regulatory model).

[27] *See id.*

[28] The "natural monopoly" rationale for utility regulation appears countless times throughout the utility law literature. *See, e.g.*, Herbert Hovenkamp, *Technology, Politics, and Regulated Monopoly: An American Historical Perspective*, 62 TEX. L. REV. 1263, 1273-74 (1984) (explaining that "the state often intervenes in natural monopoly markets" to prevent such entities from charging excessive monopoly prices); Joshua C. Macey, *Zombie Energy Laws*, 73 VAND. L. REV. 1077, 1087-89 (2020) ("The decision to protect utilities from market forces was in large part based on this view that energy companies were natural monopolies."); Posner, *supra* note 22 (noting that competition is "not a

In light of these risks and the high social value of having reliable, reasonably-priced electricity service, some have touted modern utility regulation as a justifiable governance structure for electricity distribution markets in spite of its many shortcomings.[29] Cost-based rate setting may be cumbersome and rife with inefficiency, but at least it helps to ensure that utilities earn only modest returns and that all retail customers within specific geographic areas can access reasonably-priced electricity service.

3. A System Designed Primarily to Serve Utilities' Interests?

An alternative, more cynical explanation for the nation's century-old dependence on intrusive utility rate regulation is that it is the closely-guarded brainchild of the private electricity companies that heavily benefit from it. A basic tenet of public choice theory is that companies with highly-concentrated interests at stake are typically better able than diffused groups of minor stakeholders to exert influence on legislative or regulatory actions.[30] This is because concentrated interest holders — such as large utilities — can easily allocate funds and human capital toward their rent-seeking efforts.[31] By contrast, diffused stakeholder groups — such as a utility's countless ratepayers — must grapple with a host of collective action problems that hinder their capacity to corral the financial and other resources needed to act effectively. Given utilities' comparative advantages under this public choice framework,

viable regulatory mechanism" for natural monopolies and that "direct controls" are generally necessary to prevent abuses involving such entities); Tomain, *supra* note 7, at 444-47 (describing use of natural monopoly theory as early as 1670 to help justify heavy regulation).

[29] *See, e.g.*, Hovenkamp, *supra* note 28, at 1273-74 (explaining that "the state often intervenes in natural monopoly markets" to prevent such entities from charging excessive monopoly prices); Macey, *supra* note 28, at 1087-89 ("The decision to protect utilities from market forces was in large part based on this view that energy companies were natural monopolies."); Posner, *supra* note 22 (noting that competition is "not a viable regulatory mechanism" for natural monopolies and that "direct controls" are generally necessary to prevent abuses involving such entities); Tomain, *supra* note 7, at 444-47 (describing use of natural monopoly theory as early as 1670 to help justify heavy regulation).

[30] *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 127 (1965) (noting that "relatively small groups will frequently be able voluntarily to organize and act in support of their common interests" and "large groups normally will not be able to do so" and that consequently "the outcome of the political struggle among the various groups in society will not be symmetrical").

[31] The dichotomy of concentrated benefits and diffused costs and its impacts on political decision-making are deeply enshrined in classical public choice theory. Its origins are often traced to OLSON, *supra* note 30.

modern rate regulation may be as much the product of political maneuvering as it is the product of economic theory.

The fact that Samuel Insull's vision of utility regulation awarded exclusive franchise rights to powerful private electric companies and effectively guaranteed their profits surely aided the model's initial proliferation across the country. In the electricity industry's brief pre-regulatory age, private electric companies had difficulties securing low-interest loans in part because of business risks inherent in their burgeoning industry.[32] Meanwhile, municipal utilities during that era were able to leverage their access to artificially-low-cost public financing to rapidly expand their own grid infrastructure and directly threaten private electricity companies' growth.[33] State utility regulation obliterated that growing threat by giving private electricity companies exclusive franchises across geographic service areas, reducing these companies' borrowing costs, and effectively guaranteeing their profitability.

Utilities' ongoing campaign against policy changes that might erode their monopoly positions today lends support to the view that utility regulation is partly the product of political influence and is partly designed to serve utilities' interests. Even though economists have argued since at least the 1960s that electricity *generation* markets are largely immune from natural monopoly problems and that "deregulation" or "restructuring" these markets to allow retail competition would benefit consumers, utilities in many states have successfully warded off such deregulation for decades.[34] Investor-owned utilities ("IOUs") have also fiercely rebuffed efforts by cities, such as Boulder, Colorado, to "municipalize" their electric service such that it is city-owned, even when voting ratepayers have signaled a clear

[32] *See* Cudahy & Henderson, *supra* note 11, at 46 (quoting Samuel Insull as complaining that competition within the electricity industry "frightens the investor, and compels corporations to pay a very high price for capital").

[33] *See id.* at 49 (explaining that municipal utilities were "[t]aking advantage of the low interest rates offered by tax-exempt bonds" to grow "twice as fast as private electric firms" during the electricity industry's pre-regulatory period).

[34] *See* Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773, 793 (2013) ("Restructuring of electricity regulation and other energy markets to allow for more competition, also known as deregulation, was popular in the 1990s but has slowed somewhat since the Enron crisis."); Richard J. Pierce, Jr., *The Past, Present, and Future of Energy Regulation*, 31 UTAH ENV'T L. REV. 291, 295 (2011) (asserting that failed efforts to deregulate or "restructure" electricity markets were attributable in part to resistance from "utilities that did not want to confront competition"); Tomain, *supra* note 7, at 444 ("Starting in the mid-1960s, traditional utility regulation appeared to have run its course as market distortions arose and as policymakers began to look at regulatory reform and deregulation.").

preference for such changes.[35] And utilities have fought for years against provisions in the Public Utility Regulatory Policies Act ("PURPA") specifically designed to inject competition into wholesale generation markets by requiring utilities to purchase wholesale power from qualified third-party providers at "avoided cost" rates that mirror pricing available from other wholesale generation sources.[36] Utilities' pushback against such procompetitive policies — regardless of whether such policies are likely to generate social welfare gains — is easier to explain when viewed within a public choice theory framework.

B. General Statutory Guidance on Utilities' Intended Mission

Because the utility regulatory model replaces market forces with a structure marked by high administrative costs, minimal price competition, few consumer choices, and slowed innovation, governments have generally limited its use to only a narrow set of industries. State statutory and regulatory definitions of "utility" and related terms have historically assisted with that, keeping utilities focused on their core purpose of providing grid-supplied electricity service to the paying public. For example, New Jersey's Administrative Code defines an "electric distribution company" as "a company that has an electric distribution system and meets the [statutory] definition of a public utility."[37] An accompanying statute defines a "public utility" as any entity that may "own, operate, manage or control within this State any . . . electricity distribution . . . plant or equipment for public use."[38]

States with "restructured" utility regulatory models, which let retail customers choose among competing electricity generators but still provide for delivery of electric power across rate-regulated distribution

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[35] *See* Shelley Welton, *Decarbonization in Democracy*, 67 UCLA L. REV. 56, 110-11 (2020) (calling municipalizations of electric utility service "expensive and contentious" and noting that the city of Boulder, Colorado is "in year five" of an "intense battle with the incumbent utility" to municipalize its electric utilities in an effort to accelerate decarbonization of its electricity system). After roughly ten years of effort, Boulder's municipalization attempt ultimately failed. *See* Michael Elizabeth Sakas, *Boulder Ends Decade Long Pursuit of City-Owned Power Utility*, CPR.ORG (Nov. 20, 2020, 6:31 AM), https://www.cpr.org/2020/11/20/boulder-ends-decade-long-pursuit-of-city-owned-power-utility [https://perma.cc/SKF4-F2V5].

[36] *See* Melissa Powers, Edward Jewell & Joni Sliger, *Quick Fixes or Real Remedies? The Benefits and Limitations of Climate and Energy Fast Policy*, 8 SAN DIEGO J. CLIMATE & ENERGY L. 67, 104 (2017) (arguing that "[u]tility opposition to PURPA is rooted in similar fears as utility opposition to net metering" in that, in both cases, "utilities fear losing their rate base").

[37] N.J. ADMIN. CODE § 14:5-1.2 (2022).

[38] N.J. STAT. ANN. § 48:2-13 (2022).

lines, naturally tend to define "utility" more narrowly.[39] By contrast, states with traditional utility regulatory models define "utility" broadly enough to include ownership or operation of public-facing electric generation or transmission facilities.[40] Regardless, these general statutory definitions and stability within the electricity industry have historically prevented most electric utilities from venturing into nonutility markets.

II. THE GROWING INCIDENCE OF UTILITY MISSION CREEP

Unfortunately, there is growing evidence that the combination of loose statutory guidance and industry norms that had formerly kept utility mission creep at bay is increasingly failing to serve this vital function. Utilities' inclinations to extend their monopolies into nonutility product and service markets are growing today in part because of mounting pressures related to the sustainable energy transition — pressures that are likely to only intensify in the coming years. When utilities encroach into nonutility markets, they expand their operations beyond their narrow, original "mission" to provide grid-supplied electricity service to the paying public. This Part examines several recent examples of such "utility mission creep" arising in states across the country, highlights specific rationales utilities have used to justify these actions, and describes the potential harms of this growing trend.

A. Utilities' Direct Entries into Competitive Private Markets

The most prototypical cases of utility mission creep occur whenever a regulated utility directly enters a competitive private market and begins selling products other than grid-supplied electricity service. As Judge Richard Posner once quipped, the competition between regulated utilities and private nonutility firms that results in these contexts tends to be "awkward and acrimonious" because the utilities involved are clearly operating outside their intended spheres.[41] For reasons

[39] *See* Boyd & Carlson, *supra* note 5, at 837-39.

[40] *See, e.g.*, FLA. STAT. § 366.02(4) (2022) (defining "electric utility" as an entity that "owns, maintains, or operates an electric generation, transmission, or distribution system within the state"); 66 PA. CONS. STAT. § 102 (2022) (defining "public utility" as any "person or corporations . . . owning or operating in this Commonwealth equipment or facilities for . . . [p]roducing, generating, transmitting, distributing or furnishing . . . electricity . . . to or for the public for compensation").

[41] Posner, *supra* note 22, at 673.

articulated in Part II.E below, such competition tends to also be inefficient and socially costly in the long run.[42]

The impropriety of this most basic type of mission creep is easy to recognize through a simple hypothetical example. Suppose that an electric utility were to seek its state PUC's approval to begin manufacturing "AA" and "AAA" alkaline household batteries and offering them for sale to its customers. Suppose further that, in its PUC proceeding, this fictional utility argued that its advantages as a state-chartered electric utility would enable it to acquire these batteries at a lower per-unit cost than nonutility corporations such as Duracell or Energizer could ever achieve. Accordingly, the utility vowed to pass along much of these cost savings to retail battery purchasers. Despite these potential benefits and the fact that selling household batteries arguably constitutes a sale of electric energy, it is highly unlikely that any state PUC would approve such a proposal. Most policymakers innately recognize that electric utilities were never intended to sell small alkaline batteries and that allowing them to do so would jeopardize competition and eventually produce undesirable outcomes within markets for those products.

Remarkably, some modern PUCs are authorizing utilities to enter into nonutility markets that are nearly as healthy and competitive as alkaline battery markets. These markets are similarly not prone to natural monopoly problems, and utilities' involvement in them falls outside their intended mission. The following Subsections describe a few real-life instances of this basic class of utility mission creep occurring today.

1. Entries into Rooftop Solar Markets

One recurring example of direct utility mission creep in recent years involves IOUs' attempts to enter rooftop solar markets. Because private rooftop solar markets feature relatively low barriers to entry, they are largely unsusceptible to natural monopoly problems. Nonetheless, in the past decade, several state PUCs have authorized IOUs to enter and directly compete with private companies in these markets. Although these market entries have primarily taken the form of limited pilot programs, they could eventually expand into much larger market intrusions.

Arizona Public Service ("APS"), a large Arizona IOU, won its PUC's approval in 2014 to effectively enter private rooftop solar markets

[42] *See infra* Part II.E.

through an initiative it calls its Solar Partner program.[43] Under this program, APS has leased rooftop space from roughly 1,600 of its residential electricity customers, installed solar panels on these rooftops — roughly 10 total megawatts of generating capacity — and retained ownership of the panels and all electricity they produce.[44] In exchange for making their rooftop space available, participating customers receive a $30 monthly credit on their electricity bill.[45] Conveniently, when APS introduced this program this $30-per-month savings was slightly more than APS customers could typically get through their own arrangements with private rooftop solar installers.[46] In this way, the Solar Partner program allowed APS to leverage its advantages as a rate-regulated utility to undercut the market-driven prices of private rooftop solar companies.

