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Joel B. Eisen
University of Richmond - School of Law, jeisen@richmond.edu

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UTILITIES WITH PURPOSE

*Joel B. Eisen** & *Heather E. Payne***

Abstract

Environmental, social, and governance (ESG) reporting has become a mainstay of corporate and investment decision-making, although not without controversy. Corporations are increasingly making ESG disclosures to assess and limit risks, to bolster their reputations, and to attract and keep customers. But one group of companies is significantly behind on moving toward meaningfully achieving ESG goals: large, investor-owned electric utilities (IOUs). IOUs are critical to the clean energy transition through mitigating their climate change impacts. While they claim to be increasingly focused on the environmental and social aspects of their actions, they are hampering progress on climate change. This Article is the first to describe the intersecting reasons why utilities' ESG commitments fall short of supporting the clean energy transition and the first to suggest a remedy. Utilities' ESG disclosures are inadequate and lack transparency, and utilities are not meeting the limited commitments they have made to reduce carbon emissions. Also, unlike other public corporations, utilities are monopolies governed by state public utility commissions (PUCs), which amplifies the effects of utilities' wide-ranging abuses of the regulatory system.

Simply changing ESG disclosure requirements or modifying the utility regulatory system will not reduce a utility's core incentive to maximize profits at the expense of pursuing broader societal goals. Therefore, more sweeping structural changes are necessary. This Article concludes that the utility landscape's unique features require a different approach from existing types of socially focused corporations. It proposes transforming IOUs into "purpose-driven utilities." This involves converting utilities' voluntary promises into enforceable commitments by changing an IOU's basic corporate form from one focused solely on profit to a purpose-based form with broad stakeholder involvement and ESG values established in the corporate charter. We outline the central

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* Professor of Law, University of Richmond School of Law.

** Professor of Law, Seton Hall University School of Law. The authors wish to thank Todd Aagaard; Kristen van de Biezenbos; Richard Wallsgrove; Joshua Macey; David Driesen; Peter Norman; participants of the Vanderbilt-Pace PEG, ESG and Sustainable Business Workshop for comments on an early draft; and Jonathan Brooks for research assistance.

features and benefits of the purpose-driven utility and describe the authority that state PUCs have to require and oversee this transformation. We conclude that pairing these changes with the robust powers of utilities' customers, and others, to enforce the purposes listed in the charters would make IOUs more accountable and less driven by profit, leading to a more rapid clean energy transition with broader stakeholder engagement.

INTRODUCTION

Environmental, social, and governance (ESG) considerations have become a centerpiece in discussions about American corporations.[1] A precise description is difficult,[2] but, generally speaking, ESG is a shorthand for resisting corporations' single focus on profitability by accelerating the transition to a carbon-constrained future, improving corporations' societal impact, and bringing a broader group of stakeholders into the governance conversation.[3] The growing body of business and legal literature on ESG focuses on public corporations' adherence to voluntary criteria developed by private-sector organizations.[4] Some critique ESG as vague[5] or ineffective to

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1. *See, e.g.*, Lawrence J. Trautman & Neal F. Newman, *The Environmental, Social, Governance (ESG) Debate Emerges from the Soil of Climate Denial*, 53 U. MEM. L. REV. 67 (2022); Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277; Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381 (2020).

2. Kate Aronoff, *The Right Has It in for Woke Investors. The Only Problem? They Don't Exist.*, THE NEW REPUBLIC (Feb. 15, 2023), https://newrepublic.com/article/170229/right-woke-investors-problem-dont-exist [https://perma.cc/8KLF-8KX3] ("Even the corporate staffers and Wall Street types most likely to know what ESG stands for . . . don't share a common definition; three-quarters of institutional investors admit to being unclear.").

3. *See, e.g.*, Stephen Conmy, *What Is ESG and Why Is It Important?*, CORP. GOVERNANCE INST., https://www.thecorporategovernanceinstitute.com/insights/guides/what-is-esg-and-why-is-it-important/ [https://perma.cc/P9E9-34XE].

4. *See infra* Part I.

5. *See, e.g.*, Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1828 (2021).

accomplish important social goals.[6] At the opposite end of the political spectrum, others object to ESG policies as "non-material" and because of the purported damage caused to corporations by ESG requirements.[7] Despite the controversy over ESG, investors are embracing it and corporations are increasingly making ESG reports.[8]

One segment of the economy has almost completely ignored any meaningful move toward ESG: investor-owned, rate-regulated electric utilities.[9] Achieving improved ESG performance is important for utilities given the urgency of addressing climate change, among other reasons. Many utilities have made ESG commitments and claim these demonstrate progress toward addressing their climate change impacts.[10] We disagree. While already supposedly working for the public interest, America's largest utilities have made inadequate ESG disclosures and seriously lag on their commitments to action.[11] Far from ensuring corporate accountability, utilities' ESG commitments allow them to put off progress on actions which would mitigate the impacts of climate change.[12] This reflects a common criticism of ESG: companies can avoid progress, maximizing profits as long as they disclose risks.[13] We argue that utilities must take more concrete actions to achieve the underlying policy objectives embodied in ESG reporting.[14]

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6. *See, e.g.*, Sanjai Bhagat, *An Inconvenient Truth About ESG Investing*, HARV. BUS. REV. (Mar. 31, 2022), https://hbr.org/2022/03/an-inconvenient-truth-about-esg-investing [https://perma.cc/5NPU-C5B3].

7. *Infra* note 86 and accompanying text.

8. *E.g.*, Evie Liu, *ESG Data Demand Continues to Boost Top Line of MSCI*, MARKETWATCH (July 26, 2023, 5:26 PM), https://www.marketwatch.com/articles/esg-data-demand-msci-2d374009?mod=mw_latestnews [https://perma.cc/KMZ2-GBTW]; Serena Dibra, *The 2023 State of Corporate ESG: How Companies Are Embracing ESG for Resilience and Growth*, THOMSON REUTERS (Nov. 7, 2023), https://www.thomsonreuters.com/en-us/posts/esg/state-of-corporate-esg-report-2023/ [https://perma.cc/52MG-LFXG].

9. As we note below, a number of utilities have made ESG commitments but fail to follow through on them in practice. *See infra* Part II.

10. *See infra* Section I.B.

11. *See infra* Section I.B.

12. *See infra* Section I.B.

13. *See* David Roberts, *The Depthless Stupidity of Republicans' Anti-ESG Campaign*, VOLTS (July 12, 2023), https://www.volts.wtf/p/the-depthless-stupidity-of-republicans [https://perma.cc/27SQ-PSJA]; Elizabeth Pollman, *The Making and Meaning of ESG* 45 (U. Pa. Inst. L. & Econ. Pub. L., Research Paper No. 22–23, 2022).

14. *See infra* Section I.B.

Utilities' ESG commitments mask a harsher reality. While touting their lofty promises, utilities simultaneously take actions that undercut them.[15] Much of this activity is what scholars call greenwashing: misleading the public about their ongoing efforts to build more, spend more, corrupt more, and pollute more.[16] A critical distinction between utilities and other public corporations exacerbates this failure. The rate-regulation system that state public utility commissions (PUCs) administer gives utilities monopolies and governs many matters relating to them, such as the setting of their profits.[17] This makes utilities different from all other public corporations. Because many utilities operate as regulated monopolies, they are in a stronger position than other companies to pursue their shareholders' interests and downplay or dismiss ESG concerns.[18]

The regulatory system's primary focus is on economic efficiency, not environmental objectives.[19] This introduces amplifying effects. When utilities fail to follow through on their ESG commitments, the regulatory system gives them added protection against more robust evaluation of their ESG actions. Scholars who believe private governance can make public corporations more accountable argue that these efforts are not intended to displace governmental regulation but to complement it.[20] We make a different point here. Regulation of utilities does not address the challenges to improving utilities' performance but instead increases them.

This Article is the first to comprehensively evaluate these intersecting factors, which make holding utilities accountable to their ESG commitments different from doing so for other corporations. Our central conclusion and policy prescription is

15. *See infra* Part II.A.2.

16. *See infra* notes 132–153 and accompanying text.

17. U.S. ENV'T PROT. AGENCY, AN OVERVIEW OF PUCS FOR STATE ENVIRONMENT AND ENERGY OFFICIALS 2–3 (May 20, 2010), www.epa.gov/sites/default/files/2016-03/documents/background_paper.pdf [https://perma.cc/7K78-R9UB].

18. *See* Joshua A. Basseches, *Who Pays for Environmental Policy? Business Power and the Design of State-Level Climate Policies*, POL. & SOC'Y, Sept. 11, 2023, at 9, https://journals.sagepub.com/doi/10.1177/00323292231195184 [https://perma.cc/E4QN-D995].

19. This is because many PUCs do not take environmental considerations into account, focusing instead on the economic ramifications of "safe, affordable and reliable" utility service. *Infra* Part II.

20. *See, e.g.*, Michael P. Vandenbergh et al., *The Gap-Filling Role of Private Environmental Governance*, 38 VA. ENV'T L.J. 1, 3 (2020) (discussing the gap-filling function of private environmental governance); Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 133 (2013).

that utilities' avoidance of ESG goals and their own ESG commitments, combined with the system of rate regulation that perpetuates a lack of progress, requires a mandatory change in utilities' corporate form; to fully engage in the energy transition, we must repurpose investor-owned utilities.[21] We propose requiring electric utilities transform their corporate structures, making them "purpose-driven"[22]: more accountable to their customers, shareholders, and other stakeholders. Purpose-driven utilities would achieve an articulated mission, and their management would work strategically and purposefully to create social, environmental, and economic value.

We begin in Part I by explaining the widespread interest in ESG and describing utilities' ESG commitments and how, in practice, they fall short of meaningful action to reduce greenhouse gas (GHG) emissions. In Part II, we show the many ways in which utilities abuse the public interest through their exploitation of the regulatory scheme. This Article then argues that while it is especially important for electric utilities to achieve ESG objectives, relying on today's system of ESG standards is not sufficient. And simply creating more robust ESG standards will also not be sufficient because utilities' status as monopolies subject to governmental regulation hinders progress toward achieving important goals. Finally, we commend scholars who have proposed to improve PUC regulation, but we find that this alone will also not suffice.

In Part III, we discuss public firms that have moved toward being socially responsible, including "public benefit corporations" and "B-corporations." We conclude that both of these structures have drawbacks as applied to utilities because they lack critical features, such as sufficient enforcement provisions, and because utilities could still take advantage of the regulatory landscape. We then discuss a similar structure that we believe would work and provide many of the same benefits: requiring utilities to convert from the current, profit-driven corporate form into utilities with purpose. We provide

21. *See* David Roberts, *The Simple Reason Most Power Utilities Suck*, VOX (Sept. 4, 2017, 1:00 PM), https://www.vox.com/2016/6/29/12038074/power-utilities-suck [https://perma.cc/HKN8-7X2V] ("While there's plenty of greed and animus to go around, the fact is, utilities are just doing what they've been designed to do. *The design is the problem*.").

22. *Cf.* Andrew R. Sorkin et al., *What Will Move Markets Now?*, N.Y. TIMES (Feb. 4, 2022, 7:29 AM), https://www.nytimes.com/2022/02/04/business/dealbook/markets-meta-jobs.html [https://perma.cc/G42M-R2TB] (discussing deep purpose).

specifics about purpose-driven utilities and describe PUCs' authority to require utilities to transform into them. Our proposal would address the specific challenges of the utility industry and remedy both failures we have identified: (1) the shortcomings of utilities' ESG commitments and their failures to address climate change and (2) the amplifying effects of the regulatory system.

Corporate restructuring is vital for utilities to meet climate change goals. Utilities are regulated by PUCs but face few real threats to their business models.[23] They maximize shareholder returns with little fear of potential recourse.[24] One critique of ESG is that it allows companies to continue to maximize profits.[25] For utilities, we add, "while gaming their regulatory system." Additionally, while shareholder primacy ideally "produces the optimal amount of goods and services at the lowest cost with the least waste," there is no automatic efficient allocation of resources with monopolies because there is no competition.[26] Regulatory restraints in the absence of competition have not proved sufficient to reverse utilities' profit motives.[27]

The current situation cannot continue if we are to meet the pressing need to address worsening climate change and achieve other critical objectives. Few utilities would readily embrace the transformation we propose, so it should be mandatory. This Article calls upon PUCs to use their existing authority to remake utilities into responsible utilities with purpose,

23. One recent article discussing agency interpretations of "public interest" found that agencies do not consider community values or what would be in the common good without specific statutory justification and that agencies discount these even when they are required to consider them. *See* Jodi L. Short, *In Search of the Public Interest*, 40 YALE J. ON REG. 759, 825 (2023). Economic justifications are used most frequently to show that something is in the public interest, including when regulating monopolies and utilities. *Id.* at 834.