Shortly after APS announced its Solar Partner program, Tucson Electric Power ("TEP") secured regulators' approval for a similar pilot plan. Under TEP's Residential Solar Program, TEP leases customers' rooftops in exchange for a locked-in retail electricity rate that cannot increase for 25 years — a benefit that mirrors the price stability customers enjoy when they buy or lease rooftop solar panels through a private installer.[47] Like the APS Solar Partner program, TEP's program lets the utility own the rooftop panels and all of their generated power.[48]

We Energies, a Wisconsin IOU, secured PUC approval for a comparable utility-owned rooftop leasing program in 2018 called "Solar Now." Much like the APS Solar Partner Program, Solar Now allows We Energies to lease customers' rooftop space for utility-owned solar panel

[43] *See* Herman K. Trabish, *Arizona's Utility-Owned Solar Programs: The New Business Models Utilities Are Looking for?*, UTIL. DIVE (Jan. 7, 2015), https://www.utilitydive.com/news/arizonas-utility-owned-solar-programs-the-new-business-models-utilities-a/348331 [https://perma.cc/4KG6-GPWM].

[44] *See* John Farrell, *Utilities Bid to Own Rooftop Solar Even as They Oppose It*, RENEWABLE ENERGY WORLD (July 15, 2019), https://www.renewableenergyworld.com/solar/utilities-bid-to-own-rooftop-solar-even-as-they-oppose-it [https://perma.cc/95NY-DBVL] [hereinafter *Utilities Bid to Own Rooftop Solar Even as They Oppose It*].

[45] *See* Ryan Randazzo, *APS Wants to Put Free Solar Panels on 3,000 Homes*, AZCENTRAL, https://www.azcentral.com/story/money/business/2014/07/28/aps-wants-put-free-solar-panels-homes/13299121 (last updated July 28, 2014, 10:00 PM MT) [https://perma.cc/8B7N-NM6A].

[46] *See id.*

[47] *See* Robert Walton, *Tucson Electric Power Proposes New Utility-Owned Rooftop Solar Program*, UTIL. DIVE (Aug. 20, 2014), https://www.utilitydive.com/news/tucson-electric-power-proposes-new-utility-owned-rooftop-solar-program/299840 [https://perma.cc/BH3L-8CS3].

[48] *See id.*

installations.[49] Renewable energy industry advocates strongly opposed the Solar Now plan, arguing among other things that it would enable We Energies to "us[e] its monopoly powers to compete with private developers."[50] Some lamented that the program was projected to increase We Energies' retail electricity rates by a total of roughly $128 million.[51] Others argued that the program's mere existence could also further erode We Energies' incentives to promptly approve interconnections for private third-party-owned rooftop solar installations.[52] Despite these and other concerns, Solar Now ultimately received Wisconsin utility regulators' approval — an outcome that some warned would "undermine the private market for commercial and industrial distributed solar" in that state.[53]

In addition to APS, TEP, and We Energies, multiple other IOUs across the country have secured regulatory approvals in recent years for programs that put them in direct competition with private rooftop solar installers. New Orleans-based Entergy, a Louisiana IOU, launched a small utility-owned rooftop solar program in 2019 that offers $30-per-month credits to qualified residential customers for housing utility-owned solar arrays on their rooftops.[54] Duke Energy Indiana likewise received PUC approvals in 2019 for a pilot program offering essentially the same type of rooftop solar arrangement already available through dozens of private solar installers in the state.[55] Under Duke Energy Indiana's program, eligible customers lease panels directly from the

[49] *See* Chris Hubbuch, *Wisconsin Regulators Approve We Energies Solar Projects Despite Concerns from Renewable Energy Advocates*, WIS. STATE J. (Dec. 20, 2018), https://madison.com/wsj/news/local/environment/wisconsin-regulators-approve-we-energies-solar-projects-despite-concerns-from-renewable-energy-advocates/article_3e5e1c9e-c8ae-58d0-a128-3dfd9415e708.html [https://perma.cc/T3JV-ZDMT].

[50] *Id.*

[51] *See* Tom Content, *PSC Endorses $128 Million 'Rent-a-Roof' Pilot for We Energies*, CITIZENS UTIL. BD. (Dec. 20, 2018), https://cubwi.org/psc-endorses-128-million-rent-a-roof-pilot-for-we-energies [https://perma.cc/N5L4-FP9Q].

[52] *See* Kari Lydersen, *Wisconsin 'Rent-a-Roof' Pilot Would Give Utility Solar Monopoly, Critics Say*, ENERGY NEWS NETWORK (Dec. 19, 2018), https://energynews.us/2018/12/19/wisconsin-utilitys-rent-a-roof-pilot-would-give-it-solar-monopoly-critics-say [https://perma.cc/DSG6-FNX7].

[53] *See id.*

[54] *See* Dave Kovaleski, *Entergy New Orleans to Install Solar Panels on Homes of Low-Income Customers for Bill Credit*, DAILY ENERGY INSIDER (Mar. 4, 2019), https://dailyenergyinsider.com/news/17953-entergy-new-orleans-to-install-solar-panels-on-homes-of-low-income-customers-for-bill-credit [https://perma.cc/QD8T-HM34].

[55] *See* Shelby Thomas, *Duke Energy Launches Solar Energy Pilot Program*, REPUBLIC (July 5, 2019), http://www.therepublic.com/2019/07/05/duke_energy_launches_solar_energy_pilot_program [https://perma.cc/4LZ8-WQE5].

utility for twenty years and the array's generated electricity offsets their electricity bills — just as it would if such customers were to lease or finance their purchase of the panels from a private nonutility company.[56]

2. Entries into Electric Vehicle Charging Markets

Utility mission creep is also growing more common in electric vehicle ("EV") charging markets, where electric utilities are increasingly seeking regulators' permission to build, own, and operate their own public EV charging stations. EVs have a key role to play in the decarbonization of the U.S. transportation sector, which presently relies primarily on petroleum gasoline and accounts for nearly a third of the nation's total greenhouse gas emissions.[57] Technological innovation and economies of scale have greatly improved the affordability and performance of EVs in recent years, driving rapid growth and leading multiple major car manufacturers to commit to selling mostly EVs within the next decade.[58] As this transition unfolds, hundreds of thousands of new EV charging stations will need to replace roadside gas stations, and in November 2021 Congress enacted an infrastructure spending bill that allocates $7.5 billion to support this massive buildout.[59]

The EV charging station industry, which is materially different from the electricity distribution industry, is not susceptible to natural monopoly problems. The up-front capital costs associated with EV charging stations are much lower than those required to build electricity distribution grids and are far too small to create major barriers to

[56] *See id.*

[57] *See Sources of Greenhouse Gas Emissions*, ENV'T PROT. AGENCY, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (last updated Aug. 5, 2022) [https://perma.cc/C86B-8YY9] (reporting that, as of 2019, roughly 29 percent of U.S. greenhouse gas emissions were attributable to the nation's transportation sector).

[58] *See* Annie White, *Here Are All the Promises Automakers Have Made About Electric Cars*, CAR & DRIVER (June 26, 2021), https://www.caranddriver.com/news/g35562831/ev-plans-automakers-timeline [https://perma.cc/P5V9-388G].

[59] *See* Press Release, Fact Sheet: The Bipartisan Infrastructure Deal (Nov. 6, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal [https://perma.cc/CP7T-NKGG] (describing the legislation's allocation of $7.5 billion in federal funding toward grants and incentive programs to promote the buildout of a national network of 500,000 EV charging stations).

entry.[60] A burgeoning network of public EV charging stations owned by nonutility private corporations such as Blink Charging, ChargePoint, EVGo, Tesla, and Electrify America is compelling evidence that competitive market forces are already beginning to work within this industry to drive progress and benefit consumers.[61] There are currently more than 41,000 public EV charging stations in the U.S.,[62] and the number of these stations nationwide doubled from 2015 to 2019.[63] This rapid growth has been achieved primarily through a "make-ready" model in which utilities merely make grid infrastructure upgrades to prepare sites and then allow nonutility companies to build, own, and operate the stations.[64] This model appropriately limits utilities' roles in the public EV charging station buildout to activities consistent with their mission and allows market forces to drive most other aspects of the buildout.

Even though robust competitive markets for public EV charging by nonutility companies are rapidly emerging in much of the country, electric utilities across the U.S. are increasingly seeking to own public charging stations and directly compete in these markets.[65] PUCs in

[60] By one account, charging stations cost only $125,000 to $200,000 to build. *See* Cara Korte, *Politicians and Automakers Tout the Rise of Electric Vehicles. But Gas Station Owners Aren't Rushing to Install Chargers*, CBS NEWS (June 22, 2021, 6:30 AM), https://www.cbsnews.com/news/electric-vehicles-gas-station-owners-questions [https://perma.cc/9VY7-6YJE].

[61] *See* Kristin Broughton, *Blink Charging Taps Cash Pile in Electric Car Bet*, WALL ST. J. (May 27, 2021, 8:00 AM ET), https://www.wsj.com/articles/blink-charging-taps-cash-pile-in-electric-car-bet-11622116801 [https://perma.cc/Z6MX-JRYX]; Paul A. Eisenstein, *Electric Car Charging Networks Jostle for Pole Position amid Biden's Push to Electrify*, NBC NEWS (June 8, 2021, 10:25 AM PDT), https://www.nbcnews.com/business/business-news/electric-car-charging-networks-jostle-pole-position-amid-biden-s-n1269972 [https://perma.cc/CBM4-KAE3].

[62] *See* Daniel Strauss, *Start Me Up: 'Car Guy' Joe Biden Accelerates Push to Turn America Electric*, GUARDIAN (June 6, 2021, 6:00 AM EDT), https://www.theguardian.com/us-news/2021/jun/06/car-guy-joe-biden-america-electric-vehicles [https://perma.cc/GCC6-9EL7] (reporting that there are currently roughly 41,400 public EV charging stations in the U.S., compared to roughly 130,000 gasoline stations).

[63] *See EV Charging Stations Continued Strong Growth in Early 2020, NREL Report Shows*, NAT'L RENEWABLE ENERGY LAB'Y (Nov. 10, 2020), https://www.nrel.gov/news/program/2020/ev-charging-stations-continued-strong-growth-in-early-2020-nrel-report-shows.html [https://perma.cc/6ULD-V6BQ].

[64] Multiple states, including New York, have already begun employing this "make-ready" approach. *See* Morgan Lewis, *NYPSC Approves 'Make-Ready Program' for EV Infrastructure*, JDSUPRA (Aug. 31, 2020), https://www.jdsupra.com/legalnews/nypsc-approves-make-ready-program-for-55062 [https://perma.cc/A5TN-TBWJ].

[65] In addition to California, New York, and Florida, numerous other states have authorized at least some utility-owned EV charging. *See, e.g.*, Herman K. Trabish, *As Utility Collaboration with Charging Companies Rises, Emerging Differences Could Impede*

some jurisdictions, such as California, initially opposed these utility-owned EV charging proposals, citing concerns about potential impacts on competition within EV charging markets.[66] Over time, however, the perceived short-term benefits of enlisting IOUs to accelerate the EV charging infrastructure buildout have enticed many state regulators to set such concerns aside and support utility-owned charging station programs.[67] In some states, utilities are seeking legal authority to include the construction costs for new EV charging stations in their rate base and thus recover these costs plus a reasonable investment return through retail electricity charges — a move that would put much of this cost burden on ratepayers who do not drive EVs.[68]

In California, a shift toward utility-owned public EV charging stations began after state legislators enacted a bill in 2015 embracing the tenuous notion that utility-owned public EV charging stations could fairly compete against nonutility-owned stations in the same market. California's SB 350 authorized that state's PUC to approve "programs and investments in transportation electrification, including those that deploy charging infrastructure, via a reasonable cost recovery mechanism, if they . . . do not unfairly compete with nonutility enterprises."[69] Sadly, SB 350 offered no explanation for how utilities — endowed with all of the state-furnished advantages highlighted in Section I.A above — could possibly be fair market competitors against ordinary private companies.[70] In the short few years since the bill's enactment, the California PUC has approved roughly $1 billion in IOU

EV Growth, UTIL. DIVE (Aug. 31, 2020), https://www.utilitydive.com/news/as-utility-collaboration-with-charging-companies-rises-emerging-difference/581877 [https://perma.cc/6CB9-K6TJ] ("[U]tilities in Nevada, Colorado, Kentucky, Florida and Arizona have been allowed to own chargers to some extent.").

66 *See* Rebecca Elliott, *Spread of Electric Cars Sparks Fights for Control over Charging*, WALL ST. J. (Oct. 17, 2020, 5:30 AM ET), https://www.wsj.com/articles/spread-of-electric-cars-sparks-fights-for-control-over-charging-11602927000 [https://perma.cc/283A-P9XL] (reporting that "[n]early a decade ago" California had "blocked utilities from owning most charging equipment, citing concerns about stifling competition" but that state regulators then "reversed course in 2014, seeking to spur electrification").

67 *See id.*

68 *See, e.g.*, Andrew J. Tobias, *Proposed Ohio Law Would Let Power Companies Bill Customers for Utility-Owned Charging Stations*, CLEVELAND.COM, https://www.cleveland.com/news/2022/05/proposed-ohio-law-would-let-power-companies-bill-customers-for-utility-owned-charging-stations.html (last updated May 31, 2022, 4:11 PM) [https://perma.cc/R5D3-KPHP] (describing 2022 Ohio Senate Bill 307, which would authorize electric utilities to "pass[] the costs of building [electric-vehicle charging stations] along to customers, whether they use them or not").

69 CAL. PUB. UTIL. CODE § 740.12(b) (2022).

70 *See supra* note 16 and accompanying text.

requests for ratepayer-funded EV charging infrastructure spending.[71] In some cases, these approved expenditures have raised ratepayers' monthly electricity bills — including those of millions of residential customers who do not own or drive EVs.[72]

California's experiment with allowing state-protected utilities to build and own EV charging stations has thus far produced only tepid results, casting further doubt on the view that the approach is well suited for accelerating low-cost EV charging station development. For instance, the California IOU San Diego Gas & Electric ("SDG&E") secured state regulators' approval in 2016 to expend $45 million in ratepayer funds to install and own 3,000 public charging stations in its service territory.[73] After expending more than $70 million on the project — a $25 million overrun — SDG&E then sought approval in 2021 to build and own an additional 2,000 charging ports.[74] When a ratepayer advocate group brought a legal challenge against the utility's petition to expand its project, an administrative law judge ordered SDG&E to expend shareholder funds on an independent audit to investigate the existing project's sizable budget problems.[75]

Debates over how utilities should price their public EV charging services further highlight the complications and hazards of allowing IOUs to compete in these markets. Market forces motivate nonutility businesses that own public EV charging stations to charge competitive prices, just as competition among gasoline station owners helps to moderate per-gallon prices. By contrast, IOUs that own EV charging stations are largely insulated from market forces since they are effectively guaranteed a reasonable return on their investments and state regulators set their prices. As highlighted in Section I.A above, utilities may even have incentives to submit inflated cost projections to

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[71] *See* Noah Garcia, *Advancing Utility Electric Vehicle Programs: A Snapshot from New York and California*, GREENBIZ (June 16, 2020), https://www.greenbiz.com/article/advancing-utility-electric-vehicle-programs-snapshot-new-york-and-california [https://perma.cc/GL2Y-AS7H].

[72] *See, e.g.*, Elliott, *supra* note 66 (noting that Southern California Edison's recently approved EV charging program will likely increase the average residential electricity customer's bill by about 50 cents per month).

[73] *See* Rob Nikolewski, *SDG&E Electric Vehicle Charging Program Ran $25 Million over Budget*, SAN DIEGO UNION TRIB. (Mar. 31, 2021, 6:00 AM PT), https://www.sandiegouniontribune.com/business/story/2021-03-31/sdg-e [https://perma.cc/4WW9-4LWU].

[74] *See id.*

[75] *See id.*

state regulators or to try to exert political pressure on the ratemaking process in pursuit of authorizations to charge higher rates.[76]

The absence of time-tested methodologies for setting utility-owned EV charging stations' prices makes this price-setting process even more prone to political influence and inefficiency than ordinary electricity rate-setting. For example, investor-owned Florida Power & Light ("FPL") sought state approval in 2020 to charge a $0.30/kWh volumetric rate at its fast charging stations, arguing that this proposed price was "comparable on a cost-per-mile basis to recent gasoline prices."[77] Unfortunately, such a comparison-to-gas approach if widely adopted would eliminate the fuel cost savings EV owners typically enjoy over drivers of gas-powered cars — a common selling-point of EV ownership.[78] Duke Energy Florida — another Florida IOU — received approval to set its EV fast charging fee based on the "average cost for DC fast charging provided by other [charging station] operators in Florida."[79] This pricing method is inherently problematic because it attempts to set a fixed price for the utility's stations based on the variable prices charged at privately-owned charging stations across the state. It is also worth noting that neither the FPL pricing strategy nor the Duke Energy Florida approach bases public EV charging prices on the utility's costs. Consequently, ratepayers who do not even own EVs and never use the stations could end up footing some of the bill through their retail electricity service rates — a type of cross-subsidization that utilities spurned as "unfair" in other settings when such arguments play to their advantage.[80] By untethering price-setting from a utility's costs,

[76] *See supra* note 24 and accompanying text (describing cost-based regulation's potential to encourage "gold-plating" behavior).

[77] Robert Walton, *FPL Proposes $0.30/kWh Rate for Utility-Owned EV Stations, Rider to Address High Demand Charges*, UTIL. DIVE (July 1, 2020), https://www.utilitydive.com/news/fpl-proposes-030kwh-rate-for-utility-owned-ev-stations-rider-to-address/580864 [https://perma.cc/VL64-GLGA]; *see also Florida PSC Approves FPL's EV Charging Tariffs*, T&D WORLD (Dec. 3, 2020), https://www.tdworld.com/electrification/article/21149341/florida-psc-approves-fpls-ev-charging-tariffs [https://perma.cc/HG2R-7QE2].

[78] *See* Benjamin Preston, *EVs Offer Big Savings over Traditional Gas-Powered Cars*, CONSUMER REPS. (Oct. 8, 2020), https://www.consumerreports.org/hybrids-evs/evs-offer-big-savings-over-traditional-gas-powered-cars [https://perma.cc/E676-C7J8].

[79] Dory Larsen, *Florida Public Service Commission Approves State's Largest Electric Transportation Program*, CLEANENERGY.ORG (May 13, 2021), https://cleanenergy.org/blog/florida-public-service-commission-approves-states-largest-electric-transportation-program [https://perma.cc/B54B-AD7B].

[80] Utilities have repeatedly cited "unfair" cross-subsidization effects to justify their campaigns to weaken solar net metering policies over the past decade. *See, e.g.*, Troy A. Rule, *Solar Energy, Utilities, and Fairness*, 6 SAN DIEGO J. CLIMATE & ENERGY L. 115, 129

these approaches strengthen the potential for utilities to charge unduly high prices and earn excessive returns.

New York City's large IOU, Consolidated Edison ("ConEd"), employs yet another type of pricing method for its utility-owned EV charging stations: it requires customers to pay by the hour rather than by the kWh. At ConEd's stations, customers are charged $2.50 per hour during the day and $1.00 per hour overnight.[81] The utility acknowledges that this rate translates into at least $0.40 per kWh during daylight hours — a very steep price — but notes that customers get the added benefit of having a place to park their vehicle while it charges.[82] In that sense, ConEd has arguably tiptoed into New York City's lucrative public self-parking market as well.

3. Entries into Other Competitive Product or Service Markets

Electric utilities are not only venturing into today's rooftop solar and EV charging markets; they are also entering multiple other private competitive markets that take them well beyond their primary mission to provide grid-supplied electricity service. Utilities in recent years have fashioned themselves into purveyors of a diverse array of products they were not originally intended to sell, from light bulbs to loans to residential energy storage systems. Sadly, utility regulators — eager to promote the important sustainable energy transition — have often encouraged this trend and overlooked its potentially adverse long-term consequences.

Today's rapidly evolving energy sector presents an array of enticing opportunities for electric utilities to enter emerging nonutility product markets, and a growing number of utilities are taking the bait. For instance, Liberty Utilities sought regulatory approvals in 2018 for a utility-owned distributed energy storage pilot program within its New

n.53 (2015) (citing the use of fairness arguments against net metering by utility officials in Wisconsin and Oklahoma).

[81] *See* Ian Lovett, *New York City Installs First Curbside Electric-Vehicle Charging Station*, WALL ST. J. (June 24, 2021, 12:09 PM ET), https://www.wsj.com/articles/new-york-city-to-install-first-curbside-electric-vehicle-charging-station-11624525200 [https://perma.cc/2NRR-KGU2].

[82] *See* Charles Benoit, *NYC Will Get Curbside EV Charging, but ConEd's Pricing Will Make People Sad*, ELECTREK (Feb. 18, 2020, 8:52 AM PT), https://electrek.co/2020/02/18/nyc-will-get-curbside-ev-charging-but-coneds-pricing-will-make-people-sad [https://perma.cc/F8PJ-CE2R] (noting, by comparison, that Maryland's PUC had "approved a rate of $0.18 per kWh" for curbside EV charging in that state).

Hampshire service territory.[83] Under Liberty's initial proposal, the utility sought to install 1,000 Tesla Powerwall systems in customers' homes, effectively leasing the systems to customers for monthly or lump-sum fees.[84] A Liberty spokesperson defended the controversial plan, proclaiming, "We believe the utility can do this just as well as the third-party providers . . . and we believe utility ownership for it is appropriate."[85] Despite pointing out that "[t]he utility's insistence on owning batteries makes it an outlier nationally," the private solar company Sunrun agreed not to formally oppose a settlement allowing the pilot to go forward after Liberty promised to give the company a "major role" in the program's second phase.[86]

Holy Cross Energy — a rural electric cooperative in Colorado — launched its own type of home battery storage system program, which allows the utility to sell the systems directly to its customers.[87] Because Holy Cross secured a zero-interest loan for its initiative through a federal program available only to electricity co-ops, the utility was able to offer interest-free financing to customers who purchased battery systems through them — a material competitive advantage over private energy storage system companies.[88]

Holy Cross Energy's program is just one of many through which electric utilities are using their privileged access to cheap capital to offer artificially low interest rates on energy-related retail financing products. One 2020 report found that twenty-nine different IOUs across the U.S. had established "on-bill financing" programs that allow retail customers

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[83] *See* Julian Spector, *The Controversy Surrounding Liberty Utilities' Home Storage Pilot*, GREENTECHMEDIA (June 7, 2018), https://www.greentechmedia.com/articles/read/nh-utility-home-storage-pilot-tesla-powerwall-liberty [https://perma.cc/C38T-4QGK].

[84] *See id.*

[85] Herman K. Trabish, *Is New Hampshire on the Verge of Battery Energy Storage History?*, UTIL. DIVE (June 19, 2018), https://www.utilitydive.com/news/is-new-hampshire-on-the-verge-of-battery-energy-storage-history/525876 [https://perma.cc/TDQ3-LYMV].

[86] Herman K. Trabish, *New Hampshire Settlement Moves 'Cutting-Edge' Utility BTM Storage Pilot Forward*, UTIL. DIVE (Nov. 27, 2018), https://www.utilitydive.com/news/new-hampshire-settlement-moves-cutting-edge-utility-btm-storage-pilot-for/542866 [https://perma.cc/57ML-RWYA].

[87] *See* Hamilton Steimer, *Home Battery Storage Programs Provide Grid Flexibility and Save Customers Money*, ENV'T & ENERGY STUDY INST. (Dec. 2, 2020), https://www.eesi.org/articles/view/home-battery-storage-programs-provide-grid-flexibility-and-save-customers-money [https://perma.cc/LGH9-M5Q8].