24. *See* Milton Friedman, *The Social Responsibility of Business Is To Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/39NC-QGQC] (arguing that businesses' only social duty is to engage in activities that increase their profits).

25. Brad Swanson, *The Right Hates Environment, Social, Governance (ESG) Investing. The Left Should, Too.*, THE NATION (June 29, 2023), https://www.thenation.com/article/economy/ethical-social-governance-esg/ [https://perma.cc/N5Q4-WYND].

26. *Is Shareholder Primacy the Democracy of Capitalism?*, KENAN INST. PRIV. ENTER. (Nov. 16, 2021), https://kenaninstitute.unc.edu/kenan-insight/is-shareholder-primacy-the-democracy-of-capitalism/ [https://perma.cc/4RYA-Q49C].

27. *See infra* Part II.A.1.

invoking their statutory mandates to oversee the terms and conditions of utility service to ensure that they are just and reasonable. We propose that PUCs use this power to require that in return for retaining their valuable monopoly franchises, utilities transform into responsible corporations and re-register with PUCs. To serve as a check on PUCs that do not sufficiently administer this new system, we propose that utilities' customers have enforceable rights to challenge them when they violate the provisions of their new corporate charters.

Our proposal fits comfortably within the body of corporate law scholarship that criticizes the narrow view of all corporations as existing to put the interests of shareholders first and downplay the interests of all other stakeholders, including employees, creditors, suppliers, and customers.[28] The stakeholder capitalism literature advocates for creating companies that answer to all stakeholders, rather than companies that simply maximize profits, particularly but not exclusively by addressing climate-related risks.[29] A utility with purpose would do this. Our proposal also recognizes that it would not be feasible to completely replace the utility companies that deliver electricity to the public. While it might be desirable to have an electric grid with reconstituted, responsible corporations facing free-market competition in the generation, transmission, and distribution of electricity, we acknowledge that this is not possible because we cannot dismantle the system that we have without considerable disruption. These monopolies are, at present, the only means of keeping the lights on.

Forcing utilities to change their corporate structures is essential because the alternative is not sustainable. There is considerable evidence of utilities' continued efforts to harm

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28. Comparably, Professor Claire Hill calls on institutional investors to push for reforms of corporate structures that "'take advantage . . .' [and] impos[e] negative externalities." Claire A. Hill, *Marshalling Reputation to Minimize Problematic Business Conduct*, 99 B.U. L. REV. 1193, 1197–98 (2019).

29. *See* Madison Condon, *"Green" Corporate Governance*, *in* OXFORD HANDBOOK OF CORP. L. AND GOVERNANCE 3, 8–9 (2d ed. forthcoming 2024); Dorothy S. Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. 1617, 1618–19 (2021) (advocating for "corporate social responsibility bonds" to offset corporations' costs of pursuing goals other than pure profit maximization); Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639, 645 (2013); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 764–65 (2005) (discussing public interest considerations as a basis for the denial of a takeover bid under Delaware law).

their customers and hamper the transition to a carbon-free electricity system.[30] Scholars demonstrate how fraught planning for decarbonization can be given our current regulatory frameworks,[31] without much hope for improvement. Current reform initiatives do not go far enough[32] to accelerate the energy transition and provide the innovations that utilities are attempting to block: more distributed energy resources and renewable energy capacity[33] as well as additional transmission capacity to move renewable power and provide reliability and GHG benefits.[34] A heightened focus on equity and fairness in rates and other aspects of utility regulation is also necessary.

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30. Peter Eavis, *Clean Energy Quest Pits Google Against Utilities*, N.Y. TIMES (Dec. 27, 2022), https://www.nytimes.com/2022/12/20/business/google-clean-energy.html?smid=nytcore-ios-share&referringSource=articleShare [https://perma.cc/B9ZV-WE3L] (detailing such efforts despite Southern's Tom Fanning claiming that vertically integrated monopolies "absolutely are superior in every regard to [competitive] markets over time"); Reese Rogers, *Carolina Market Reforms Would Increase Grid Reliability and Reduce Customer Costs*, UTIL. DIVE (May 17, 2023), https://www.utilitydive.com/news/carolina-market-reforms-rto-grid-reliability-ceba/650491/ [https://perma.cc/JJ24-8UWB] (noting that RTO in the southeast would save South Carolina residents $300 million annually, save North Carolina residents $600 million annually, and reduce emissions by 37%); John McCracken, *How Wisconsin's Largest Power Company Lobbies Legislators to Stall a Clean Energy Transition*, TONE (Aug. 10, 2023), https://tonemadison.com/articles/how-wisconsins-largest-power-company-lobbies-legislators-to-stall-a-clean-energy-transition/ [https://perma.cc/7ZYP-GFME].

31. *See, e.g.*, Sharon Jacobs & Dave Owen, *Community Energy Exit*, 73 DUKE L.J. 251, 257 (2023); Alexandra B. Klass & Gabriel Chan, *Regulating for Energy Justice*, 97 N.Y.U. L. REV. 1426, 1430–31 (2022); Shelley Welton, *Electricity Markets and the Social Project of Decarbonization*, 118 COLUM. L. REV. 1067, 1072 (2018).

32. *See, e.g.*, *New LPDD Model Provisions on Aligning State Energy Regulatory Bodies with Decarbonization Goals*, LEGAL PATHWAYS TO DEEP DECARBONIZATION (Nov. 6, 2021), https://lpdd.org/new-lpdd-model-provisions-on-aligning-state-energy-regulatory-bodies-with-decarbonization-goals/ [https://perma.cc/V4YV-GLPS].

33. Herman K. Trabish, *High Electricity Rates Impede Crucial but Costly Technology Investments To Manage Rising DER Levels: Utilities*, UTIL. DIVE (Nov. 29, 2022), https://www.utilitydive.com/news/high-electricity-rates-impede-crucial-but-costly-technology-investments-to/637126/ [https://perma.cc/9F7H-HAWM] (noting that the systems needed to integrate more renewables can be done in a cost-effective way, not the way the utilities are currently planning on doing it).

34. While a comprehensive discussion of regional transmission organizations is outside the scope of this Article, that should not be taken as an indication that utility behavior there is better. Indeed, utilities commit some of the same abuses there as we describe here. For example, utilities have increasingly demanded and obtained "rights of first refusal" to construct new transmission lines without bidding processes, thereby shutting out would-be competitors. Ari Peskoe, *Is The Utility Transmission Syndicate Forever?*, 42 ENERGY L.J. 1, 61 (2021); for a specific example, see CST Editorial Board, *Last-Minute Power Grid Bill is Bad for Illinois Transition*

Requiring utilities to change their corporate form as a remedy for their abuses is not a new idea. In 1935, the Public Utility Holding Company Act (PUHCA) mandated the breakup of utility holding companies.[35] This was needed to reduce abuses where utilities' corporate structures had allowed them to take advantage of their regulatory environment over many years.[36] The situation is comparable today, and the issues with regulation that we identify date in some cases to at least the 1980s.[37] Even with a more intense focus on regulation in the intervening decades, regulated monopoly utilities continue to act against the public interest. Specific, incremental structural changes such as restructuring[38] and retail choice[39] have not brought the desired outcomes. It is time for more sweeping structural changes.

I. ESG IN THE UTILITY INDUSTRY: FALLING SHORT OF MEANINGFUL PROGRESS

The debate over whether corporations primarily serve their shareholders or whether they should advance broader societal values dates back to the 1930s.[40] For decades, scholars have argued that corporations should do more to serve the public

to Renewable Energy, CHI. SUN TIMES (May 31, 2023, 10:19 AM), https://chicago.suntimes.com/2023/5/31/23742644/illinois-power-lines-ameren-renewable-energy-legislature-climate-change-greenhouse-gases-editorial [https://perma.cc/RWN8-CY7V] (discussing a proposed power grid bill that "puts corporate profits over consumers").

35. Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, 109 CALIF. L. REV. 209, 234–35 (2021).

36. *Id.* Unlike PUHCA, which was adopted at the federal level, our proposals can be adopted at the state level by PUCs using existing statutory authorities.

37. *See generally* RICHARD RUDOLPH & SCOTT RIDLEY, POWER STRUGGLE: THE HUNDRED-YEAR WAR OVER ELECTRICITY (1986) (discussing the centuries-long power struggle between public and private interests over electricity).

38. *See generally* Shelley He et al., *How Does Restructuring of Electricity Generation Affect Renewable Power?*, 43 ENERGY L.J. 125 (2022) (arguing that restructuring efforts on divesture and siting matter in increasing competition).

39. *See generally* Lynne Kiesling, *Electricity Restructuring and the Failure to Quarantine the Monopoly*, KNOWLEDGE PROB. (Feb. 16, 2023), https://knowledgeproblem.substack.com/p/electricity-restructuring-and-the?utm_source=substack&utm_medium=email [https://perma.cc/NR9S-6XNF].

40. Thomas Lee Hazen, *Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies' CSR and ESG Disclosures*, 23 U. PA. J. BUS. L. 740, 741 (2021); Elizabeth Pollman, *Corporate Social Responsibility, ESG, and Compliance*, *in* THE CAMBRIDGE HANDBOOK OF COMPLIANCE 662, 663 (Benjamin van Rooij & D. Daniel Sokol eds., 2021).

interest.[41] The debate about whether corporations should be good stewards of the environment has shifted to broader discussions about sustainability, with a growing body of literature too vast to summarize here.[42] Recent attention has shifted to ESG disclosures of corporate risks, where this Part begins. As the acronym suggests, ESG focuses on environmental, social, or governance practices and measurements of the societal impacts of a company and its business activities.[43] The practices typically evaluated include "corporate governance, labor and employment standards, human resource management, and environmental practices."[44] The central premise of ESG reporting is that accounting for a firm's risks, both financial and nonfinancial, is indispensable because these risks can impact a company's financial performance and its ability to execute its business strategy.[45]

Given the close linkage between their actions and climate change impacts, utilities must acknowledge the risks they face and improve their ESG performance, particularly by doing more to cut GHG emissions and to deploy more clean energy. Utilities are substantial contributors to the adverse impacts of climate change because they generate electricity using fossil fuels.[46] They should mitigate these environmental impacts by investing in the clean energy transition and by phasing out fossil-fuel generation. The alternative is unthinkable. Climate change is increasing the frequency of adverse environmental

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41. Pollman, *supra* note 40, at 663; Matthew T. Bodie, *The Next Iteration of Progressive Corporate Law*, 74 WASH. & LEE L. REV. 739, 744 (2017).

42. *See generally*, *e.g.*, Wendy E. Wagner, *Imagining Corporate Sustainability as a Public Good Rather Than a Corporate Bad*, 46 WAKE FOREST L. REV. 561 (2011) (showing the shift to broader discussions about sustainability); Robert G. Eccles et al., *The Impact of Corporate Sustainability on Organizational Processes and Performance*, 60 MGMT. SCI. 2835 (2014) (showing the shift to broader discussions about sustainability). Additionally, a recent search of the Lexis+ database conducted by the authors yielded 19,591 articles that used the term "sustainability."

43. *See*, *e.g.*, Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 650–51 (2016).

44. *Id.* at 651.

45. *Id.* at 663.

46. *See* Zizzo Strategy, *Climate Change and Power Utilities*, 2 CLIMATE RADAR 1, 1 (2018) https://www.tcfdhub.org/wp-content/uploads/2019/07/Climate-Change-and-Power-Utilites-Final.pdf. [https://perma.cc/Y2EB-6MHE]. While not the focus of this Article, gas utilities have an even more direct connection: the very product they are selling *at its best* releases carbon dioxide, the basis for significant amounts of climate change, when combusted. *Natural Gas*, CTR. FOR CLIMATE & ENERGY SOLS., https://www.c2es.org/content/natural-gas/ [https://perma.cc/5EHN-RHKG]. If the gas does not combust, it releases methane (natural gas), which is an even more potent contributor to climate change than carbon dioxide. *Id.*

events, such as hurricanes, floods, heat waves, and wildfires.[47] As the damage caused by the California, Oregon, and Colorado wildfires has shown, these climate-change-related events can have severe financial consequences for utilities.[48] These adverse impacts are exacerbated if utilities do not appropriately protect their systems against foreseeable climate risks and incorporate planning for climate risks into their corporate governance structures.[49]

There is nothing new about requiring utilities to assess these risks because it is information that all investors seek. As one investment advisor put it, "[i]t's not 'ESG investing.' It's just investing"—risk assessment is what investors do all the time.[50] In a report about conservative groups funding the anti-ESG backlash, another investment advisor noted succinctly about

47. *Climate Change*, WORLD HEALTH ORG. (Oct. 12, 2023), https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health#:~:text=Climate%20change%20is%20directly%20contributing,highly%20susceptible%20to%20climate%20change [https://perma.cc/MQ3C-J46P].