[88] *See* Miguel Yañez-Barnuevo, *Colorado Utility Launches Innovative Financing Tool for Battery Storage*, ENV'T & ENERGY STUDY INST. (Dec. 10, 2020), https://www.eesi.org/articles/view/colorado-utility-launches-innovative-financing-tool-for-battery-storage [https://perma.cc/3PE4-SEP4].

to finance distributed energy device purchases through their utilities, including some for rooftop solar.[89] In the words of one commentator, "[b]ecause these loans are backed by a utility's borrowing power, they often have lower interest rates than market-rate lending options."[90] The writer adds, however, that many utilities are still "reluctant to enter what they see as the banking business" — a sensible position given that rate-regulated utilities were never intended nor designed to be retail lenders.[91]

Utility-owned "community solar" programs are another potential way for utilities to leverage their state-provided advantages to make aggressive plays in an emerging competitive market not prone to natural monopoly problems. The Florida utility FPL received regulatory approval in 2020 to build and own nearly 1.5 GW of community solar generating capacity and offer subscriptions to these projects to its retail customers.[92] Although these plans for a massive buildout of community solar projects in Florida could help to make community solar participation more accessible in the short run, they drew significant criticism because they rely on utility ownership rather than competition among third-party community solar developers. When asked about FPL's new utility-owned community solar initiative, one solar energy industry advocate remarked:

> [W]e'd much rather see a system in which the market is allowed to compete . . . . I don't agree that utility self-build is the only way, the fastest way . . . or the least costly way . . . to add solar in Florida or anywhere else.[93]

As the resounding success of third-party owned community solar in other states shows, community solar markets are not prone to monopoly problems and thus do not need regulated utilities to operate

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[89] *See* TOM STANTON & SCOTT SKLAR, NAT'L REGUL. RSCH. INST., UTILITY TARIFF ON-BILL FINANCING: PROVISIONS AND PRECAUTIONS FOR EQUITABLE PROGRAMS 1-2 (2020), https://pubs.naruc.org/pub/0E0B2716-947E-B0A8-2899-3DCA0F0C8F16 [https://perma.cc/RDV7-EMLT].

[90] Annie Gilleo, *On-Bill Financing Gains Ground but Faces Barriers to Wider Adoption*, AM. COUNCIL FOR AN ENERGY EFFICIENT ECON. (Apr. 18, 2019), https://www.aceee.org/blog/2019/04/bill-financing-gains-ground-faces [https://perma.cc/3Y3H-8KKN].

[91] *Id.*

[92] *See* Iulia Gheorghiu, *Florida Signs Off on FPL's 1.5 GW Community Solar Program, Despite Lack of Competition*, UTIL. DIVE (Mar. 4, 2020), https://www.utilitydive.com/news/florida-signs-off-on-fpls-15-gw-community-solar-program-despite-lack-of-c/573428 [https://perma.cc/8SPW-A8JC] [hereinafter *Florida Signs Off*].

[93] *Id.*

in them. For years, Minnesota's largest IOU, Xcel Energy, has been required under state law to purchase power from third-party-owned "community solar garden" projects so that Xcel's customers can subscribe to and get monthly billing statement credits for their shares in these projects.[94] These laws enabling nonutility companies to dominate Minnesota's community solar markets have generated enviable outcomes: as of December 2021, this northern state with below-average solar resources has more installed community solar generating capacity than any other state in the U.S. other than Florida.[95] Sadly, FPL's massive new utility-owned community solar program will likely deny Floridians similar benefits by stunting competition among private community solar providers in that sunny state.

B. Misuses of Utility Assets to Advantage Unaffiliated Nonutility Companies

A second general category of utility mission creep occurs when utilities misuse their state-provided privileges or status to convey competitive advantages to specific nonutility companies. Although utilities engaged in these activities do not directly enter competitive markets themselves, their actions still venture beyond utilities' general mission in ways that can chill competition in affected markets.

This distinct class of utility mission creep was on display in 2017 when Consumers Energy — a large Michigan IOU — rolled out a program designed to draw potential rooftop solar customers to privately-owned SunPower.[96] Under the program, Consumers Energy's residential electricity customers were notified they could receive a "customized" in-home solar assessment through the utility and then purchase a prescribed rooftop solar array for their home through SunPower.[97] Consumers Energy's website did mention in passing that

[94] *See* MINN. STAT. § 216B.1641 (2022).

[95] *See Community Solar*, NAT'L RENEWABLE ENERGY LAB'Y, https://www.nrel.gov/state-local-tribal/community-solar.html (last visited Sept. 21, 2022) [https://perma.cc/YVA7-Q38J] (reporting that, as of December 2021, 834 MW of community solar capacity had been installed in Minnesota, which was second only to Florida's total of 1,636 MW).

[96] Although Consumers Energy's program ended in 2018 and is no longer visible on the utility's website, the utility's press release describing the program remains accessible online. *See* Consumers Energy, *Consumers Energy Offers New Rooftop Solar Pilot Program for Michigan Households*, PR NEWSWIRE (May 26, 2017, 6:00 AM ET), https://www.prnewswire.com/news-releases/consumers-energy-offers-new-rooftop-solar-pilot-program-for-michigan-households-300464283.html [https://perma.cc/7JAK-HHUD].

[97] *See* Kim Riley, *Consumers Energy, SunPower Launch Rooftop Solar Pilot Program in Michigan*, DAILY ENERGY INSIDER (May 26, 2017), https://dailyenergyinsider.com/

customers remained free to get rooftop solar through other private installers.[98] Still, the utility's press release and public announcement of its so-called "collaborat[ion]" with SunPower gave SunPower a bright spotlight in front of Consumers Energy's massive customer base — a valuable competitive advantage over other private solar installers in the state.[99]

This type of utility mission creep has likewise impacted Vermont's residential battery storage market in recent years. A Vermont utility, Green Mountain Power ("GMP"), entered into an exclusive partnership arrangement with Tesla in 2015 to lease Tesla's Powerwall residential energy storage systems to the utility's customers.[100] Under GMP's initial program, which it expanded in 2017, residential customers leased Powerwalls directly through the utility for a ten-year term in exchange for a monthly fee that appeared on their utility bills.[101] Although GMP eventually rolled out a "bring-your-own-device" program in 2018 that allowed customers to access similar benefits using non-Tesla storage devices, for years GMP allowed Tesla to leverage the utility's monopoly position and other privileges to drive sales of Tesla products.[102] This unusual arrangement even prompted the state's Department of Public Service to call for an investigation into whether the program placed a "disproportionate share of financial risk" on GMP's non-participating ratepayers.[103] Ironically, GMP's special relationship with Tesla

featured/5379-consumers-energy-sunpower-launch-rooftop-solar-pilot-program-michigan [https://perma.cc/ATZ9-MVAV].

98 *See id.*

99 *See* Consumers Energy, *supra* note 96.

100 *See* Jeff St. John, *What's the Value of a Tesla Powerwall? $50 per Month, Bets Green Mountain Power*, GREENTECHMEDIA (Dec. 8, 2015), https://www.greentechmedia.com/articles/read/green-mountain-powers-bet-on-tesla-powerwall-value-50-per-month [https://perma.cc/WB49-2LDG].

101 *See GMP Launches New Comprehensive Energy Home Solution from Tesla to Lower Costs for Customers*, GREEN MOUNTAIN POWER (May 12, 2017), https://greenmountainpower.com/news/gmp-launches-new-comprehensive-energy-home-solution-tesla-lower-costs-customers [https://perma.cc/33JV-AVWP]; Jeff St. John, *Tesla and Green Mountain Power: Get Your Behind-the-Meter Battery for $15 a Month*, GREENTECHMEDIA (May 12, 2017), https://www.greentechmedia.com/articles/read/tesla-and-green-mountain-power-get-your-behind-the-meter-battery-for-15-a-m [https://perma.cc/4AFY-6PPR].

102 *See Green Mountain Power Offers New "Bring Your Own Device" Program to Cut Energy Peaks*, GREEN MOUNTAIN POWER (Mar. 21, 2018), https://greenmountainpower.com/gmp-offers-new-bring-device-program-cut-energy-peaks [https://perma.cc/3N29-MQYJ].

103 Ellie French, *State Calls for Investigation into GMP Tesla Battery Program*, VTDIGGER (Sept. 5, 2019), https://vtdigger.org/2019/09/05/state-calls-for-investigation-into-gmp-tesla-battery-program [https://perma.cc/D3KE-33Q2].

reemerged that same year when the utility launched an "initiative" offering exclusive Tesla-branded residential solar-plus-storage packages to the utility's customers, complete with an optional "special bundle deal" that included a $1,500 discount on a Tesla Model 3 EV.[104]

C. Misuses of Utility Assets to Advantage Affiliated Nonutility Companies

A third, related category of utility mission creep occurs when a utility misuses its privileges and position to advantage its own unregulated nonutility subsidiaries or affiliates.[105] Utilities have been using affiliates or subsidiary entities for years to compete against nonutility companies in competitive product or service markets.[106] In theory, this practice

[104] *See* Kyle Field, *Tesla & Green Mountain Power Launch New Flat Rate Solar + Storage Bundles*, CLEANTECHNICA (Sept. 11, 2019), https://cleantechnica.com/2019/09/11/tesla-green-mountain-power-launch-new-flat-rate-solar-storage-bundles [https://perma.cc/Z2PT-5P43].

[105] A fourth category of utility mission creep, which goes beyond the primary focus of this Article but still warrants parenthetical mention, consists of instances when privately-owned utilities take on tasks that government entities should perform. Programs that enlist utilities to help accelerate the deployment of energy-efficient bulbs and fixtures are one example of this distinctive type of utility mission creep. *See* Scott Dimetrosky, Katie Parkinson & Noah Lieb, *Residential Lighting Evaluation Protocol*, *in* THE UNIFORM METHODS PROJECT ch. 6, at 1, 1 (Nat'l Renewable Energy Lab'y 2018), https://www.nrel.gov/docs/fy18osti/70472.pdf [https://perma.cc/H9TP-Q28P]. For instance, rather than subsidizing these products using taxpayer dollars, California's Statewide Lighting program allows IOUs to earn financial incentives by buying down the prices of efficient bulbs through ratepayer-funded payments to manufacturers and distributors based on quantities sold. *See* KEMA, INC., CAL. PUB. UTIL. COMM'N, WORK ORDER 28, CALIFORNIA UPSTREAM AND RESIDENTIAL LIGHTING IMPACT EVALUATION 3-1 (2014), http://www.calmac.org/publications/WO28_-_California_Upstream_and_Residential_Lighting_Impact_Evaluation_Final_Report.pdf [https://perma.cc/ZL7L-J2AH].

As one recent scandal showed, such programs not only add additional bureaucratic layers but can also be prone to abuse. From 2017 to 2019, SDG&E earned more than $6 million in incentive payments from state regulators based on claims it had sent subsidy payments to manufacturers and distributors for millions of efficient light bulbs. *See* Nikolewski, *supra* note 73. Many of those bulbs — 15 million in 2017 alone — never reached retailers, but SDG&E counted them anyway in its reports to the state PUC. *See id.* SDG&E ultimately agreed to pay a $5.5 million fine and return all incentive payments it had received under the program from the state during the relevant period. Abigail Sawyer, *SDG&E Proposes $51.6-Million Settlement in Lost-Lightbulb Debacle*, CAL. ENERGY MKTS. (Dec. 18, 2020), https://www.newsdata.com/california_energy_markets/regulation_status/sdg-e-proposes-51-6-million-settlement-in-lost-lightbulb-debacle/article_91450cbe-418f-11eb-b8e7-574522588ec7.html [https://perma.cc/3WK9-UFJT].

[106] *See* Michael Wara, *Competition at the Grid Edge: Innovation and Antitrust Law in the Electricity Sector*, 25 N.Y.U. ENV'T L.J. 176, 202 (2017) ("[S]ome utility holding

may seem innocuous since the nonutility affiliate involved has no state-provided monopoly protection and is not subject to cost-based regulation. In reality, however, it can create opportunities and incentives for utilities to act in ways that advantage their own nonutility affiliates and distort competitive markets. For example, a utility may be tempted to stall or complicate interconnection processes for private third-party rooftop solar installers that compete with its own nonutility rooftop solar affiliate.[107] Even if private companies merely believe a utility could engage in such anticompetitive activity within their market, such perceived risk could chill private investment and market growth.

As Professor Joshua Macey has aptly highlighted, IOUs are likewise aiding affiliated nonutility companies by guaranteeing these other companies' debts.[108] If affiliates' risky new ventures financed through such mechanisms ultimately fail, a utility's retail customers may pay for those failures through increased electricity rates.[109] In that sense, these debt guarantees allow regulated electric utilities to effectively cross-subsidize their unregulated affiliates — something regulated utilities were never intended to do.

In recent years, some IOUs have also engaged in this third type of mission creep by indirectly entering into markets that offer corporate "fleet electrification services" — financing, planning, and EV procurement services for private businesses seeking to electrify their automobile fleets. For example, in 2021, the large IOU Duke Energy announced its formation of eTransEnergy — a wholly-owned subsidiary focused on providing EV "fleet services" to corporate customers.[110] This

companies, like NRG, are moving into the distributed solar energy business using unregulated subsidiaries and attempting to build large, national distributed energy providers akin to SolarCity."); Jeff Winmill, *Electric Utilities and Distributed Energy Resources — Opportunities and Challenges*, 6 SAN DIEGO J. CLIMATE & ENERGY L. 199, 202 (2015) ("Many IOUs are part of larger holding companies that have unregulated affiliates or subsidiaries engaged in a variety of competitive, energy-related businesses.").

107 *See* Wara, *supra* note 106, at 218 (noting the potential for a utility to use "its interconnection processes to impede competition" for the benefit of its affiliated nonutility distributed energy business).

108 *See* Joshua C. Macey, *Utility Mergers and the Modern (and Future) Power Grid*, 42 ENERGY L.J. 237, 244 (2021) ("When a utility guarantees non-utility affiliates' debt, creditors of non-utility affiliates can pursue the utility's assets directly. Such guarantees benefit non-utility affiliates by lowering their financing costs.").

109 *See id.*

110 *See* Matthew Bandyk, *Duke, Other Utilities See Dollar Signs in Becoming EV Experts*, UTIL. DIVE (Mar. 24, 2021), https://www.utilitydive.com/news/duke-other-utilities-see-dollar-signs-in-becoming-ev-experts/596231 [https://perma.cc/CA82-EY5L].

new entity seeks to be "one comprehensive source for transitioning [companies'] fleets to EVs, from start to finish."[111] The markets for these services are not prone to natural monopoly problems: only relatively modest up-front capital investment is needed to advise companies on their transition to EVs. However, as one utility consultant observed, "[I]f utilities do not take advantage of services unlocked by EVs, then others will."[112] Although eTransEnergy is subject to state-level codes of conduct aimed at preventing the company from leveraging its Duke Energy ties to gain advantages in this competitive market, enforcing those rules in practice could prove to be a difficult task.[113]

D. Common Justifications for Utility Mission Creep

Utilities and their regulators tend to rely on a few recurring rationales to advocate for and defend utility mission creep activities. Many of these justifications focus heavily on short-term policy objectives and largely disregard the potential long-term consequences of bringing utilities into nonutility markets. The following Subsections describe some of the most common arguments made in defense of utility mission creep initiatives and programs.

1. Utilities' Market Entry May Accelerate Short-Run Sustainable Energy Growth

The enticing prospect of harnessing a large utility's vast resources to accelerate the near-term deployment of important sustainable energy technologies can sometimes persuade regulators to approve utility mission creep programs. Electric utilities — which were purposefully designed to finance, build, and operate large-scale energy infrastructure[114] — can seem like ideal candidates to assist in advancing sustainable energy initiatives that involve smaller-scale development as well. At first glance, programs that enlist utilities for such purposes can seem like a "win-win," advancing regulators' short-term policy objectives while enabling utilities to further expand their rate base. As

[111] Jennifer Sharpe, *eTransEnergy Named by GM as a Preferred Provider for Fleet Electrification*, DUKE ENERGY (July 15, 2021), https://news.duke-energy.com/releases/etransenergy-named-by-gm-as-a-preferred-provider-for-fleet-electrification [https://perma.cc/J85G-Q8H3].

[112] Bandyk, *supra* note 110.

[113] *See id.* ("eTransEnergy must abide by a code of conduct that differs legally from state to state regarding how it markets to and recruits customers of Duke's utilities . . . .").

[114] *See supra* Part I.

calls for action on climate change intensify, these potential benefits only grow more alluring.

This emphasis on the potential to accelerate short-run policy gains as a justification for utility mission creep is detectible today in a wide range of energy industry settings. For example, a pair of utility executives argued in 2020 that, "when the utilities are engaged" in the buildout of EV charging stations, "there's quicker adoption" of EV technologies, resulting in "immediate benefits for everyone."[115] In that same year, advocates made similar arguments in defense of FPL's new utility-owned community solar program, which largely excludes private third-party providers.[116] In both cases, advocates' heavy focus on the short-term benefits of welcoming utilities into these competitive markets obscured the potential long-run costs of such an approach.

2. Utilities' Market Entry May Advance Research or Justice Goals

A second category of justifications for utility mission creep diverts attention away from potential long-term consequences by fixating instead on a proposed initiative's justice-promoting features or research value. In an era when advancing important social and racial justice goals has rightly become a major policy focus, new utility initiatives touted as ways to help low-income residents, disadvantaged minority groups, renters, or nonprofit organizations tend to be more immune to objection. Many types of pioneering sustainable energy research efforts also enjoy broad political support and can thus bring similar benefits. Accordingly, many utility mission creep programs have curried favor by incorporating and strongly emphasizing research- or justice-oriented elements and ignore the fact that there are less distortive ways to advance those same objectives.[117]

Arizona's largest utility, APS, used this type of strategy when seeking approval to expand its incursion into the state's residential rooftop solar market. The utility's initial foray into the market in 2016 — its rent-a-roof Solar Partner pilot program highlighted above — was limited to just 1,600 households.[118] When APS sought regulators' approval in 2018 to use ratepayer funds to significantly expand this business model, it surely recognized that such expansion of its pilot program would

[115] Elliott, *supra* note 66.

[116] *See* Gheorghiu, *Florida Signs Off*, *supra* note 92 (quoting an industry advocate as saying he's "not sure that if you had competitive procurement [instead of a utility-owned model] that you would have a pathway to deploy more than 1.4 GW of solar").

[117] *See supra* Part II.

[118] *See supra* notes 43–46 and accompanying text.

draw opposition.[119] Accordingly, the utility rebranded it as the "Solar Communities" program and stipulated that only households with annual incomes below the state median would be eligible to enroll.[120] APS also explained that the program would install panels on south and southwest facing roofs to help the utility "conduct research on integrating more renewable energy without compromising reliability."[121] This emphasis on research benefits and greater access for moderate- and low-income customers proved effective at helping APS secure approval to dive more deeply into what had been a healthy competitive market. By voluntarily restricting program eligibility to the bottom fifty percent of its residential customer base by income level, APS secured regulators' blessing to offer its utility-owned rooftop solar product to hundreds of thousands of additional households comprising roughly half of the potential residential rooftop solar market within the utility's service area.[122]

Multiple other utilities have similarly shored up political support for their utility-owned solar programs by marketing them as initiatives tailored to benefit low-to-moderate-income customers or other disadvantaged groups. Because they enjoy access to subsidized financing, regulated utilities can sometimes offer better financing options to low-income households than the open market can provide.[123] The New Orleans utility Entergy launched a residential rent-a-roof program very similar to the APS program in 2019 that was available only to low-income households.[124] Florida's FP&L secured approvals in 2020 for a utility-owned community solar program in the state that expressly sets aside about five percent of its new generating capacity for low-income enrollees.[125] We Energies specifically mentions that its

[119] *See APS Limited-Income Customers Now Have Access to Rooftop Solar*, APS (Sept. 4, 2018), https://www.aps.com/en/About/Our-Company/Newsroom/Articles/APS-limited-income-customers-now-have-access-to-rooftop-solar [https://perma.cc/237S-8USA] (stating that its Solar Communities program would require a "investment of $10 to $15 million per year for the [first] three years").

[120] *See id.*

[121] *Id.*

[122] Pinnacle West, the publicly-traded parent of APS, reports on its website that APS provides electricity service to nearly 1.3 million customers. *See About Us*, PINNACLE WEST, http://www.pinnaclewest.com/about-us/default.aspx (last visited Aug. 11, 2021) [https://perma.cc/9WZQ-F5EX].

[123] *See* Wara, *supra* note 106, at 203 ("Utilities, because of their ability to earn a guaranteed return on investments via retail rates, may be able to offer solar to customers who could not meet the standards set by solar firms and their bankers.").

[124] *See* Farrell, *Utilities Bid to Own Rooftop Solar Even as They Oppose It*, *supra* note 44.

[125] *See* Gheorghiu, *Florida Signs Off*, *supra* note 92.

Solar Now utility-owned rooftop solar leasing products are available to Wisconsin nonprofits and government entities, even though nearly all large entities — including for-profit businesses — are potentially eligible.[126] And Duke Energy Indiana used a comparable approach when rolling out a very similar program in 2019.[127]

Utilities have also begun appealing to social justice ideals to bolster their petitions to enter EV charging station markets. There is growing recognition that lower-income neighborhoods across the U.S. have fewer public EV charging stations than higher-income communities and that greater policy attention is needed to address this significant problem.[128] Unfortunately, one of the California PUC's ("CPUC") approaches to addressing this problem was to invite PG&E, a large IOU, into the state's private competitive EV charging market. In 2018, the CPUC approved a plan that allows PG&E to own EV charging stations it develops in lower-income zones or at multiunit residential buildings within its service territory.[129]

The core flaw in this type of rationale for utility mission creep activities is that it falsely assumes that the only way to promote the valid social justice or research goals involved is through programs that allow regulated utilities into markets where they do not belong. As explained

[126] *See Building a Bright, Sustainable Future*, WEC ENERGY GRP., https://www.wecenergygroup.com/environment/wec-clean-energy.htm (last visited July 20, 2021) [https://perma.cc/2BEF-D36R].

[127] *See* Duke Energy, *Duke Energy Offers Solar Service Program Tailored to Businesses, Schools and Nonprofits*, PR NEWSWIRE (June 6, 2019, 2:01 PM ET), https://www.prnewswire.com/news-releases/duke-energy-offers-solar-service-program-tailored-to-businesses-schools-and-nonprofits-300863518.html [https://perma.cc/75KZ-YLB5].

[128] *See, e.g.*, Jonathan Gomez, *Why Equity Must Be Central to EV Infrastructure Planning*, GREENBIZ (May 25, 2021), https://www.greenbiz.com/article/why-equity-must-be-central-ev-infrastructure-planning [https://perma.cc/B87Z-GEHV] (noting growing "concern about creating what amount to charging station deserts that leave out BIPOC — Black, Indigenous and people of color — and low-to-moderate income communities"); *ACEEE Study: Few States, Utilities Ensure Equity in EV Charging Investments*, T&D WORLD (Apr. 7, 2021), https://www.tdworld.com/distributed-energy-resources/article/21160495/aceee-study-few-states-utilities-ensure-equity-in-ev-charging-investments [https://perma.cc/3A69-5GJA] (describing the inequitable geographic distribution of EV charging facilities in the U.S.).

[129] *See* Iulia Gheorghiu, *PG&E Taps EVBox to Build up to 2.5K Charging Station*s, UTIL. DIVE (May 9, 2018), https://www.utilitydive.com/news/pge-taps-evbox-to-build-up-to-25k-charging-stations/523093 [https://perma.cc/2SG3-7D38] [hereinafter *PG&E Taps EVBox*] (reporting that the CPUC has authorized PG&E to own up to 2,560 EV charging stations in qualifying lower-income areas or at multiunit residences).

in Part III below, it is usually possible to advance these important justice and research goals through less distortive means.[130]

3. "It's Just a Pilot Program"

A third common strategy for utilities seeking regulatory approvals for mission creep activities is to frame such initiatives as pilot programs that are narrow in scope and thus would not materially impact the competitive product and service markets involved. Attaching the "pilot" moniker to a program and capping its initial size can be an effective way to assuage concerns about the propriety of a utility's entry into an otherwise competitive market. Over time, if the small pilot program succeeds without greatly disrupting competition, those fears may fade even more and eventually open the door for utilities to more aggressively enter affected markets.

Most of the utility-owned residential rooftop solar initiatives in existence today are self-described "pilot" programs.[131] Among them are the APS Solar Partner program, TEP Residential Solar Program, We Energies Solar Now program, Duke Energy Indiana's customer pilot program, and Entergy Residential Rooftop Solar Program highlighted in Section II.A above.[132] The unusual utility-assisted marketing arrangement between Consumers Energy and Sunpower mentioned above was also labeled a "pilot" program.[133] Holy Cross Energy's direct sales of residential energy storage systems to customers were part of a "pilot" initiative.[134] Even many utility-owned public EV charging station projects are framed as "pilot" programs.[135]

The obvious risk of utility mission creep activities masquerading as pilot programs is that some such programs may eventually gain footholds and expand into much larger, permanent initiatives that threaten otherwise healthy competitive markets. Through this "pilot-first" approach, regulators and the public can eventually become

130 *See infra* text accompanying notes 196–97.