48. *See* Alex Formuzis, *PG&E Asks California Regulators to 'Recover' $1.36B from Ratepayers for Cost of Utility's Wildfires*, ENV'T WORKING GRP. (Dec. 19, 2022), https://www.ewg.org/news-insights/news-release/2022/12/pge-asks-california-regulators-recover-136b-ratepayers-cost [https://perma.cc/S8T3-LWAQ].

49. Ryan Haas, *PacifiCorp Verdict Adds to Pressure on Utilities to Speed Up Wildfire Prevention Efforts*, OR. PUB. BROAD. (June 19, 2023, 9:00 AM), https://www.opb.org/article/2023/06/19/pacificorp-verdict-climate-change-utilities-wildfire-prevention/ [https://perma.cc/573N-8YV7]; *see also* Dylan Brown, Note, *Lost in Transmission: Where ERCOT Went Astray and How It Can Find Its Way*, 75 FLA. L. REV. 1203, 1210 (2023) (explaining ERCOT's grid loss in Texas that was due to cold weather and detailing the call for plant operators to prepare for weather emergencies). Completely foreseeably, at least one of the utilities is asking for ratepayers to pay for its liability from the fires it started. Ryan Haas, *Pacific Power Potentially Wants its Customers to Pay $90M in Wildfire Liability*, OR. PUB. BROAD. (June 16, 2023, 5:29 PM), https://www.opb.org/article/2023/06/16/pacific-power-pacificorp-lawsuit-wildfire-2020-public-utility-damages/ [https://perma.cc/7LMY-3U29]. The utility has since settled another lawsuit regarding wildfires and continues to face more litigation. Ryan Haas, *PacifiCorp Agrees to $200M Settlement for Southern Oregon Wildfire*, OR. PUB. BROAD. (Dec. 6, 2023, 2:15 PM), https://www.opb.org/article/2023/12/06/pacificorp-labor-day-archie-creek-fire-settlement/ [https://perma.cc/P34H-JERP]; Associated Press, *Oregon Jury Awards $85 Million to 9 Victims of Deadly 2020 Wildfires*, POWERGRID INT'L (Jan. 24, 2024), https://www.power-grid.com/td/oregon-jury-awards-85-million-to-9-victims-of-deadly-2020-wildfires/ [https://perma.cc/995A-AKFU]. The utility is asking the state to protect it from future liability. Ted Sickinger, *PacifiCorp Wants State to Protect it From Future Wildfire Lawsuits. Past Victims are Disgusted*, ENERGY CENTRAL NEWS (Nov. 10, 2023), https://energycentral.com/news/pacificorp-wants-state-protect-it-future-wildfire-lawsuits-past-victims-are-disgusted [https://perma.cc/AN2X-CHFJ].

50. Zach Conway, *It's Not 'ESG Investing.' It's Just Investing*, WEALTHMANAGEMENT (Apr. 20, 2023), https://www.wealthmanagement.com/equities/it-s-not-esg-investing-it-s-just-investing [https://perma.cc/YB8J-QHM6].

energy companies that "[m]aking recommendations about which sectors to invest in—including expressing negative views about the risks of investing in a dying industry like coal, for example, or giving opinions about the benefits of investments, for example investing early in the transition to cleaner energy" is "what investment groups have been hired to do on a daily basis for decades."[51] But as we discuss in the remainder of this Part, utilities are significantly behind on moving toward or achieving any meaningful success in implementing ESG goals. Utilities' reporting on ESG is ineffective at best and inadequate and damaging at worst because the greenwashing their reporting facilitates obfuscates the need for regulatory action, hence the slow pace of change within the industry.[52]

A. *The Rise of Widespread Interest in ESG*

Interest in prompting major corporations to make ESG disclosures has increased tremendously. Ninety-nine percent of Fortune 500 companies, including major utilities, now make detailed ESG information publicly available.[53] One central goal, among others, is to "allow stakeholders—including investors, consumers, and employees—to make informed decisions about the risks to people and the planet created by a company's operations and the operational and financial risks posed by climate change."[54] A recent survey found that "there has been a 25% rise in the proportion of major, global companies that have committed to net zero targets since December [20]21 (from 27%

51. Amy Westervelt, *The Right's Desperate Push to Tank ESG and Avoid Disclosing Climate Risks*, INTERCEPT (July 2, 2023, 6:00 AM), https://theintercept.com/2023/07/02/esg-investing-sec-climate/ [https://perma.cc/TF3G-RQNX]; *see also* Anne Kelly, *ESG is Investment Strategy*, 53 ENV'T L. REP. 10640, 10640 (2023) ("[C]limate risk is financial risk[.]").

52. Of course, this is not just true for utilities, but all companies. *See* Oren Perez & Michael P. Vandenbergh, *Making Climate Pledges Stick*, OXFORD LAW BLOGS (July 18, 2023), https://blogs.law.ox.ac.uk/oblb/blog-post/2023/07/making-climate-pledges-stick [https://perma.cc/CN5M-KL98] (discussing both the potential for greenwashing and the regulatory gap).

53. Dan Harris, *99% of the S&P 500 is Reporting on ESG and 65% are Obtaining ESG Assurance*, BDO (July 21, 2023), https://www.bdo.com/insights/sustainability-and-esg/99-of-the-s-p-500-is-reporting-on-esg-and-65-are-obtaining-esg-assurance [https://perma.cc/4RMB-QX2S].

54. Elizabeth Anne Richman, *The Future of US Environmental, Social and Corporate Governance*, A.B.A. YOUNG LAW. DIV. (July 27, 2022), https://www.americanbar.org/groups/young_lawyers/resources/tyl/practice-areas/future-us-environmental-social-corporate-governance/ [https://perma.cc/VSP2-EBVT].

to 34%)."[55] This is just one example of how ESG has become prominent in corporate goals and decision-making.

Advocacy by consumers and environmental groups pressing for more corporate accountability,[56] such as tying Chief Executive Officer (CEO) compensation to achieving ESG goals,[57] has been a catalyst for this activity. Major institutional investors such as Blackrock and Vanguard (which has now backtracked[58]) have sparked an exponential rise of "socially responsible investing" in companies and funds with positive social impacts.[59] By one estimate, in 2022 over $250 billion was invested in sustainable funds, which use ESG criteria to evaluate investments.[60]

Even with all this focus, there is no universally agreed upon definition of ESG.[61] Approaches to ESG reporting vary, and there is a lack of consistency across companies and industries about what information is disclosed and how. There are hundreds of different approaches and frameworks and a wide variety in ESG criteria.[62] Some reporting frameworks are tailored to specific industries.[63] Key benchmarks include guidelines issued by the Sustainability Accounting Standards

55. Perez & Vandenbergh, *supra* note 52.

56. *See, e.g.*, Hill, *supra* note 28, at 1197.

57. Almost seventy percent of investors think ESG should figure into executive compensation targets. *ESG Utilities Survey*, PwC, https://www.pwc.com/us/en/industries/energy-utilities-resources/library/esg-utilities-survey.html [https:// perma.cc/R2Y6-MUSR]. A recent article claims this approach may help companies reduce GHG emissions but that it otherwise doesn't work. Patrick J. Kiger, *Does It Pay to Link Executive Compensation to ESG Goals?*, STAN. BUS. INSIGHTS (July 13, 2023), https://www.gsb.stanford.edu/insights/does-it-pay-link-executive-compensation-esg-goals [https://perma.cc/3JPC-89XP].

58. Courtney Vinopal, *Vanguard Splits From BlackRock Over Major Climate Alliance as the Backlash to ESG Builds*, OBSERVER (Dec. 15, 2022, 2:32 PM), https://observer.com/2022/12/vanguard-splits-from-blackrock-over-major-climate-alliance-as-the-backlash-to-esg-builds/ [https://perma.cc/Z4KM-EJKY].

59. *See* Jeff Sommer, *Millions of Fund Investors Are Getting a Voice*, N.Y. TIMES (Feb. 23, 2024), https://www.nytimes.com/2024/02/23/business/vanguard-blackrock-state-street-investing-voting.html [https://perma.cc/FVN2-YGAA].

60. Morningstar Manager Research, *What Are Sustainable Funds and How Have They Performed?*, MORNINGSTAR (Feb. 13, 2024), https://www.morningstar.com/business/insights/blog/funds/us-sustainable-funds-performance [https://perma.cc/CC2J-YM3A].

61. *See* Harper Ho, *supra* note 1, at 291.

62. *See generally* Satyajit Bose, *Evolution of ESG Reporting Frameworks*, *in* VALUES AT WORK: SUSTAINABLE INVESTING AND ESG REPORTING 13 (Daniel C. Esty & Todd Cort, eds. 2020).

63. *Infra* note 107 and accompanying text.

Board and Financial Stability Board Task Force on Climate-Related Financial Disclosures.[64] Ratings agencies that evaluate corporate debt have also become involved; for example, Standard and Poor's has an ESG website with scores for individual companies.[65]

There are some common themes in ESG reporting. Core environmental criteria include a company's carbon emissions, both those it emits directly through its operations and indirectly in its supply chain, and other adverse environmental impacts such as air and water pollution.[66] Carbon emissions are referred to as Scope 1, Scope 2, and Scope 3.[67] Scope 1 includes emissions from sources that a company owns or controls directly—for example, by burning fossil fuels in power plants it owns.[68] Scope 2 includes emissions that a company causes indirectly, such as those from power plants from which a utility purchases electricity.[69] Scope 3 goes further and tracks emissions by those firms the company is indirectly responsible for up and down its supply chain.[70] Scope 3 emissions contribute significantly to emissions for many companies,[71] but reporting on them sparks controversy because they originate from firms outside of a company's direct control.[72] The Edison Electric Institute (EEI), the trade association for America's largest

64. Harper Ho, *supra* note 1, at 284.

65. Hill, *supra* note 28, at 1197 n.5; *ESG Scores*, S&P GLOB., https://www.spglobal.com/esg/solutions/data-intelligence-esg-scores [https://perma.cc/EGD6-NQ9F].

66. *See Understanding the "E" in ESG*, S&P GLOB., (Oct. 23, 2019), https://www.spglobal.com/en/research-insights/articles/understanding-the-e-in-esg [https://perma.cc/6G84-GL2R].

67. Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36,654, 36,677–78 (proposed June 17, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274, and 279).

68. *See Scope 1 and Scope 2 Inventory Guidance*, EPA: CTR. CORP. CLIMATE LEADERSHIP (Aug. 21, 2023), https://www.epa.gov/climateleadership/scope-1-and-scope-2-inventory-guidance#:~:text=Scope%201%20emissions%20are%20direct,boilers%2C%20furnaces%2C%20vehicles) [https://perma.cc/7LAD-KGYA].

69. *See id.*

70. Madison Condon, *What's Scope 3 Good For?*, 56 U.C. DAVIS L. REV. 1921, 1923 (2023).

71. *Scope 3 Inventory Guidance*, EPA: CTR. CORP. CLIMATE LEADERSHIP (Dec. 15, 2023), https://www.epa.gov/climateleadership/scope-3-inventory-guidance [https://perma.cc/S328-GGZ9].

72. *See* Avery Ellfeldt & E&E News, *Proposed SEC Climate Rules Have Sparked a Fight over Indirect Emissions*, SCI. AM. (Mar. 22, 2022), https://www.scientificamerican.com/article/proposed-sec-climate-rules-have-sparked-a-fight-over-indirect-emissions/ [https://perma.cc/7UKW-4LCL].

utilities, opposes reporting on Scope 3 emissions.[73] Not surprisingly, then, these utilities do not currently report them.[74]

Social criteria address "the relationships [a] company has and the reputation it fosters with people and institutions in the communities where [it does] business."[75] For utilities, this includes their relationships with the consumers they serve and the factors that go into maintaining a good reputation with consumers, members of the community, and other stakeholders. Governance criteria include attention to the inward- and outward-facing aspects of how the corporation governs itself and responds to stakeholders, including governmental regulators.[76] For utilities, this focuses on the practices, controls, and procedures the company adopts to make decisions, such as planning to meet future demand for electricity, and on its relationships with PUCs, federal regulators, and others. And while this discussion presents these three sets of criteria in isolation, in reality, they are interrelated, and the company's ESG disclosures should present them as such. For example, meeting environmental goals requires considering the company's governance structure, which involves planning for sustainability and the company's impacts on carbon emissions in its direct operations and across its supply chains.