131 *See* Farrell, *Utilities Bid to Own Rooftop Solar Even as They Oppose It*, *supra* note 44 (describing "pilot" utility-owned residential rooftop solar programs).

132 *See supra* notes 43–56 and accompanying text.

133 *See supra* notes 96–99 and accompanying text; *see also* Riley, *supra* note 97 (describing the Consumers Energy-SunPower arrangement as a "new pilot program").

134 *See supra* notes 87–88 and accompanying text; *see also* Steimer, *supra* note 87 (labeling Holy Cross Energy's initiative as a "home battery storage pilot program").

135 *See, e.g.*, Gheorghiu, *PG&E Taps EVBox*, *supra* note 129 (describing three different utility-owned EV charging station pilot programs approved by the California Public Utilities Commission); Walton, *supra* note 77 (explaining FPL's pilot EV charging tariff programs).

complacent enough with the degree of mission creep involved in the pilot program that they open up to the idea of allowing the utility to venture even further into a nonutility market. The potential for this effect is not merely theoretical; some such pilot programs have already begun to expand and even become permanent market fixtures. APS, for example, earned regulators' approval to expand its Solar Partner program a few years after its initial rollout as a pilot initiative.[136] And in 2020 — roughly five years after GMP first introduced its Tesla Powerwall program as a pilot initiative — Vermont regulators authorized the utility to convert it into a permanent program even though it remains just as distortive as it was when first approved.[137] As one reporter covering Vermont regulators' 2020 decision observed:

> GMP is . . . allowed to own and rate-base the batteries on customer property, something that other states do not allow their utilities to do. There is a market-design tension involved in letting utilities supply a product that competitive installers can also provide.[138]

More vigilant policing against utility mission creep at the pilot program approval stage is the most surefire way to deter utilities from employing this "pilot first" tactic. By definition, a "pilot" project is one that serves "as an experimental or trial undertaking *prior to full-scale operation* or use."[139] If allowing utilities to aggressively enter non-utility markets amounts to bad policy, it seems equally unjustifiable for regulators to authorize "pilot" programs that enable utilities to encroach into those same markets on a smaller scale.

4. Utilities' Market Entry Promotes Their Own Long-Term Stability

One other argument sometimes proffered in support of allowing utilities into emerging nonutility markets is that doing so shores up utilities' own financial stability. For instance, some have argued in

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[136] The expansion of the APS Solar Partner program into the broader Solar Communities program is highlighted earlier in this Section. *See supra* notes 118–22 and accompanying text.

[137] *See* Julian Spector, *From Pilot to Permanent: Green Mountain Power's Home Battery Network Is Here to Stay*, GREENTECHMEDIA (Oct. 16, 2020), https://www.greentechmedia.com/articles/read/from-pilot-to-permanent-green-mountain-powers-home-battery-network-is-sticking-around [https://perma.cc/D9Y4-C3AZ].

[138] *Id.*

[139] *Pilot*, DICTIONARY.COM, https://www.dictionary.com/browse/pilot (last visited Sept. 20, 2021) [https://perma.cc/CNW4-47LP] (emphasis added).

recent years that distributed solar energy and distributed energy storage technologies could eventually create a "death spiral" scenario for electric utilities.[140] As Americans increasingly turn to rooftop solar arrays to meet their electricity needs, utilities must raise electricity rates to maintain their revenues.[141] However, raising rates only exacerbates utilities' woes by driving even more retail customers to switch to rooftop solar.[142] Absent intervention, this cycle of ever-climbing electricity rates and ever-fewer retail customers could theoretically drive a utility into insolvency or at least threaten their long-term financial stability.

In light of the death spiral narrative, authorizing electric utilities to venture into rooftop solar markets may seem like a justifiable way to help these important service providers preserve their stability and financial footing. Business management theory's conventional prescription for companies facing new disruptive threats is to embrace the very innovations that threaten them and incorporate those technologies into their own business models.[143] For electric utilities, this would involve allowing them to enter and compete against nonutility companies in rooftop solar and distributed energy storage markets. Accordingly, some utility officials have openly made this type of argument in defense of their mission creep activities.[144]

Unfortunately, electric utilities — as vital as their services may be — are materially different from conventional businesses in ways that should preclude them from defending their market positions by entering new nonutility markets.[145] Rather than acquiescing to utilities'

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[140] *See generally* Elisabeth Graffy & Steven Kihm, *Does Disruptive Competition Mean a Death Spiral for Electric Utilities?*, 35 ENERGY L.J. 1 (2014) (observing the growing "characterization of renewable energy innovations, such as rooftop solar, as a 'mortal threat' or 'radical threat' to utilities and utilities themselves as in a 'death spiral'").

[141] *See* Rule, *supra* note 80, at 119-20.

[142] *See id.*

[143] *See* CLAYTON M. CHRISTENSEN, MICHAEL B. HORN & CURTIS W. JOHNSON, DISRUPTING CLASS: HOW DISRUPTIVE INNOVATION WILL CHANGE THE WAY THE WORLD LEARNS 48-50 (2008).

[144] *See, e.g.*, Spector, *supra* note 83 (quoting Liberty Utilities senior analyst Heather Tebbetts's direct testimony in defense of the company's utility-owned home energy storage systems pilot as stating: "Electric utilities that do not address these emerging customer needs will be left behind like the landline phone companies [with] millions of dollars in costs associated with poles and wires with a declining number of customers taking service").

[145] *See, e.g.*, Judy Sheldrew, Note, *Shutting the Barn Door Before the Horse Is Stolen: How and Why State Public Utility Commissions Should Regulate Transactions Between a Public Utility and Its Affiliates*, 4 NEV. L.J. 164, 195 (2003) (arguing that "regulated utilities must be viewed much more like government entities than private entities and,

mission creep activities to promote utilities' long-term financial health, regulators should keep in mind that the utility regulatory system exists chiefly to promote the social welfare and not to protect utilities from disruptive innovation.[146] Historical accounts of major transitions away from trolley systems and landline telephone companies highlight the reality that such shifts are often contentious and may generate sizable losses for utilities inextricably wedded to outmoded technologies.[147] However, such utility declines can also promote the social welfare by facilitating the more rapid deployment of newer, better innovations.

E. Potential Adverse Consequences of Utility Mission Creep

The growing prevalence of utility mission creep warrants policy attention not only because of its distortive impacts on markets but also because of its potential to hamper the nation's transition to a clean, carbon-free renewable energy system. Programs that allow regulated utilities to enter private markets may sometimes deliver short-run policy benefits, but their disruptive effects on those markets have the potential to overshadow such gains over the long run.

Legal restrictions on utility mission creep serve functions comparable to those of laws that limit medical patients' access to prescription drugs.[148] Many prescription medications formulated to treat a particular

as such, are not entitled to claim the prerogatives of a privately held business" because they "have submitted to be controlled for the public good").

146 Other scholars have highlighted this point. *See, e.g.*, Graffy & Kihm, *supra* note 140, at 16 ("Historical precedent clearly shows that when emerging conditions create a critical tension between upholding social welfare objectives and upholding continuity of a utility for its own sake, courts will decisively favor social welfare objectives and markets play no favorites. Indeed, neither regulators nor courts can ultimately protect regulated utilities from all competition, even when — perhaps especially when — the character of that competition challenges the viability of their fundamental business model.").

147 The case of San Francisco's Market Street Railway exemplifies this idea. *See id.* at 23-29 (describing the Market Street Railway's struggle to adapt to the proliferation of single-passenger automobiles). Bell Telephone's battle against the deployment of cellular telephone technologies is another notable example. *See* Jordan Jay Hillman, *Telecommunications Deregulation: The Martyrdom of the Regulated Monopolist*, 79 NW. U. L. REV. 1183, 1214 (1984) (describing landline telephone companies' struggles to adapt to the advent of wireless technologies); Adam D. Thierer, *Unnatural Monopoly: Critical Moments in the Development of the Bell System Monopoly*, 14 CATO J. 267, 281 n.4 (1994), https://www.cato.org/sites/cato.org/files/serials/files/cato-journal/1994/11/cj14n2-6.pdf [https://perma.cc/3SKA-YTF9] (describing Bell Telephone's ultimately-failed attempts to preserve its monopoly as cellular phone technologies emerged).

148 More than a half-century ago, Richard Posner drew a similar analogy between public utility regulation and medication. *See* Posner, *supra* note 22, at 635-36

disease also cause adverse side effects. Taking such drugs may be justifiable for patients diagnosed with the disease who are willing to endure a drug's side effects to receive its medicinal benefits. However, individuals who do *not* have the disease but still take the drug tend to reap net negative outcomes: they suffer side effects yet receive no offsetting health benefit. Requiring patients to get diagnosed and present a written doctor's prescription before gaining legal access to prescription medications helps to avoid such abuses.[149]

Analogously, state utility regulation is formulated to combat a particular type of market ailment — a natural monopoly problem — but also produces harmful "side effects" in markets as described above.[150] Allowing regulated utilities to enter healthy competitive markets where no natural monopoly problem exists thus tends to generate net-negative policy outcomes over the long run. In particular, utility mission creep can chill private innovation and investment in affected markets, reduce price competition and consumer choice, and thereby decelerate the deployment and adoption of sustainable energy technologies. This Subsection details how utility mission creep can produce each of these harmful effects, requiring that rules unambiguously excluding utilities from such markets be an essential component of any utility regulatory regime.

1. Stunted Innovation and Decelerated Market Growth

When state-privileged utilities enter competitive nonutility markets, their presence tends to deter new entrepreneurial investment and ultimately slows the pace of innovation. These effects initially result from nonutility companies' concerns about new uncertainty and business risk, and they can become even more pronounced over time if nonutility companies exit and a utility begins to dominate the invaded market.

Because of their state-provided advantages, utilities that wade into competitive markets can be formidable threats to incumbent nonutility firms. As highlighted above, regulated utilities often possess sizable competitive advantages over ordinary private businesses.[151] Utilities

(comparing public utility regulation to "the treatment of an ailment whose gravity is not known with a costly and dangerous drug whose efficacy is highly uncertain").

[149] For a detailed discussion of laws and legal duties related to prescription drug access, see generally Barry R. Furrow, *Enterprise Liability for Bad Outcomes from Drug Therapy: The Doctor, the Hospital, the Pharmacy, and the Drug Firm*, 44 DRAKE L. REV. 377 (1996).

[150] *See supra* text accompanying notes 23–24.

[151] *See supra* text accompanying notes 14–16.

earn nearly-guaranteed positive returns on their capital investments, enjoy government protection against most forms of competition within their service territories, and have unparalleled access to their customer base.[152] They may also have strong influence over grid interconnection activities and other aspects of electricity system operations that are critical to certain private product or service markets.[153] Recognizing that it could be difficult to compete against a utility for the reasons just described, nonutility firms within a market are likely to respond to a utility's entry by behaving more cautiously and delaying investments so as to avoid greater risk exposure.

As utilities have ventured into private markets in recent years, their intent and capacity to slow growth within those markets have become increasingly evident. Distributed solar energy markets are one setting in which some utilities have openly acknowledged that their mission creep activities are aimed at warding off new competitive threats. Multiple IOUs that sought regulators' permission to enter rooftop solar markets in the mid-2010s were actively working to combat new competition from nonutility companies within these emerging markets.[154] Many didn't even attempt to hide their "if you can't beat 'em, join 'em" motive for entering rooftop solar markets. One utility CEO proclaimed, "The demand [for rooftop solar] is there and we're ready to meet it."[155] Another remarked, "If somebody wants to buy distributed generation, I want to sell it to 'em."[156] His declared philosophy was clear: "If distributed generation is eroding your growth, own distributed generation."[157]

Utilities' incursions into nonutility markets can also chill private investment by introducing the risk that the utility will leverage its state-

[152] *See supra* notes 13–16 and accompanying text.

[153] *See supra* note 107 and accompanying text.

[154] *See* John Farrell, *If You Can't Beat 'Em, Own 'Em — Utilities Muscle in to Rooftop Solar Market*, INST. FOR LOC. SELF-RELIANCE (Aug. 11, 2015), https://ilsr.org/if-you-cant-beat-em-own-em-utilities-muscle-in-to-rooftop-solar-market [https://perma.cc/GVU4-R4GL] [hereinafter *If You Can't Beat 'Em, Own 'Em*] (describing the activities of APS and TEP during this time and characterizing utilities' attempts to enter the rooftop solar market as "part of a plan to kill competition").

[155] Don Brandt, *The Market Expands* in *What If: APS Puts Solar Panels on Residential Roofs?*, AZCENTRAL, https://www.azcentral.com/story/opinion/op-ed/2014/08/29/what-if-aps-rooftop-solar/14809005 (last updated Aug. 30, 2014, 5:39 PM MT) [https://perma.cc/ZY7L-HCL2].

[156] Herman K. Trabish, *Inside Georgia Power's Move into the Residential Solar Market*, UTIL. DIVE (June 11, 2015), https://www.utilitydive.com/news/inside-georgia-powers-move-into-the-residential-solar-market/400562 [https://perma.cc/7PW2-VK6F] (quoting Southern Company CEO Tom Fanning).

[157] Farrell, *If You Can't Beat 'Em, Own 'Em*, *supra* note 154.

provided status and advantages for a competitive edge. For instance, opponents of We Energies's "Solar Now" utility-owned solar program warned that the program could strengthen the incentive for We Energies to "'poach' solar projects from businesses that have already signed on with solar companies but need the monopoly utility's OK to hook up those projects."[158] We Energies was later sued for attempting to do just that in connection with a proposed distributed solar project for the city of Milwaukee.[159] The utility also discouraged nonutility-owned solar development within its territory by paying greater compensation for excess generated power to its own Solar Now program customers than to independent solar producers — a move one critic described as a "large company illegally trying to squeeze out competition."[160]

Utilities are beginning to have similar adverse impacts as they wade into public EV charging markets. The prospect of having utilities fund and develop public EV charging stations may seem appealing at first glance, given utilities' deep pocketbooks and their necessary involvement in preparing grid connections for charging station sites.[161] In reality, however, their presence could ultimately have devastating effects on an important emerging competitive market. To quote one writer:

> Many advocates of electric vehicles mistakenly assume that the quickest and most effective way to increase charging options for consumers is to have electric utilities build, own and operate those chargers . . . but the spread of utility-owned chargers is one of the biggest impediments to private-sector investment. . . . [T]he utility-owned EV-charger model would stunt the expansion of charging infrastructure and be more

158 Content, *supra* note 51.

159 *See* Lyderson, *supra* note 52.

160 Chris Hubbuch, *Clean Energy Groups Sue Wisconsin Regulators over We Energies Solar Rates*, WIS. STATE J. (Jan. 21, 2020), https://madison.com/wsj/news/local/environment/clean-energy-groups-sue-wisconsin-regulators-over-we-energies-solar-rates/article_cdd2c92b-9241-553d-a9d0-1d7c93185b76.html [https://perma.cc/28QK-29ZD].

161 Florida's Public Utility Commission recently embraced this view. *See In re* Petition for Approval of Optional Elec. Vehicle Pub. Charging Pilot Tariffs, by Fla. Power & Light Co., No. 20200170-EI, 2020 WL 7658073, at *5 (Fla. P.S.C. Dec. 21, 2020) (finding that "[a]llowing FPL to participate in the EV infrastructure build-out in Florida by offering a utility-based rate as an option to EV customers . . . promotes the public interest . . . by allowing the utility, together with other providers, to offer fast charging EV services" and thereby "remove a barrier to adoption of electric vehicles in Florida").

> expensive for everyone. Utilities won't have the right incentives to be responsive to EV drivers' needs. . . . Anyone who wants widespread EV adoption should move away from the utility model before it is too late to build a consumer-friendly charging market.[162]

In summary, if a utility's advantages within a once-competitive market appear to be too great, nonutility firms are likely to eventually downsize their operations or exit the market altogether. When they do, a formerly vibrant market with multiple producers competing on quality, innovation, and customer service will devolve into a market controlled by a monopolist with relatively weak incentives to move past the status quo.

2. Higher Retail Prices and Fewer Consumer Choices

Utilities' presence in competitive private markets can also lead to less price competition and fewer options for consumers. Because utilities are insulated against many market risks and have access to large amounts of low-cost capital, some may be able to offer comparatively low prices on certain products and services in the short run and may be incentivized to predatorily do so to ward off competition.[163] However, those short-term pricing benefits can easily fade over time as nonutility companies exit and utilities come to dominate once-competitive markets.[164] Utilities operating under cost-based regulatory schemes have notoriously weak incentives to find ways to reduce their expenses.[165] Facing little or no price competition, they are likewise more reluctant to voluntarily lower prices when production economies of scale or other factors reduce their costs over time.[166] Instead, profit-maximizing utility companies are likely to seek whatever pricing structures best promote their own interests.

The potential market price impacts of a utility's entry into a once-competitive private industry are already becoming detectable today in

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[162] Harry O. Armour, *Let the Private Sector Compete to Charge EVs*, WALL ST. J. (Oct. 26, 2020, 3:44 PM ET), https://www.wsj.com/articles/let-the-private-sector-compete-to-charge-evs-11603741442 [https://perma.cc/RG87-GU65].

[163] For an overview of predatory pricing, its potential ills, and some antitrust law strategies for discouraging it, see generally Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 CORNELL L. REV. 1, 2-9 (2005).

[164] *See generally* Posner, *supra* note 22, at 637 (explaining certain advantages public entities have when competing with private firms to offer a service).

[165] *See* Tomain, *supra* note 7, at 447.

[166] *See id.* at 446-47.

some EV charging markets. Consider, for instance, the stark difference between how retail gasoline and EV charging at utility-owned stations are currently priced in Florida. Competitive market forces drive gasoline prices, which vary from station to station and fluctuate based on shifts in supply, demand, and other relevant factors.[167] Prices at EV charging stations owned by nonutility companies in Florida are similarly variable and responsive to market forces.[168] By contrast, FPL secured regulators' permission in late 2020 to charge $0.30 per kWh at its utility-owned EV charging stations — a price set by regulators that was based on the cost-per-mile of gasoline and bears no relation to FPL's actual costs.[169] Multiple nonutility EV charging companies objected to this pricing approach, arguing it could create a "tilted playing field" that "challenges third-party charging infrastructure development over time" — especially if FPL is allowed to effectively subsidize its charging stations by rate-basing some of their associated costs.[170]

If the tilted playing field resulting from a utility's presence in a once-competitive market ultimately prompts nonutility firms to exit, consumers may eventually face markets where state-approved monopoly price structures have supplanted market-driven price competition. The potential for this type of outcome was recently visible in New York City, where ConEd has positioned itself to dominate that city's curbside EV charging market.[171] ConEd's $2.50-per-hour pricing structure for charging at its curbside stations equates to $0.40 per kWh — a price that is roughly double the utility's own residential electricity rate and is equivalent to a gasoline price of at least $3.20 per gallon.[172] One critic of ConEd's foray into the city's EV charging market called it

[167] *See Gasoline Explained — Factors Affecting Gasoline Prices*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/energyexplained/gasoline/factors-affecting-gasoline-prices.php (last updated Mar. 15, 2022) [https://perma.cc/FR7B-MHTK].

[168] *See* Walton, *supra* note 77 (noting that "Tesla charges about $0.28/kWh at its proprietary stations," "EVgo charges about $0.42/kWh," and "Electrify America charges between $0.19/kWh and $0.51/kWh").

[169] *See In re* Petition for Approval of Optional Elec. Vehicle Pub. Charging Pilot Tariffs, by Fla. Power & Light Co., No. 20200170-EI, 2020 WL 7658073, at *3-4 (Fla. P.S.C. Dec. 21, 2020) (noting that FPL's proposed $0.30/kWh rate was "not cost-based" and was "based on a comparison of various automotive fuel alternatives available to customers" — specifically, a comparison of "the average mileage efficiency of electric vehicles to gasoline-powered vehicles").

[170] *Id.* at *4.

[171] *See* Lovett, *supra* note 81 (reporting that ConEd is "investing $310 million by 2025 to fund more than 21,000 level-2 chargers and more than 525 fast chargers in New York City" and surrounding counties, and that only about 1,400 level-2 chargers and 117 fast chargers are presently found in the city, mostly in parking garages).

[172] *See* Benoit, *supra* note 82.

an "unregulated side-hustle by [New York's] monopoly-utility."[173] If ConEd's vision becomes reality, New Yorkers may someday have few alternatives to the utility's pricey curbside EV charging network.

3. A Slower Sustainable Energy Transition

To the extent it distorts markets for clean energy-related products and services, utility mission creep can ultimately hinder the nation's shift to a carbon-free sustainable energy system. By decelerating retail price declines for important technologies such as rooftop solar and EV charging, utility mission creep can ultimately slow the deployment of these technologies and the carbon-cutting benefits associated with them. By increasing nonutility companies' uncertainty and risk, utility mission creep can also decelerate private investment in low-carbon energy infrastructure development. Utility mission creep can likewise lead to poorly-sited EV charging stations and other market distortions resulting from the fact that utilities' incentives are notoriously more misaligned than those of companies operating in competitive markets. And by allowing utilities to encroach into or even monopolize markets for sustainable energy products, utility mission creep can slow the pace of innovation in those industries over the long run.

The potential social welfare losses from ignoring or enabling utility mission creep will only grow as the effects of human-induced climate change intensify in the coming decades. A major 2021 United Nations Intergovernmental Panel on Climate Change report found it "unequivocal that human influence has warmed the atmosphere, ocean and land" and that "[h]uman-induced climate change is already affecting many weather and climate extremes in every region across the globe."[174] Distributed solar energy development can be a powerful tool for reducing the nation's dependence on fossil fuel-generated electricity.[175] EV technologies could likewise have transformative effects by largely decarbonizing the transportation industry, which presently

173 *Id.*

174 INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, HEADLINE STATEMENTS FROM THE SUMMARY FOR POLICYMAKERS (2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Headline_Statements.pdf [https://perma.cc/8BLR-CCQ3].

175 *See* LINDSEY HALLOCK & ROB SARGENT, SHINING REWARDS: THE VALUE OF ROOFTOP SOLAR POWER FOR CONSUMERS AND SOCIETY 5 (2015), https://www.seia.org/sites/default/files/resources/EA_shiningrewards_Summer2015.pdf [https://perma.cc/N5Q3-8VPD] (outlining how rooftop solar energy development diminishes the amount of energy lost in electricity transmission and distribution, improves the resiliency of power grids, reduces greenhouse gas emissions and energy-related air pollution, and provides multiple other benefits).

accounts for nearly one third of the nation's greenhouse gas emissions.[176] For the reasons highlighted above, utility mission creep activities threaten the steady expansion and maturation of these and other emerging industries that are critical to addressing climate change and building a sustainable energy infrastructure.

III. STRATEGIES FOR COMBATTING UTILITY MISSION CREEP

Fortunately, policymakers have access to a wide range of strategies capable of combatting the growing problem of utility mission creep. State legislatures and utility regulatory commissions can enact statutes and adopt rules that more expressly prohibit utilities from venturing into new product or service markets. Clearer constraints on utilities' use of subsidiary entities should accompany these rules to deter utilities from thereby circumventing restrictions on mission creep activities. And governments at all levels should be more wary of proposals to bring utilities into private competitive markets in furtherance of research or social justice objectives, searching instead for less distortive means of advancing those important goals. The following Sections describe each of these strategies and how they could help to battle utility mission creep and its attendant costs.

A. Clarifying Restrictions on Utility Activities

The most straightforward way to deter utility mission creep is through new state legislation that more clearly limits the scope of regulated utilities' permissible activities. In most states, legislatures have provided only loose statutory guidance regarding the permitted scope of utilities' activities.[177] Such lack of clarity is increasingly enticing utility regulators who are eager to advance sustainable energy policy goals to approve programs and initiatives that pursue those aims by pitting utilities against nonutility companies in competitive markets.[178]

Until states expressly prohibit utility mission creep, state statutory definitions of the term "public utility" like those described in Part I above are among the few potential sources of legal authority for formal actions against it.[179] These statutes, which authorize the formation of rate-regulated electric utilities, tend to define these utilities simply as

[176] *See Sources of Greenhouse Gas Emissions*, *supra* note 57.

[177] *See supra* notes 37–40 and accompanying text.

[178] *See supra* Part II.A.