While the private sector leads much ESG activity, one federal agency action is noteworthy. In March 2024, the Securities and Exchange Commission (SEC) issued a rule to

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73. U.S. Sec. and Exch. Comm'n, Comment Letter on Proposed Rule for The Enhancement and Standardization of Climate-Related Disclosure for Investors 3 (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131803-302239.pdf [https://perma.cc/7HUH-L7M2] ("The Commission should not require inclusion of Scope 3 emissions disclosures."). The new head of EEI was United States Secretary of Energy under President Donald Trump, Dan Brouillette, who has questioned the scientific consensus that humans are causing climate change. *EEI Board Names Dan Brouillette President and Chief Executive Officer Elect*, EDISON ELEC. INST. (Aug. 16, 2023) https://www.eei.org/en/news/news/all/eei-board-names-dan-brouillette-president-and-chief-executive-officer-elect [https://perma.cc/2K6S-VS3Q]; *Energy Secretary Questions Scientific Consensus on Climate Change*, COLUM. CLIMATE SCH., https://climate.law.columbia.edu/content/energy-secretary-questions-scientific-consensus-climate-change [https://perma.cc/KMR4-PS9S].

74. *Infra* note 114 and accompanying text.

75. Witold Henisz et al., *Five Ways that ESG Creates Value*, MCKINSEY Q., Nov. 2019, at 1, 1, https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Strategy%20and%20Corporate%20Finance/Our%20Insights/Five%20ways%20that%20ESG%20creates%20value/Five-ways-that-ESG-creates-value.ashx [].

76. *See id.*

standardize some aspects of ESG reporting.[77] It requires all public companies that register with the SEC to include climate-related disclosures in their registration statements and make periodic reports about climate-related risks that are "reasonably likely to have a material impact on their business, results of operations, or financial condition."[78] This includes disclosure of how a public company collects, assesses, and reports climate-related data and how that data relates to future corporate risks.[79] Following the Supreme Court's enunciation of a more robust "major questions doctrine" in *West Virginia v. EPA*[80] and the limits the Court placed on more extensive federal regulation of power plant carbon emissions, some question whether the SEC has any authority to require climate-risk disclosures.[81] Others criticize the sweeping nature of the required reporting.[82] Still, others criticize the SEC's action as insufficient because it does not "provide the means to ensure that corporations comply with their long-term pledges."[83]

The fierce pushback to the SEC's rule is not unique. ESG has sparked a backlash from those who believe climate change and other risks are not material to a corporation's bottom line and should not be disclosed.[84] Republican members of Congress,

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77. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668 (Mar. 28, 2024) (to be codified at 17 C.F.R. 210, 229, 230, 232, 239, and 249).

78. *Id.*

79. *See id.*

80. 597 U.S. 697 (2022).

81. *See e.g.*, Bernard S. Sharfman & James R. Copland, *The SEC Can't Transform Itself into a Climate-Change Enforcer*, WALL ST. J. (Sept. 14, 2022, 6:31 PM), https://www.wsj.com/articles/securities-exchange-sec-climate-change-esg-major-questions-doctrine-west-virginia-v-epa-supreme-court-disclosure-rule-11663178488 [https://perma.cc/FN83-Z5MD] (calling the SEC's then-proposed rule "clearly unconstitutional").

82. *See* Declan Harty, *SEC's Gensler Weighs Scaling Back Climate Rule as Lawsuits Loom*, POLITICO (Feb. 4, 2023, 1:58 PM), https://www.politico.com/news/2023/02/04/sec-climate-rule-scale-back-00081181 [https://perma.cc/C8EQ-8GAY].

83. Perez & Vandenbergh, *supra* note 52; *see also* Joan Michelson, *Pushback on the SEC's Proposed Climate Risk Disclosure Rules is a Good Sign*, FORBES (Feb. 8, 2023, 7:25 AM), https://www.forbes.com/sites/joanmichelson2/2023/02/08/pushback-on-the-secs-proposed-climate-risk-disclosure-rules-is-a-good-sign/?sh=654863cb69c1 [https://perma.cc/CZJ4-2TPT].

84. Emily Atkin, *The Curious Origins of the Anti-ESG movement*, HEATED (Oct. 14, 2022), https://heated.world/p/the-dirty-origins-of-the-anti-esg?utm_source=%2Fsearch%2FESG&utm_medium=reader2 [https://perma.cc/XL9F-Q5GX]; *e.g.*, Justin Worland, *The Business Community Is Terrified of the ESG Backlash. It's Just Starting to Fight Back*, TIME (Apr. 5, 2023, 9:34 AM), https://time.com/6267352/esg-business-backlash/ [https://perma.cc/9W8L-KN9X].

state officials, and legislatures have resisted ESG by withdrawing governmental investments from firms connected to ESG investment funds,[85] holding hearings to blast the SEC's proposed rule and investors' calls for ESG disclosures,[86] and introducing legislation aimed at discouraging companies from being required to report on ESG issues.[87] One critic even sees an anti-ESG focus as a business opportunity, seeking to start a competing investment company—the "anti-Blackrock," if you will—that will cater to those who believe "that attempts by companies to address societal problems are cynical and ineffective, and that those attempts also pose an existential threat to the democratic process."[88]

As scholars have ably demonstrated, opposition to ESG may be politically convenient, but it falsely narrows the issues. For example, if a retailer or semiconductor manufacturer is oblivious to climate risks in its supply chain, that can and will have an impact on the bottom line.[89] Moreover, although the lack of a definition of ESG criteria makes it difficult to tie ESG disclosures precisely to "materiality" under the securities laws, climate risks can be materially related to a firm's profitability.[90] Nor is an ESG focus incompatible with profitability. From the

85. *See, e.g.*, David Gelles & Hiroko Tabuchi, *How an Organized Republican Effort Punishes Companies for Climate Action*, N.Y. TIMES (May 27, 2022), https://www.nytimes.com/2022/05/27/climate/republicans-blackrock-climate.html [https://perma.cc/3WGC-6BUN] (reporting that West Virginia's state treasurer pulled money from BlackRock, the world's largest asset manager).

86. Chelsey Cox, *Lawmakers Tussle over GOP Efforts to Thwart ESG Investing*, CNBC (July 12, 2023, 3:16 PM), https://www.cnbc.com/2023/07/12/lawmakers-tussle-over-gop-efforts-to-thwart-esg-investing.html [https://perma.cc/D84T-6FQB]; *see ESG Part I: An Examination of Environmental, Social, and Governance Practices with Attorneys General: Hearing Before the Subcomm. On Health Care and Fin. Servs. of the J. Comm. On Oversight and Accountability,* 118th Cong. (2023); *ESG Part II: The Cascading Impacts of ESG Compliance: Hearing Before the Subcomm. On Health Care and Fin. Servs. of the J. Comm. On Oversight and Accountability*, 118th Cong. (2023); Worland, *supra* note 84 (discussing a hearing of the Texas House of Representatives about a potential ban on insurance companies' use of ESG in the state).

87. Gelles & Tabuchi, *supra* note 85 (discussing laws introduced in numerous states).

88. Sheelah Kolhatkar, *Anti-Woke, Inc.*, THE NEW YORKER (Dec. 12, 2022), https://www.newyorker.com/magazine/2022/12/19/the-ceo-of-anti-woke-inc [https://perma.cc/JE7F-K8SV]; Liz Hoffman & Charley Grant, *'Woke, Inc.' Author's Startup to Take On BlackRock*, WALL ST. J. (May 10, 2022, 12:01 PM), https://www.wsj.com/articles/upstart-money-manager-gets-billionaires-to-back-the-anti-blackrock-11652134919 [https://perma.cc/87DP-NMPQ].

89. *See* Condon, *supra* note 70, at 1944.

90. *See* Harper Ho, *supra* note 1, at 291–92.

very beginning, ESG has recognized that companies can make disclosures while continuing to maximize profits. Indeed, ESG could "increase shareholder value by better managing risks related to emerging ESG issues, by anticipating regulatory changes or consumer trends, and by accessing new markets or reducing costs."[91] There is some indication that the anti-ESG focus can actually hurt a firm's business, not the other way around.[92] So the consternation around ESG disclosures seems to be with accountability rather than the ideas of ESG.[93] Notwithstanding the backlash, the prevalence of ESG reporting continues to increase.[94]

B. *Utilities' ESG Commitments Are Falling Short*

Utilities claim they are making comprehensive ESG disclosures and translating their commitments into positive action. We disagree on both counts. Their ESG disclosures fall short of full transparency. And their underlying promises are insufficient to support a clean energy transition, and, in any event, utilities are often falling short of meeting even the lackluster commitments they have made. Because these promises involve only disclosures, not action,[95] utilities are simply assessing risks to their profits while avoiding further scrutiny. In addition, utilities accept no responsibility in their ESG disclosures to transform themselves into responsible companies that answer to all of their stakeholders.[96] We will return to that deficiency in Part III.

1. Investor-Owned Utilities' ESG Commitments

First, we define what we mean by "utilities." A bewildering array of companies delivers (distributes, in utility lingo)

91. Aronoff, *supra* note 2.

92. *Id.*

93. *See* Westervelt, *supra* note 51.

94. *See, e.g.*, Jon McGowan, *Newsom Commits To Sustainability/ ESG Reporting In California By 2026*, FORBES (Sept. 19, 2023, 4:12 PM), https://www.forbes.com/sites/jonmcgowan/2023/09/19/newsom-commits-to-sustainability-esg-reporting-in-california-by-2026/?sh=3703f737ccc0 [https://perma.cc/KA72-WSLK] (discussing new California climate disclosure laws).

95. *See* Brad Swanson, *The Right Hates Environment, Social, Governance (ESG) Investing. The Left Should, Too.*, THE NATION (June 29, 2023), https://www.thenation.com/article/economy/ethical-social-governance-esg/ [https://perma.cc/TS95-G4U3] (arguing that ESG is "simply a risk management tool meant to increase companies' profits, not make them act in accordance with higher social values").

96. *See id.*

electricity to consumers. For two principal reasons, this Article focuses on the largest distribution utilities, known as "investor-owned utilities" (IOUs). While there are far fewer IOUs than other types of utilities, they deliver 72% of the nation's electricity.[97] Unlike other companies that distribute electricity to consumers, IOUs are owned by their shareholders.[98] This makes them different from municipal utilities, which are nonprofit entities owned by cities and towns, and cooperatives, which are membership organizations.[99] In 2020, the 30 largest IOUs accounted for nearly 60% of U.S. net electricity generation after taking the power they purchase into account.[100] As such, they are responsible for considerable climate change impacts. By contrast, municipal and cooperative utilities are typically smaller and often do not own power plants.[101]

Most IOUs now have ESG commitments of some form.[102] Some have been reporting on sustainability metrics for years,[103] while others began reporting more recently.[104] One common theme involves discussions of climate risks, such as risks to a utility posed by new climate laws that put increased prices on GHG emissions.[105] Another is discussion of opportunities to respond to the changing climate, such as deploying more renewable energy.[106] Many IOUs use the EEI's ESG template,

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97. Of the 2,938 U.S. electric utilities, just 168 are IOUs. *Investor-Owned Utilities Served 72% of U.S. Electricity Customers in 2017*, U.S. ENERGY INFO. ADMIN. (Aug. 15, 2019), https://www.eia.gov/todayinenergy/detail.php?id=40913 [https://perma.cc/74VM-P2BS]. Yet, those 168 IOUs serve 110 million, or seventy-two percent of all U.S. electric utility customers. *Id.*

98. *Id.*

99. JIM LAZAR ET AL., REG. ASSIST. PROJ., ELECTRICITY REGULATION IN THE US: A GUIDE 9–10 (2016).

100. NAT'L PUB. UTIL. COUN., ANNUAL UTILITY DECARBONIZATION REPORT 2022, at 22, https://www.motive-power.com/wp-content/uploads/2022/09/2022-NPUC-Annual-Utility-Decarbonization-Report.pdf [https://perma.cc/9UPT-FBVW].

101. *See id.* at 21. We do not mean to slight municipal and cooperative utilities when it comes to ESG commitments; some have adopted notable goals. *See, e.g.*, Michael Lusting and Anna Duquiatan, *Los Angeles Directs Utility to Aim for Net-Zero Emissions by 2035*, S&P GLOB. (Sept. 17, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/los-angeles-directs-utility-to-aim-for-net-zero-emissions-by-2035-66537338 [https://perma.cc/TDQ8-65PR] (explaining that Los Angeles's municipal utility adopted a goal of 100% carbon-free electricity generation by 2035).

102. NAT'L PUB. UTIL. COUN., *supra* note 100, at 36.

103. *ESG Utilities Survey*, *supra* note 57.

104. *See* NAT'L PUB. UTIL. COUN., *supra* note 100, at 34.

105. *Utilities and ESG*, KPMG, https://www.kpmg.us/insights/2021/utilities-esg-reporting-strategic-advantage.html [https://perma.cc/4B3L-2F9M]

106. *Id.*

first issued in 2018 and "customized for regulated electric and gas companies."[107] The EEI claims that this template is the "first and only industry-focused and investor-driven reporting template for ESG and sustainability-related information."[108] It includes both qualitative and quantitative sections. Qualitative sections include "ESG/Sustainability Governance," defined as "Management and oversight of ESG/sustainability," and "ESG/Sustainability Strategy," defined as "Practices, programs, and initiatives designed to support the company's transition to a lower carbon and increasingly sustainable energy future."[109] Quantitative sections include data on a utility's portfolio of power plants and a utility's emissions.[110]

2. How IOUs' ESG Commitments Fall Short

Many IOUs have not sufficiently discussed and disclosed climate, and other risks, as evidenced by the IOUs' poor scores for ESG reporting.[111] These low ratings square with findings by major investors that utilities' disclosures of risks are incomplete.[112] One report that examined fifty IOUs' ESG reports found "mixed definitions and labeling" and "many inconsistencies and question marks."[113] Utilities' disclosures are often lacking in transparency, missing relevant information. A common omission is that most IOUs report on their Scope 1 and 2 emissions but not on Scope 3 emissions, keeping with the EEI template that does not include Scope 3

107. EDISON ELEC. INST., ESG/SUSTAINABILITY TEMPLATE – VERSION 3, at 2 (2021), https://www.aga.org/wp-content/uploads/2022/12/esg_template_version_3_qualitative.pdf [https://perma.cc/7GXG-4RST].

108. EDISON ELEC. INST., ESG/SUSTAINABILITY WHITE PAPER 1 (2018), https://www.eei.org/-/media/Project/EEI/Documents/Issues-and-Policy/Finance-And-Tax/EEI-ESG-WhitePaper.pdf?la=en&hash=479E0EEA210720D15295607217FED498AD5A80F9 [https://perma.cc/L6H3-3VPP].

109. EDISON ELEC. INST., *supra* note 107.

110. *Id.*

111. For example, as of 2023, Dominion Energy scores 38 out of 100 on S&P's ESG scale. *Dominion Energy, Inc. ESG Score*, S&P GLOB., https://www.spglobal.com/esg/scores/results?cid=4001616 [https://perma.cc/69FN-W4EH].

112. Joe Smyth, *Utility Trade Associations Say Utilities are Disclosing Climate Risks to Investors. Major Investors Disagree*, ENERGY & POL'Y INST., (Jan. 11, 2022), https://energyandpolicy.org/utility-trade-associations-say-utilities-are-disclosing-climate-risks-to-investors-major-investors-disagree/ [https://perma.cc/79B4-NN2X].

113. Omri Wallach, *Tracked: The U.S. Utilities ESG Report Card*, DECARBONIZATION CHAN. (Nov. 6, 2022), https://decarbonization.visualcapitalist.com/tracked-the-u-s-utilities-esg-report-card/ [https://perma.cc/GWK2-AUKK].

reporting.[114] There are other notable types of omissions. A recent survey found that "[s]trategy remains the least robust disclosure area in utilities' ESG reporting," because few IOUs specify how they plan to achieve the scenarios they describe qualitatively.[115] One further reason why disclosures are deficient is that some utilities simply lack the institutional capabilities to develop appropriate information. A recent study identified this and other shortcomings of utilities' data collection and analysis.[116]

The lack of transparency becomes obvious on viewing the EEI's ESG template, which gives utilities a green light to make incomplete disclosures. Its instructions allow utilities to omit any data or information they don't want to publish.[117] In a 2022 letter to the SEC, the EEI explained that reported information is "limited to information investors tell us is critical for their decisionmaking,"[118] which is being left to individual utilities' discretion. The template gives "flexibility in what is reported by each company," and provides that "[c]ompanies may elect to include or exclude any of the topics outlined [in the template]."[119] Of course, what a utility perceives as information unnecessary to disclose, such as its Scope 3 emissions, may well be viewed by others as critical to assessing its progress on environmental matters.[120]

Because ESG reporting is primarily about disclosure, connecting disclosures to action is where utilities fall even further short of what is necessary. Many utilities have adopted

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114. *See* NAT'L PUB. UTIL. COUN., *supra* note 100, at 37. The template's "Quantitative metrics and definitions" spreadsheet contains no category corresponding to Scope 3 emissions. *See generally* EDISON ELEC. INST., *supra* note 107.

115. *Utilities and ESG*, *supra* note 105.

116. *ESG Utilities Survey*, *supra* note 57 (discussing a survey conducted in 2021 in which 40% of utilities described themselves as "still learning" how to collect ESG data and only 48% of utilities felt they were "highly capable").

117. EDISON ELEC. INST., *supra* note 107, at 1.

118. U.S. Sec. and Exch. Comm'n, Comment Letter on Proposed Rule for The Enhancement and Standardization of Climate-Related Disclosure for Investors 4 (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131803-302239.pdf [https://perma.cc/7HUH-L7M2].

119. EDISON ELEC. INST., *supra* note 107.

120. For example, suppose a utility supplies customers with both natural gas and electricity. The emissions from customers who use the natural gas that the utility provides are Scope 3 emissions. If a utility were required to disclose Scope 3 emissions, investors could determine which utilities were actively working to switch customers from natural gas to electric appliances, thereby limiting carbon emissions in the future.

decarbonization targets.[121] Yet these commitments to emissions reductions are not nearly ambitious enough to mitigate the worsening impacts of climate change. A recent study of utility ESG commitments conducted by the Rocky Mountain Institute found that "[i]n aggregate, utility decarbonization targets, if achieved, will reduce emissions by just 50 percent."[122] This is far short of what experts believe is needed to aggressively reduce carbon emissions in the utility industry,[123] and, in so doing, meet the targets established by nations of the world to limit global warming to 1.5°C if possible.[124]

The vague language of utilities' commitments leaves plenty of room for them to delay and defer progress. Some IOUs have made commendable progress toward decarbonization, but most have not.[125] They make "net zero" commitments (promises to become carbon neutral) without specifying detailed paths to get there.[126] Or if they do specify, their projections for growth of renewable and distributed energy are either exceedingly unrealistic or put off to the distant future, or both.[127] Climate Action+, a group of hundreds of major investors, has reported that "most power companies have not been progressing at the pace required to restrict rises in global temperatures to

121. NAT'L PUB. UTILS. COUN., *supra* note 100, at 31 (summarizing these targets).

122. Tricia Holland et al., *Utilities Need Investments to Decarbonize — Investors Need Accountability*, ROCKY MOUNTAIN INST. (Dec. 13, 2023), https://rmi.org/utilities-need-investments-to-decarbonize-investors-need-accountability/#:~:text=In%20aggregate%2C%20utility%20decarbonization%20targets,while%20delivering%20equally%20massive%20returns [https://perma.cc/SD6J-CLNM].

123. *See* Jared Anderson, *Climate Experts Discuss What Policies, Incentives Are Most Effective at Reducing Energy Emissions*, S&P GLOB. (Sept. 19, 2023, 8:05 PM), https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/electric-power/091923-climate-experts-discuss-what-policies-incentives-are-most-effective-at-reducing-energy-emissions [https://perma.cc/YCR2-UF7W].

124. *See generally* Esme Stallard, *What Is the Paris Agreement and Why Does 1.5C Matter?*, BBC (Feb. 8, 2023), https://www.bbc.com/news/science-environment-35073297 [https://perma.cc/56JU-JMKA].

125. *See* NAT'L PUB. UTILS. COUN., *supra* note 100, at 24–25.

126. Karin Rives, *Survey Finds Just 1 US Utility Has 'Detailed' Plan for Reaching Net-Zero by 2050*, S&P GLOB. MKT. INTEL. (June 13, 2023), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-head lines/survey-finds-just-1-us-utility-has-detailed-plan-for-reaching-net-zero-by-2050-76146165 [https://perma.cc/7R9F-J39A].

127. Jonathan Hahn, *Many Utilities' Net-Zero Commitments Amount to a Big Zero for Climate*, SIERRA (Oct. 3, 2022), https://www.sierraclub.org/sierra/many-utilities-net-zero-commitments-amount-big-zero-climate [https://perma.cc/5A6P-ZPSL] (explaining that, for many utilities, setting distant targets for clean energy is part of an avoidance strategy).

1.5°C."[128] Of the sixty-eight companies surveyed, only one was currently on pace to achieve this target.[129] The Rocky Mountain Institute study found that utilities' actual planned capital expenditures would not be sufficient to meet even their own stated emissions targets, let alone the more aggressive ones needed to respond to the climate challenge.[130] As we describe in Part II, utilities have no intention of satisfying their commitments, knowing they can leverage the regulatory system to put off the clean energy transition to the future.[131]

While deferring and delaying progress, utilities frequently deceive the public about their ESG commitments in ways that fit the well-known label of "greenwashing."[132] Scholars describe greenwashing as

> a set of deceptive marketing practices in which an entity publicly misrepresents or exaggerates the positive environmental impact or attributes of a product or service to create a favorable impression that is not supported by evidence (product-level claims), or in which an entity misrepresents the entity's overall impact on the environment (firm-level claims).[133]

Plenty of utilities greenwash.[134] As one example, in keeping with the discussion above, utilities overclaim what their carbon

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128. INSTITUTIONAL INVS. GRP. ON CLIMATE CHANGE, GLOBAL SECTOR STRATEGIES: INVESTOR INTERVENTIONS TO ACCELERATE NET ZERO ELECTRIC UTILITIES 6 (Oct. 2021), https://www.climateaction100.org/wp-content/uploads/2021/10/Global-Sector-Strategy-Electric-Utilities-IIGCC-Oct-21.pdf [https://perma.cc/XN5K-PZLM]. Climate Action 100+ includes hundreds of major investors.

129. *Id.*

130. *Id.*

131. Joshua A. Basseches, *The Key to Passing Climate Policy? Rein in (or Win Over) Utilities Monopolies*, FIX SOLS. LAB (Mar. 2, 2021), https://grist.org/fix/opinion/investor-owned-utilities-climate-policy/ [https://perma.cc/WLP9-SPKV] (contending that utilities have no intention of meeting their climate goals).

132. Amanda Shanor & Sarah E. Light, *Greenwashing and the First Amendment*, 122 COLUM. L. REV. 2033, 2037 (2022). A new form of deception is "greenhushing": companies concerned about liability for misrepresentations and other deceptions simply stop talking altogether about important matters like their impacts on climate change. Kate Yoder, *Greenhushing, Explained: Why Companies Have Stopped Talking About Their Climate Pledges*, GRIST (July 24, 2023), https://grist.org/language/greenhushing-climate-pledges-greenwashing-lawsuits/ [https://perma.cc/W8AW-ZXD9].

133. Shanor & Light, *supra* note 132.

134. *See, e.g.*, Amanda M. Grossman et al., *A Saga of Clean-Coal Electric Power: The Multibillion-Dollar Southern Company Fraud*, 15 J. FORENSIC & INVESTIGATIVE

emissions reduction targets will achieve.[135] The Climate Action+ report features a case study of the utility American Electric Power (AEP).[136] In its ESG report, AEP claims that it will achieve "an 80% reduction by 2030 (from a 2000 base) and net-zero emissions by 2050."[137] This, it claims, is 2°C aligned[138]—that is, enough to do its part to help reduce utility industry emissions sufficiently to keep global temperatures from increasing to 2°C above pre-industrial levels. The report concludes that notwithstanding AEP's claim to the contrary, AEP's plans for adding and retiring power plants would keep its emissions above its benchmark in the long term.[139] Other IOUs use the EEI template's language to obfuscate their deployment of clean energy. For example, the utility Arizona Public Service aims to have "65% clean energy by 2030 with 45% renewable energy."[140] It includes energy savings from demand reductions (through demand side management and

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ACCT. 54, 54 (2023) ("Seemingly, ample evidence exists to charge the company and executives with willfully providing the public erroneous and incomplete information."); Associated Press, *Whistleblower Says Atlanta-Based Southern Co. Should Repay $382 Million in Federal Aid*, WABE (Oct. 31, 2023), https://www.wabe.org/atlanta-whistleblower-says-utility-should-repay-382-million-in-federal-aid-given-to-failed-clean-coal-plant/ [https://perma.cc/UM4F-ZPDU]; Keriann Conroy, *Utility Front Groups Spending on Disinformation Advertising*, ENERGY & POL'Y INST. (Sept. 23, 2022), https://energyandpolicy.org/utility-front-groups-spending-on-disinformation-advertising/ [https://perma.cc/8RZ6-X3TK]; Joe Smyth, *Xcel Energy Supports Gas Industry Group Pushing False Claims in Colorado*, ENERGY & POL'Y INST. (Feb. 3, 2022), https://www.energyandpolicy.org/xcel-energy-supports-gas-industry-group-pushing-false-claims-in-colorado/ [https://perma.cc/FAC2-8JXM]; Sharon Udasin, *California Secures Settlement with SoCalGas over 'Misleading' Claims That Natural Gas Is 'Renewable'*, THE HILL (Aug. 14, 2023, 2:29 PM), https://thehill.com/policy/equilibrium-sustainability/4151995-california-secures-settlement-with-socalgas-over-misleading-claims-that-natural-gas-is-renewable/ [https://perma.cc/DN22-KNBH].