[179] *See supra* Part II.A.

entities that own, maintain, or operate electricity distribution facilities for public use.[180] Because these definitions reside within authorizing statutes, one could argue that they implicitly establish outer limits on utilities' activities — including forays into other product or service markets. Since such utility incursions into other markets are not expressly authorized by statute and would serve no proprietary function in the context of the utility's core mission, courts may well determine on that basis that they are not authorized under state law.[181]

Although existing statutory definitions of "utility" provide a decent argument against utility mission creep,[182] state legislators could substantially strengthen such challenges by enacting provisions that more expressly forbid utilities from engaging in the practice. Among other things, such new statutory provisions could prohibit utilities from owning, selling, or leasing any distributed solar energy assets, public EV charging stations, behind-the-meter distributed energy storage systems, interests in community solar arrays, or the like, except those reasonably necessary for their proprietary use in providing grid-delivered electricity service. To ensure that utility regulators vigilantly enforced these new restrictions, state legislatures could enact accompanying legislation requiring that regulators specifically consider whether all activities associated with a utility's proposed program were consistent with these requirements.

In the many states where enacting legislation to deter utility mission creep is not politically feasible, state utility commissions may provide an alternative avenue for advancing these goals. A small number of state utility commissions have already adopted regulations that limit utilities' participation in specified emerging markets. Among them is New York's Public Service Commission ("NYPSC"), which adopted rules in 2015 forbidding utilities from owning distributed energy generation facilities or devices except in certain narrow circumstances.[183] The NYPSC then reiterated its policy against utility ownership of distributed energy

[180] *See supra* Part II.A.

[181] Existing case law appears to support this theory. *See, e.g.*, Okeson v. City of Seattle, 150 P.3d 556, 561 (Wash. 2007) (finding that a municipal utility's powers were strictly limited to those "granted in express words, or those necessarily or fairly implied in or incident to the powers expressly granted"); *see also* Inara Scott, *Teaching an Old Dog New Tricks: Adapting Public Utility Commissions to Meet Twenty-First Century Climate Challenges*, 38 HARV. ENV'T L. REV. 371, 397-98 (2014) (citing and describing relevant portions of the aforementioned case).

[182] *See supra* note 5 and accompanying text.

[183] *See* Proceeding on Motion of the Comm'n in Regard to Reforming the Energy Vision, Order Adopting Regulatory Policy Framework and Implementation Plan, No. 14-M-0101, 2015 WL 862119, at *34 (N.Y.P.S.C. Feb. 26, 2015).

assets in 2021, rejecting an IOU group's proposal for utility ownership of mid-sized energy storage systems.[184]

Enacting new laws that clarify the scope of utilities' missions might also help to deter utilities from attempting to challenge nonutility companies' activities in emerging product and service markets on the ground that such markets are for utilities only. For example, in recent years some utilities have cited statutory definitions of "utility" when attempting to characterize private third-party solar leasing companies as electric utilities subject to state utility regulation.[185] Such weaponization of statutory definitions of "utility" against nonutility actors for anticompetitive purposes is yet another consequence of the lack of clear laws demarcating the outer bounds of electric utilities' monopoly authority. The type of potential new legislation highlighted above would help fill this gap, reducing legal uncertainty and thereby encouraging nonutility companies' investment in emerging sustainable energy-related markets.

B. Strengthening Rules Against Unregulated Affiliates' Involvement in Competitive Markets

To more effectively combat utility mission creep, state governments could also adopt rules and procedures that more explicitly prohibit regulated utilities from advantaging their own unregulated affiliates. Utilities' temptation to use unregulated affiliates to operate within competitive markets dates back to at least the 1930s, when some electric and gas utilities sought to increase energy demand by forming

184 *See In re* Energy Storage Deployment Program, Order Directing Modifications to Energy Storage Solicitations, No. 18-E-0130, 2021 WL 1555780, at *6-7 (N.Y.P.S.C. Apr. 16, 2021).

185 *See, e.g.*, Joint Application of Wis. Elec. Power Co. and Wis. Gas LLC, both d/b/a We Energies, for Auth. to Adjust Elec., Nat. Gas, & Steam Rates, No. 5-UR-107, 2014 WL 7398769, at *50 (Wis. P.S.C. Dec. 23, 2014) (declining to evaluate We Energies's claim that only public utilities could offer third-party-financed distributed solar energy systems in Wisconsin); *see also* Danielle Kaeding, *Renewable Energy Group Sues Regulators, Hoping to Remove Barriers to Clean Energy Development*, WPR, https://www.wpr.org/renewable-energy-group-sues-regulators-hoping-remove-barriers-clean-energy-development (last updated Feb. 26, 2021, 4:45 PM) [https://perma.cc/J7HG-GXXA] (describing a new lawsuit seeking clarification on whether a company that offers third-party financing for distributed solar energy installations constitutes a "public utility" under Wisconsin law); Lydersen, *supra* note 52 (describing We Energies's continued legal opposition to nonutility companies' offering of third-party-financed distributed solar energy systems).

unregulated subsidiaries to sell kitchen ranges and water heaters.[186] The basic anticompetitive hazards associated with this practice remain largely the same today. Among other things, utilities may try to use lopsided transactions to confer competitive advantages or subsidies to their unregulated affiliates.[187] Utility regulators have long recognized the impropriety of such abuses and sought to guard against them.[188] For instance, many state legislatures have enacted statutes that allow for heavy oversight of transactions between utilities and their unregulated affiliates.[189] However, as emphasized in Part II above, the energy industry's rapidly changing landscape today is creating many new opportunities for this brand of utility mission creep and a need for greater attention to these risks.[190]

Numerous IOUs have formed unregulated nonutility subsidiaries to compete in private competitive solar- or EV-related markets over the past decade, raising concerns about the potential for anticompetitive behavior.[191] For instance, AES Corp., the parent of the utility AES Indiana, secured regulators' permission in 2020 to form an unregulated utility to lease EVs to customers in that state.[192] Then, less than a year

[186] *See* William H. Lawrence & John H. Minan, *Financing Solar Energy Development Through Public Utilities*, 50 GEO. WASH. L. REV. 371, 401 (1982) (citing WENDELL R. THOMPSON & C. WOODY SMITH, PUBLIC UTILITY ECONOMICS 510 (1941)).

[187] *See id.* ("Regulators' primary concerns with utility subsidiary actions are the reasonableness of transactions between a regulated utility and its nonregulated subsidiary, and the utility's use of profits derived through its monopoly status to subsidize unregulated activities to the unfair advantage of its competitors.").

[188] *See id.* (noting that regulators "carefully scrutinize" the financial records of regulated utilities with unregulated affiliates in an effort to "detect . . . utility subsidization of unregulated activities").

[189] *See* Sheldrew, *supra* note 145, at 177-79 (describing "affiliated interests" statutes enacted in several states that give "commissions authority to monitor transactions between utilities and corporations," including the power to void unapproved contracts and to "inspect the affiliate's books and records").

[190] *See generally supra* Part II (describing, for instance, utilities' guaranteeing of nonregulated affiliates' debts).

[191] *See, e.g.*, Amy Stein, *Regulated Reliability*, 54 HOUS. L. REV. 1191, 1259 (2017) (stating that "[t]he major utilities in Georgia and Alabama [have] received regulatory approval to establish subsidiaries to provide third-party solar services to customers in the unregulated markets" and "[t]hese utilities are in direct competition with the nonutility third-party solar providers" (citing Trabish, *supra* note 156)); Bandyk, *supra* note 110 (describing Duke Energy's formation of eTransEnergy as an unregulated subsidiary that provides "fleet services" to corporations seeking to electrify their vehicle fleets); *see also supra* notes 106–08 and accompanying text.

[192] *See generally* Susan Orr, *Electric-Vehicle Subscription Service Launched in Indianapolis Market*, INDIANAPOLIS BUS. J. (Aug. 27, 2020), https://www.ibj.com/articles/electric-vehicle-subscription-service-launched-in-indianapolis-market [https://perma.cc/UZ99-33Q9] (describing AES Corp.'s new "Motor Drive" EV

later, AES Indiana sought approval to use ratepayer funds to subsidize customers' purchases of home EV charging stations.[193] Citing AES Corp.'s EV-selling subsidiary, opponents of the proposal cried foul and claimed that AES Indiana was "utilizing its captive ratepayers to subsidize the unregulated affiliate."[194] Such situations are likely to only grow more common as new competitive markets leveraging sustainable energy technologies continue sprouting up in the coming decades.

The simplest way for governments to mitigate these growing risks would be to legally prohibit unregulated affiliates of utilities from entering competitive product and service markets for products such as distributed solar or EV charging. Some state utility regulators have already rejected utilities' bids to have their subsidiaries enter such markets, finding no good justification to allow them in.[195] Clearer prohibitions against utility affiliates' incursions into competitive markets would spare utility regulators from having to incessantly monitor against abuses of those relationships.

C. Using Other Policy Tools to Advance Research and Justice Goals

Lastly, governments can help to ward off utility mission creep by resisting utilities' bids to enter competitive markets in furtherance of research or justice goals and opting instead to promote those important objectives through less distortive means. As described in Section II.C above, utilities are increasingly arguing that their incursions into competitive product or service markets are needed to advance research projects or to aid lower-income or disadvantaged ratepayers.[196] In recent years, such arguments have helped utilities in several states to secure approvals for programs that pull them into distributed solar markets, EV charging markets, or other emerging competitive markets.[197]

subscription service); John Russell, *AES Indiana Seeks to Boost Electric Vehicle Usage with Incentives that Could Raise Overall Rates*, INDIANAPOLIS BUS. J. (Mar. 3, 2021), https://www.ibj.com/articles/aes-indiana-wants-to-boost-electric-vehicle-usage-with-incentives-that-could-raise-rates-for-all [https://perma.cc/8Y7L-MXA7] (describing Motor EV LLC, an unregulated affiliate of the utility AES Indiana, that offers "monthly subscriptions on electric vehicles that . . . include[] use of a car, plus all insurance and maintenance costs").

193 *See* Russell, *supra* note 192.

194 *Id.*

195 *See, e.g.*, Elliott, *supra* note 66 (reporting that utility regulators in the "District of Columbia rejected an Exelon subsidiary's request to own public chargers, saying independent charging companies had it covered").

196 *See supra* Part II.C.

197 *See supra* Part II.C.

As noble as the general aims of some of these programs may be, allowing electric utilities to extend their monopolies into emerging product or service markets is rarely the only viable way of facilitating valuable research or promoting vital justice ideals. For example, legislators hoping to assist lower-income homeowners in getting solar panels can do so by enacting special targeted rebates, tax credit programs, or financing programs designed for that purpose. Utilities desiring to study the impacts of having more customers' distributed solar arrays on west-facing roofs could offer special net metering tariffs or retail rate discounts to customers who volunteer to assist in those research studies. And governments could make targeted grant or tax credit programs available only for new public EV charging stations that are sited at multiunit residential buildings or in designated underserved areas. In short, it is usually more efficient and effective to pursue pressing energy research and justice objectives through policy strategies that do not require regulated utilities to enter affected markets and compete against nonutility companies.

CONCLUSION

As the sustainable energy movement places unprecedented pressure on electric utilities, a growing number of them are trying to gradually extend their monopolies into emerging competitive markets for rooftop solar arrays, public EV charging, and other products. At first glance, regulated utilities' forays into such markets can seem like an appealing way to accelerate progress toward pressing decarbonization goals and other short-term policy objectives. However, utilities encroaching into these markets carry with them the distortive features of a highly intrusive regulatory structure designed only to confront the natural monopoly challenges that afflict electricity distribution markets. Because regulated utilities have access to artificially cheap capital and near-guaranteed investment returns, their entry into competitive markets is likely to discourage private investment, stunt competition, harm consumers, and ultimately decelerate sustainable energy development.

Policymakers can discourage utilities' incursions into competitive nonutility markets — a practice this Article calls *utility mission creep* — through a handful of readily available policy strategies. Among other things, governments can enact and adopt rules that more clearly define the scope of utilities' permitted activities and expressly forbid them from entering emerging competitive product and service markets. States can also impose stronger restrictions on utilities' use of unregulated affiliates to indirectly invade such markets. And policymakers can

consciously commit to advance important research and justice goals only though policy strategies that do not require utilities to compete directly against nonutility companies. By using these and other strategies to proactively confront the growing problem of utility mission creep, governments can help to ensure that utilities serve ratepayers' long-term interests and advance, rather than hinder, the nation's vital transition to a cleaner and more sustainable energy system.