135. Jonathan Hahn, *Most Utilities That Pledge "Net Zero by 2050" Are Doing Little to Achieve That Goal*, SIERRA (Oct. 10, 2023), https://www.sierraclub.org/sierra/utilities-net-zero-2050-pledge-dirty-truth-doing-little-to-achieve-goal [https://perma.cc/T9GD-CZC5].

136. *Id.*

137. AM. ELEC. POWER, POWERING FORWARD TO NET ZERO: AEP'S CLIMATE IMPACT ANALYSIS 23 (Mar. 2021), http://www.aepsustainability.com/performance/report/docs/AEPs-Climate-Impact-Analysis-2021.pdf [https://perma.cc/DY46-WGPK].

138. *Id.* at 24.

139. INSTITUTIONAL INVS. GRP. ON CLIMATE CHANGE, *supra* note 128, at 30.

140. *APS Clean Energy Commitment*, ARIZ. PUB. SVC., https://www.aps.com/-/media/APS/APSCOM-PDFs/About/Our-Company/Energy-Resources/CleanEnergyCommittment.ashx?la=en&hash=EC0606653A170A6A83A716703CD62B44 [https://perma.cc/MSD6-MAS8].

energy efficiency,[141] for example) as "clean energy," which means less than 10% of Arizona Public Service's energy generation actually comes from renewable energy.[142]

Utilities' greenwashing sometimes involves outright deception. Hiding behind powerful and deeply funded front organizations with anodyne names that lobby at the state and federal levels,[143] utilities spread ominous messages of climate denial.[144] Utilities attempt to block climate action through opposition to new legislation, regulation, and ballot initiatives,[145] while simultaneously highlighting their ESG commitments.[146] This makes their hypocrisy even more problematic.[147] Sometimes utilities adopt even more devious

141. Joel B. Eisen, *Demand Response's Three Generations: Market Pathways and Challenges in the Modern Electric Grid*, 18 N.C. J.L. & TECH. 351, 366–67 (2017).

142. Smyth, *supra* note 112.

143. Joseph Winters, *Is Your Electric Utility Blocking Climate Action?*, GRIST (Apr. 14, 2022), https://grist.org/accountability/is-your-electric-utility-blocking-climate-action/ [https://perma.cc/M756-C5KL]; *see also* Mario Ariza, *Power Companies Quietly Pushed $215m into US Politics via Dark Money Groups*, THE GUARDIAN (June 15, 2023 6:00 EST), https://www.theguardian.com/us-news/2023/jun/15/us-power-companies-political-lobbying-donations-nonprofit [https://perma.cc/SJ97-NJCH].

144. *See* Robinson Meyer, *It Wasn't Just Oil Companies Spreading Climate Denial*, THE ATLANTIC (Sept. 7, 2022), https://www.theatlantic.com/science/archive/2022/09/electric-utilities-downplayed-climate-change/671361/ [https://perma.cc/9ETW-GM3L]; Geoff Dembicki, *U.S. Coal Utility Knew About 'Massive' Climate-Fueled Extinction, Still Funded Climate Denial Ads*, ENERGY MIX (June 10, 2022), https://www.theenergymix.com/2022/06/10/u-s-coal-utility-knew-about-massive-climate-fueled-extinction-funded-climate-denial-ads/ [https://perma.cc/W5WH-B7 HE]. Climate denial is hardly unique to the United States. *See, e.g.*, Eliz Mizon, *Behind the Scenes of British Media's Climate Denial*, BYLINE TIMES (Aug. 2, 2022), https://bylinetimes.com/2022/08/02/behind-the-scenes-of-british-medias-climate-denial/ [https://perma.cc/5SMN-NBTZ].

145. David Pomerantz, *Guess Who's Been Paying to Block Green Energy. You Have.*, N.Y. TIMES (July 5, 2023), https://www.nytimes.com/2023/07/05/opinion/utility-bills-clean-energy.html?smid=tw-nytopinion&smtyp=cur [https://perma.cc/Z72L-JZES]; Winters, *supra* note 143; Letter from four U.S. Senators to FTC Chair Lina Khan (Feb. 6, 2023), https://www.washingtonpost.com/documents/79b152a6-bd70-4b89-81a5-8be98f3eb739.pdf?itid=lk_inline_manual_60 [https://perma.cc/6EK4-RCW9] (describing Florida Power and Light's campaign to defeat—by promoting a competing and highly misleading initiative of its own—a state ballot initiative to increase solar deployment by allowing for retail competitive choice).

146. Diana DiGangi, *Duke, NextEra, Other Utilities Are Uneven Advocates for Climate Policy, Says Nonprofit*, UTIL. DIVE (Jan. 30, 2024), https://www.utilitydive.com/news/utilities-climate-policy-paris-agreement-misalignment/705983/ [https://perma.cc/425X-XDZ6].

147. Winters, *supra* note 143 (noting that "Missouri-based Ameren sent Grist a slideshow highlighting its high rating on [ESG] metrics" even though it was flagged as a laggard IOU that was blocking climate action).

tactics to block more renewable energy. Some are quietly helping to fund front groups that attempt to convince public officials at the state and local levels and their constituents to oppose policies that threaten the utilities' business models.[148] Utilities fund other front groups that describe the "wishes of the public"[149] without sufficient supporting evidence.[150] For example, a utility may engage in astroturfing (pretending the "public" opposes a project or policy when in fact the voice is that of the utility).[151] In some cases, utilities have simply gone the direct route: paying news sites to attack their critics[152] or using other intimidating tactics.[153]

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148. *Front Groups and Trade Associations Funded by Gas Utilities Fight Electrification Policies*, ENERGY & POL'Y INST., https://energyandpolicy.org/gas-utilities-greenwashing-to-expand-fossil-fuels-rng-hydrogen/front-groups-and-trade-associations-funded-by-gas-utilities-fight-electrification-policies/ [https://perma.cc/S43Q-JABN].

149. Dave Anderson, *FirstEnergy Dark Money Payments Included over $550,000 for 'Consumers' Group's Campaign Against Cleveland Public Power*, ENERGY & POL'Y INST. (June 29, 2023), https://energyandpolicy.org/firstenergy-cleveland-public-power/ [https://perma.cc/7DX5-Q4BW]; Fabiola Santiago, *FPL's Dirty Politics Hurt Customers with More Than High Fees*, MIA. HERALD (Aug. 26, 2022, 6:00 AM), https://www.miamiherald.com/news/local/news-columns-blogs/fabiola-santiago/article264888754.html [https://perma.cc/EHQ9-ZKMJ]; *Front Groups and Trade Associations Funded by Gas Utilities Fight Electrification Policies*, *supra* note 148.

150. *See Front Groups and Trade Associations Funded by Gas Utilities Fight Electrification Policies*, *supra* note 148.

151. Michael Isaac Stein, *The Energy Industry's Secret Campaign to Get Us to Build More Power Plants*, THE NATION (May 14, 2019), https://www.thenation.com/article/environment/energy-utility-entergy-astroturfing-nola/ [https://perma.cc/2CPD-T6A6]; *See also* Joe Rubin & Ari Plachta, *SoCalGas Fought a Key California Climate Solution for Years. It Cost Customers Millions*, SACRAMENTO BEE (Aug. 17, 2023, 10:40 AM), https://www.sacbee.com/news/politics-government/capitol-alert/article277266828.html [https://perma.cc/3B84-L5A6] (describing how one utility company paid for speakers to oppose electrification so that it could charge its customers for the time it spent fighting against the speakers); Robert Walton, *Maine Debate Heats Up as Vote Nears on Public Takeover of CMP, Versant Power*, UTIL. DIVE (Oct. 11, 2023), https://www.utilitydive.com/news/maine-votes-takeover-cmp-versant-pine-tree-power/696078/ [https://perma.cc/A8RZ-4SHD] (describing a front group set up by utilities advocating for a competing ballot measure that would nullify a vote for public takeover).

152. David Folkenflik et al., *In the Southeast, Power Company Money Flows to News Sites That Attack Their Critics*, NPR (Dec. 19, 2022, 5:00 AM), https://www.npr.org/2022/12/19/1143753129/power-companies-florida-alabama-media-investigation-consulting-firm [https://perma.cc/LS7E-3MM8]; Sarah Blaskey, *Florida Utility Secretly Took Over a News Site to Bash Critics*, GOVERNING (July 27, 2022), https://www.governing.com/now/florida-utility-secretly-took-over-a-news-site-to-bash-critics [https://perma.cc/YCB9-A82A].

153. Dennis Hoey, *CMP Private Investigator Tailed Anti-Corridor Petitioners*,

Beyond this, a core question remains about utilities' ESG commitments: to what end? We have already seen how, despite their promises, utilities have not improved their performance.[154] Utilities' ESG commitments are also exceedingly unlikely to achieve the other functions of ESG disclosures, the most familiar of which is to guide responsible investing. Factoring ESG goals into decisions about investing in corporations has become common; investors are increasingly using corporate ESG reporting to identify risks posed by investing in corporations and to evaluate those corporations' opportunities to manage or diminish those risks.[155] For example, if investors were aware of the risks posed by a utility's continued investments in fossil fuel power plants, they might contemplate choosing alternative investments without such risks.[156]

For most corporations, the threat of disinvestment by an institutional investor may be a powerful incentive to change.[157] But utilities are different because they are monopolies. If investors decided to switch their investments from one utility to another, this would not impact the first utility's ability to retain its dominant monopoly position. Nor would it have significant financial impacts. A recent study indicates that investors choosing greener utilities instead of other utilities might increase the costs of obtaining capital for the latter.[158] But as we show in Part II, this is no bar to utilities: the

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PORTLAND PRESS HERALD (Mar. 5, 2020), https://www.pressherald.com/2020/03/05/central-maine-power-pac-admits-it-hired-private-investigator-to-keep-tabs-on-anti-corridor-petitioners/ [https://perma.cc/RG3N-HU4B].

154. *See supra* text accompanying notes 125–30.

155. Mark Segal, *94% of Investors Say Corporate Sustainability Reporting Contains Unsupported Claims: PwC*, ESG TODAY (Nov. 16, 2023), https://www.esgtoday.com/94-of-investors-say-corporate-sustainability-reporting-contains-unsupported-claims-pwc/ [https://perma.cc/Z4VH-DBP8].

156. *See, e.g.*, Vandenbergh et al., *supra* note 20, at 6 (discussing how Tennessee Valley Authority recognizes that it faces material threats from customers' preference for carbon-free resources). This could take a number of forms. For example, recognizing potential carbon constraints, investors might also choose electricity-only utilities or combined electric and gas utilities, rather than continuing to invest in gas-only utilities, which carry significantly more risk.

157. *See BlackRock's New Goal Could Signal the Investor Transition to Net Zero is Well Underway*, CERES (Apr. 14, 2022), https://www.ceres.org/news-center/press-releases/blackrocks-new-goal-could-signal-investor-transition-net-zero-well [https://perma.cc/KA7K-KL2B].

158. Samuel M. Hartzmark & Kelly Shue, Counterproductive Sustainable Investing: The Impact Elasticity of Brown and Green Firms 1 (Dec. 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359282 [https://perma.cc/A8YU-UNGT].

regulatory system is designed to allow them to pass those higher costs through to their customers or even to seek to earn a profit on that more-expensive capital.[159] To one observer, this makes it largely irrelevant whether utilities switch to green energy because their customers will bear the costs regardless.[160]

Utilities' monopolies also make it nearly impossible to achieve the third major function of ESG: influencing consumer choices. Companies tout their ESG commitments on social media and on their websites,[161] hoping their positive commitments will sway consumers to choose their services and products. Public polling consistently shows that consumers are more interested in products and services from companies that have made ESG commitments than from those that have not.[162] However, this has no relevance for monopoly utilities. Selecting an electric utility is not the equivalent of choosing between two car companies, one virtuous and one not. There is often no realistic choice because most utility customers have no alternative to their monopoly distribution utilities.[163] If they

159. In one example, Georgia Power "could collect $2.1 billion more from ratepayers" by completing expansion of two nuclear power reactors in 2023 and 2024 than by completing it in 2016 and 2017 as scheduled. Stanley Dunlap, *Sparks Fly at Hearing on Georgia PowerProject That Could Stick Ratepayers with Plant Vogtle Tab*, GA. RECORDER (July 28, 2023, 1:00 AM), https://georgiarecorder.com/2023/07/28/sparks-fly-at-hearing-on-georgia-power-project-that-could-stick-ratepayers-with-plant-vogtle-tab/ [https://perma.cc/2VFB-AM7C].

160. Aronoff, *supra* note 2. For those who invest in utilities and other energy companies, taxpayers "will shoulder the risk of new green asset classes as the private sector reaps the reward; whether emissions decline as a result is, for asset managers, irrelevant." *Id.*

161. *See, e.g.*, *Corporate Sustainability*, PG&E CORP., https://www.pgecorp.com/corp/responsibility-sustainability/corporate-responsibility-sustainability.page [https://perma.cc/MTF8-3YK9] ("PG&E's commitment to sustainability begins with our customers. They have told us—and we agree—that our responsibilities as an energy provider go beyond delivering energy that is safe, reliable, affordable and clean."); *Sustainability*, EXXONMOBIL, https://investor.exxonmobil.com/esg [https://perma.cc/8LDL-MQJV]. As the ExxonMobil site demonstrates, even oil and gas companies tout their ESG credentials, although, as with some utilities, they are often accused of greenwashing. Maxine Joselow, *Lawsuits Target Exxon's Social Media 'Green Washing'*, CLIMATEWIRE (July 22, 2021, 6:49 AM), https://www.eenews.net/articles/lawsuits-target-exxons-social-media-green-washing/ [https://perma.cc/HLM5-N6P9].

162. Sherry Frey et al., *Consumers Care About Sustainability—And Back It Up with Their Wallets*, MCKINSEY & CO. (Feb. 6, 2023), https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/consumers-care-about-sustainability-and-back-it-up-with-their-wallets [https://perma.cc/XN3C-DSFG].

163. Even in restructured electricity markets, the incumbent monopoly utility

believe the utility is not performing well, a utility's customers typically cannot choose to leave.[164] They are still beholden to it for transmission and distribution of electricity (and its generation of electricity, in states that have not restructured). Whether it meets ESG standards or not, the utility will still be there.

II. TRADITIONAL UTILITY REGULATION GIVES IOUS INCENTIVES AND OPPORTUNITIES TO MASK THEIR LACK OF FOLLOW-THROUGH ON ESG COMMITMENTS

To summarize the discussion so far, the nature of how utilities develop and bypass ESG commitments, and the advantages of their monopoly status, limits progress on climate change and other goals. In this Part, we demonstrate how IOUs use the rate regulation process to further mask their lack of follow-through on their ESG commitments. Utilities' relationship with state PUCs makes them unique among U.S. public corporations. Their monopolies in the geographic territories they serve make them wholly different from other profit-making enterprises. The rate regulation system administered by state PUCs—not the free market—aims to curb utilities' monopoly power. The ESG situation for utilities is therefore different from that of other corporations because the PUC sets the utility's *profit*. That is, the regulatory scheme interposes an added layer into the decision-making process between the firm's operations and profit-setting. This is a crucial distinction from the operational landscape that other firms face. As this Article shows, utilities' ESG commitments simply greenwash their ongoing efforts under the regulatory system to build more, spend more, corrupt more, and pollute more.

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still provides transmission and distribution service. Kathryne Cleary & Karen Palmer, *US Electricity Markets 101*, RES. FOR FUTURE (Mar. 17, 2022) https://www.rff.org/publications/explainers/us-electricity-markets-101/ [https://perma.cc/NYQ3-49D9].

164. And recent surveys show customer satisfaction is decreasing. Sean Wolfe, *As Electricity Costs Rise, Customer Satisfaction Continues to Fall: Report*, POWERGRID INT'L (Nov. 16, 2023), https://www.power-grid.com/customer-service/as-electricity-costs-rise-customer-satisfaction-continues-to-fall-report/ [https://perma.cc/J2RD-7B8H]. This trend is likely to continue given the large number of rate increases that utilities are currently requesting. Mark Spalinger, *The Rate Cases Are Coming: How Will Utility Customers React?*, UTIL. DIVE (Nov. 9. 2023), https://www.utilitydive.com/news/electricity-rate-cases-high-prices-consumer-backlash/699263/ [https://perma.cc/TM4M-BRXS].

A leading utility executive states that public utility regulation creates warped incentives for utilities, which blunt the impacts of any ESG criteria for the industry.[165] We agree. State rate regulation systems are neither appropriately designed nor implemented to encourage or require utilities to meet ESG objectives. Utilities say one thing about ESG and use the regulatory system's incentives to delay and defer progress. This is an obstacle to improving utilities' performance, with amplifying effects that empower utilities to delay or defer progress toward ESG goals. In this Part, we therefore conclude that ESG criteria cannot harness utility behavior effectively and that we must address both the combination of utilities' avoidance of ESG and their ability to use the rate-regulation system to further evade progress. In Part III, we illustrate how to do this through the creation of purpose-driven utilities.

In this Part, we explore three major shortcomings of rate regulation that contribute to the inability to rein in utilities. First, the system of rate regulation was designed long before the advent of ESG, and its venerable standards have little intersection with ESG objectives. Utility rate regulation is designed to curb monopoly ills and is primarily focused on economic objectives instead of other goals. PUCs often legally apply the standards in setting utility rates without serious consideration of environmental or other objectives. The suggestion that a PUC should do otherwise is frequently rejected as outside the scope of the proceeding. And rate regulation makes few inquiries or assumptions about a utility's commitment to social and governance objectives.

Second, cost-of-service regulation perpetuates perverse incentives for a utility to avoid meeting environmental goals and, in many cases, even rewards it for not doing so. There are many reasons for this: incentives to boost rate of return by overspending on capital projects, utility dominance in PUC proceedings, regulatory capture, and numerous opportunities for utilities to obfuscate and delay or defer progress on climate-friendly programs such as energy efficiency[166] or distributed

165. Travis Kavulla (@TKavulla), X (May 14, 2023, 11:08 AM), https://twitter.com/TKavulla/status/1657764859801468932?s=20 [https://perma.cc/LE94-K3VZ] (summarizing the viewpoint of Travis Kavulla, former commissioner of the Montana PSC and current Vice President of Regulatory Affairs for NRG Energy).

166. In at least one case, at a utility-sponsored energy efficiency program, bribery occurred. Paul Korzeniowski, *Fraud Becomes a Problem with Energy Efficiency Programs*, ENERGY CENT. (May 9, 2022), https://energycentral.com/c/ee/fraud-becomes-problem-energy-efficiency-programs?utm_medium=email&utm_source=rasa_io [https://perma.cc/3SSS-RUH3].

energy resources.[167] A utility can—and often does—compound the problem by arguing that, under state utility regulatory laws, it has a legal responsibility to take specific anti-environmental actions.

Finally, we describe how the utility regulatory process has numerous limitations as a vehicle for delivering relevant information about utilities' performance in a timely and transparent manner. These would make it difficult to craft more robust ESG standards to overcome the limitations of the rate regulation process. Institutional investors could potentially seek to use their clout to demand more broadly that utilities pursue ESG goals in the regulatory process, reviewing actions taken by utilities and PUCs and making investment decisions accordingly. This assumes that they would have sufficient information to evaluate utilities' progress, but that assumption is faulty for reasons we discuss below.

Descriptions of bad behavior by utilities in PUC proceedings are legion, and we list some examples that involve IOUs. Because they deliver much of the nation's electricity, their hypocrisy of saying one thing to the public and doing another before their regulators is outsized in nature. Unfortunately, this is a logical and natural extension of the fact that IOUs are major investor-owned businesses, mandated by their corporate form to maximize shareholder returns and in doing so to take advantage of every incentive that the cost-of-service regulatory system provides.[168]

Every shortcoming of PUC regulation and utilities' abuses of it can be viewed in two different ways. First, the regulatory system's failure to rein in utilities makes attaining environmental objectives more difficult. A second and equally potent view of these abuses is a complete and damning contradiction to utilities' ESG commitments, and a demonstration of the need for reform. Not all IOUs take the actions we describe here, but there are so many examples that the patterns are compelling. Indeed, one federal agency compares the current utility environment to that of the 1930s, where utility holding companies engaged in widespread

167. *See, e.g.*, Will Norman, *Idaho PUC Scraps Net Metering, Solar Advocates Slam 'Monopoly Utility' Influence*, PVTECH (Jan. 4, 2024), https://www.pv-tech.org/idaho-puc-scraps-net-metering-solar-advocates-slam-monopoly-utility-influence/ [https://perma.cc/2PN8-R7PX].

168. Friedman, *supra* note 24.

abuses.[169] As noted earlier, that led to a major structural overhaul of the industry.[170]

By pointing out these challenges inherent in the intersection between ESG objectives and the regulatory system for utilities, we argue that simply making incremental reforms to the system of PUC regulation cannot accomplish the objectives contained in ESG standards. Instead, in Part III, we propose a different solution: a PUC mandate that utilities become purpose-driven corporations.

A. *Utility Abuses of the Traditional Regulatory System*

We begin by summarizing the familiar core principles of state public utility regulation. We then turn to describing some of the many ways in which utilities have contravened the public interest in that system, in direct opposition to the ESG commitments they so proudly tout.

1. Cost-of-Service Regulation and Its Critiques

Governmental regulation of investor-owned utilities has been taking place in the "public interest" for over a century. Since the early twentieth century, monopoly electric utilities have been regulated to make sure they do not abuse their power and reap monopoly rent by charging excessive rates.[171] The fundamental form of governance for a monopoly utility is an understanding commonly, if somewhat inaptly, known as the regulatory compact.[172] The PUC regulates the rates utilities charge on the basis of the costs they incur in return for granting them monopoly franchises.[173] The government's main role is to ensure that utilities' rates approximate those that a competitive market would produce.[174]

169. *See* U.S. ENERGY INFO. ADMIN., OFF. OF THE ADM'R, U.S. DEP'T OF ENERGY, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935: 1935-1992, at 5 (1993), https://www.eia.gov/electricity/archive/0563.pdf [https://perma.cc/L33S-6E5Z].

170. *See supra* notes 35–39 and accompanying text.

171. *See* Joshua C. Macey & Jackson Salovaara, *Rate Regulation Redux*, 168 U. PENN. L. REV. 1181, 1194–95 (2020).

172. Letter from Ari Peskoe, Harv. Env't Pol'y Initiative, to Quadrennial Energy Review Task Force, Office of Energy Policy and Systems Analysis, at 4 (2016), http://eelp.law.harvard.edu/wp-content/uploads/Harvard-Environmental-Policy-Initiative-QER-Comment-There-Is-No-Regulatory-Compact.pdf [https://perma.cc/FS45-RBJZ] (calling this an incorrect characterization and tracing the origin of the term's popularization to utilities seeking rate recovery of cancelled nuclear projects in the early 1980s).

173. *See* Macey & Salovaara, *supra* note 171, at 1194–95.

174. *See id.*

The state laws that regulate utilities and provide them with their monopolies date to the early 1900s, when companies began providing essential services to the public at a large scale.[175] These laws are different in each state, but their basic structure is similar. The PUC grants a utility its monopoly franchise and in turn regulates how it provides service to the public and what rate of return (profit) it earns, based on the utility's prudently incurred costs of providing service.[176] Due to this focus on the utility's costs, the shorthand "cost-of-service regulation" is typically used to describe the process.[177]

PUCs normally set "just and reasonable" rates for utilities under venerated principles established decades ago in Supreme Court precedents. A utility's rate of return is set by PUCs under the standards first enunciated in two Supreme Court decisions: *Federal Power Commission v. Hope Natural Gas*[178] and *Bluefield Co. v. Public Service Commission*.[179] The principles in these decisions empower PUCs to set rates of return at levels that allow utilities to make a return on capital investments sufficient to assure the continuation of the enterprise.[180] PUCs must consider the utility's reasonable and prudent operating expenses and cost of property used, and whether the utility's assets are used for providing adequate, safe, and reliable service to ratepayers. State utility codes typically contain some variant of this language, which provides considerable latitude to PUCs in rate cases, the proceedings in which PUCs establish utility rates.[181]

We have previously criticized this regulatory system.[182] Its drawbacks are well-understood. For example, utility profits are calculated as a percentage of "rate base," the sum of the utility's

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175. *See id.*

176. *See id.*

177. *Id.* at 1196.

178. 320 U.S. 591 (1944).

179. 262 U.S. 679 (1923). *See generally id.* (holding that rates need not be established by any single formula or combination of formulas); *Hope Natural Gas Co.*, 320 U.S. at 602–03 (defining the "just and reasonable" standard).

180. *See Hope Natural Gas Co.*, 320 U.S. at 605.

181. *See, e.g.*, VA. CODE ANN. § 56-235.2(A) (2023).

182. *See* Eisen, *supra* note 141, at 370 n.59 (citing Harvey Averch & Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. 1052 (1962)). *See generally* Heather Payne, *Private (Utility) Regulators*, 50 ENV'T L. 999 (2021) [hereinafter Payne, *Private*] (describing problems with the regulatory compact and proposing a solution); Heather Payne, *Game Over: Regulatory Capture, Negotiation, and Utility Rate Cases in an Age of Disruption*, 52 U.S.F. L. REV. 75 (2017) [hereinafter Payne, *Game Over*] (proposing changes to the current regulatory framework to stop normal negotiation theory in this context).

approved capital expenditures.[183] This gives utilities ample incentives to over-invest in capital assets because the more capital a utility spends, the more it earns back from its ratepayers.[184] Utilities recoup investments added to rate base from ratepayers through annual application of the rate of return percentage to the underlying expenditure.[185] Gold plating (setting higher price tags on capital expenditures to increase rate base) is an "age-old" concern in the utility industry.[186] Utilities overspend tremendously on projects such as "grid modernization" initiatives[187] or on costly power plants which could more rightly be considered boondoggles.[188] Utilities cherish their profits and have numerous ways of protecting them against risk. As an example, they use "construction work in progress" to argue for charging construction costs to ratepayers before power plants are completed.[189] They also

183. Coley Girouard, *How Do Electric Utilities Make Money?*, ADVANCED ENERGY UNITED (Apr. 23, 2015, 10:55 AM), https://blog.advancedenergyunited.org/how-do-electric-utilities-make-money [https://perma.cc/YUW5-LZHY].

184. *Id.*

185. *See id.*

186. Karl Dunkle Werner & Stephen Jarvis, *Rate of Return Regulation Revisited* 2 (Energy Inst. At Haas, Working Paper No. 329R, 2023), https://haas.berkeley.edu/wp-content/uploads/WP329.pdf [https://perma.cc/S85H-Q6ML].

187. Herman K. Trabish, *How Southern California Edison's New Rate Case Would Transform the Grid*, UTIL. DIVE (Sept. 21, 2016), https://www.utilitydive.com/news/how-southern-california-edisons-new-rate-case-would-transform-the-grid/426493/ [https://perma.cc/A5MS-48J6]; Herman K. Trabish, *The SoCal Edison Rate Case: A Canary in the Coal Mine for DER Policy Debates*, UTIL. DIVE (May 18, 2017), https://www.utilitydive.com/news/the-socal-edison-rate-case-a-canary-in-the-coal-mine-for-der-policy-debate/438970/ [https://perma.cc/2PS5-26VM]; Ed Smeloff & Sean Gallagher, *SoCal Edison Should Go Back to the Drawing Board on its Grid Modernization Proposal*, UTIL. DIVE (May 18, 2017), https://www.utilitydive.com/news/socal-edison-should-go-back-to-the-drawing-board-on-its-grid-modernization/443058/ [https://perma.cc/CT9T-RYSB]. *See generally The 50 States of Grid Modernization Q1 2023: States Address Microgrids, Resilience, and Low-Income Rate Reforms during Q1 2023*, N.C. CLEAN ENERGY TECH. CTR. (Apr. 27, 2023), https://nccleantech.ncsu.edu/2023/04/27/the-50-states-of-grid-modernization-q1-2023-states-address-microgrids-resilience-and-low-income-rate-reforms-during-q1-2023/ [https://perma.cc/XJ5H-7EYN] (providing a general discussion of grid modernization initiatives).

188. *See, e.g.*, Patty Durand, *Georgia's Plant Vogtle Is a $35B Boondoggle. We Need New and Better Solutions for a Carbon-Free Grid.*, UTIL. DIVE (May 18, 2023), https://www.utilitydive.com/news/georgia-power-plant-vogtle-boondoggle-small-modular-reactor-carbon-free-grid/650456/ [https://perma.cc/WZ54-CDX2] (showing how a Georgia plant's costs "ballooned past $35 billion, making it the most expensive power plant ever built on Earth").

189. *See e.g.*, Leslie Bonilla Muñiz, *Utilities Notch Legislative Wins*, IND. CAP.

argue that it is necessary to earn a profit on investments, even if their benefits are deferred to the future (in effect, stating, "trust us").[190]

The formula for how much profit utilities earn on rate base—the "rate of return"—often gives utilities higher profits than would prevail in a competitive market. Setting a utility's rate of return requires a comparison to market conditions—that is, profits of other firms engaged in ventures bearing similar risks.[191] A detailed example is the requirement of Virginia's utility law that constrains its commission's ability to set rates of return within specific percentage bands based on profits of other utilities in the region.[192] But even in states with less prescriptive utility laws, the calculation of utility profits has made utilities exceedingly prosperous.

Over the past quarter century, applying rate of return formulas has made utilities more profitable. A recent study by the Energy Institute at Berkeley found that high rates of return have resulted in customers overpaying by as much as $20 billion per year, with utility rates of return for the past forty years outstripping the costs of capital.[193] Because rate cases are not held every year, PUCs often face the task of returning in a later year and determining whether a utility has taken in profits that exceed the fixed rate of return.[194] Not surprisingly, in the meantime, the utility can be over-earning and over-collecting, and, while PUCs typically have broad latitude to order refunds, consumers suffer in the interim.[195] Depending on

CHRON. (May 15, 2023, 7:00 AM), https://indianacapitalchronicle.com/2023/05/15/utilities-notch-legislative-wins/ [https://perma.cc/T2KG-AF2B] (explaining that utilities were allowed to put natural-gas plant costs into rates before construction ended).

190. There are many examples of this relating to smart meter installations. *See e.g.*, R.I. OFF. OF THE ATT'Y GEN. STATEMENT OF POSITION ON THE NARRAGANSETT ELECTRIC CO. D/B/A RHODE ISLAND ENERGY'S ADVANCED METERING FUNCTIONALITY BUSINESS CASE 3–5 (May 4, 2023), https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2023-05/2249-RIAG-PositionStatement_5-4-23.pdf [https://perma.cc/7H56-JKZ9] (providing a recent example of a utility that justified smart meters in part with a promise to roll out a program of "Time-Varying Rates" but that also stated the program was a "*future* capability . . . that [would] require further investment").

191. LAZAR ET AL., *supra* note 99, at 54–56.

192. VA. CODE ANN. § 56-585.1(A) (2023).

193. Werner & Jarvis, *supra* note 186, at 5, 8.

194. *See, e.g.*, Minn. Stat. § 216b.16 (2023) (describing the general process and variability of timelines for rate cases in the state of Minnesota).

195. *See, e.g.*, *id.*

the political environment in which the PUC is operating, over-earnings may never be refunded.[196]

Some utility expenditures cannot be added to the rate base. Anything categorized as an operating expense is recovered by passing the costs directly to ratepayers. The utility earns no profit on it. As a result, there is no incentive to maximize these expenses, and utilities are generally less interested in them. This can have catastrophic results if important operations and maintenance expenditures are deferred. In the case of California's recent wildfires, for example, one contributing cause of the massive response costs by the state's IOUs was inattention to preventative measures beforehand.[197]

Regulatory failure can also be demonstrated by the fact that utility businesses are selling the unregulated parts of their business and holding firmly to the rate-regulated ones.[198] Because regulated and unregulated businesses have different profit motives (unregulated businesses face competition), utilities are also engaging in strategies that use regulated businesses to subsidize unregulated ones.[199] This is additional evidence that regulators are providing more profit for utilities

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196. Kathiann M. Kowalski & Energy News Network, *Ohio Ratemaking Reform Bill Would Give More Favors to Utilities, Critics Say*, OHIO CAP. J. (May 21, 2024, 4:50 AM), https://ohiocapitaljournal.com/2024/05/21/ohio-ratemaking-reform-bill-would-give-more-favors-to-utilities-critics-say/ [https://perma.cc/J3W4-586Y].

197. The California utility, Pacific Gas and Electric, spent insufficiently on programs such as inspecting transmission lines and clearing underbrush from rights-of-way, which contributed to the massive impacts of subsequent wildfires. Ivan Penn et al., *How PG&E Ignored Fire Risks in Favor of Profits*, N.Y. TIMES (Mar. 18, 2019), https://www.nytimes.com/interactive/2019/03/18/business/pge-california-wildfires.html [https://perma.cc/LB5W-XWBZ].

198. *See e.g.*, Diana DiGangi, *Duke Energy Sells 3.4-GW Commercial Renewables Business to Brookfield for $2.8B*, UTIL. DIVE (June 13, 2023), https://www.utilitydive.com/news/duke-energy-sale-brookefield-unregulated-commercial-renewables/652776/ [https://perma.cc/ELP8-QAAY] ("Duke Energy announced Wednesday that it completed the sale of its . . . unregulated, utility-scale commercial renewables business . . . for $2.8 billion."); Stephen Singer, *Eversource Sells 50% Stake in Offshore Wind Lease to Partner Ørsted as it Seeks a Buyer for 3 Other Sites*, UTIL. DIVE (May 26, 2023), https://www.utilitydive.com/news/eversource -orsted-offshore-wind-sale/651363/[https://perma.cc/X2L8-QG9S] ("Eversource Energy . . . agreed to sell its [fifty percent] stake in its offshore wind lease area . . . . [However,] CEO Joe Nolan said Eversource remains 'fully committed to being a catalyst to the region's clean energy transition' with its regulated companies . . . .").

199. *See* Aneil Kovvali & Joshua C. Macey, *Hidden Value Transfers in Public Utilities*, 171 U. PENN. L. REV. (forthcoming) (manuscript at 4), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1115&context=law_and_economics_wp [https://perma.cc/2J2L-B8LA] ("[R]egulated utilities directly subsidize non-regulated affiliates . . . .").

than the market would, which is inefficient for and harms customers. Regulators are allowing monopoly utilities to charge more than the market would allow, and rate regulation is supposed to approximate the results that competition would yield, not give utilities excess profits.

In the rapidly changing modern electric grid, with new resources coming on every day, cost-of-service regulation is something of an anachronism. Its justification to provide incentives to firms to build out the electric grid, with regulation designed to constrain natural monopoly attributes, is eroding. The increasing flood of new power plants that rely on renewable resources, and the wide variety of small-scale sources of electricity generation collectively called "distributed energy resources" (DERs) coming on the grid every day and seeking to compete with entrenched monopolies, challenges the assumption that electricity should be delivered by regulated monopolies. But for now, this is the system we have, and we do not believe this is the time or place to call for its elimination.

2. Utilities' Abuses of the Regulatory System

This Subsection details a litany of utility abuses of the regulatory system and of public trust, aimed at delaying, deferring, and blocking progress. For convenience, we roughly group the anti-consumer and anti-environment aspects of utilities' intersection with their PUCs into the three categories of ESG, and we compare these actions with the EEI template's ESG criteria. In numerous ways, we find that utilities' behavior in the regulatory system exacerbates their failures to meet ESG benchmarks.

a. Environmental

We begin with utility behavior in PUC proceedings with environmental implications. As noted in Part I, utilities' commitments to deploy more clean energy and achieve "net zero" carbon neutrality in the future fall far short of what is needed.[200] In regulatory proceedings, utilities often act to boost their high profits at the expense of achieving climate-change goals. The built-in incentive to spend more and rate base it all gives utilities an economic rationale to spend big and build more large-scale infrastructure than necessary.[201] They often build less optimally from an environmental perspective, but in

200. *See supra* Part I.
201. *See supra* Part II.A.1.

completely understandable ways if one appreciates the rate of return formula.[202] Utilities invest in large, utility-scale natural gas plants instead of energy efficiency software or promotion of rooftop solar, neither of which is added to rate base to earn the precious rate of return.[203] They downplay distributed energy in their integrated resource plans (IRPs)[204] with modeling that involves questionable assumptions about meeting future demand.[205] Most egregiously, utilities continue to build fossil-fuel power plants even as they have proven to be more (not less) vulnerable to failure than alternative means of generating electricity[206] and even when this investment contravenes utilities' clean energy commitments.[207]

As noted above, there is little evidence that utilities' high levels of capital spending are translating into meaningful progress toward emissions reductions.[208] And this is far from

202. *See, e.g.*, Aaron Cantú, *California Utility Wants Customers to Pay for Carbon Capture and Hydrogen*, CAP. & MAIN (Aug. 30, 2023), https://capitalandmain.com/california-utility-wants-customers-to-pay-for-carbon-capture-and-hydrogen [https://perma.cc/6F6X-JECW] (discussing how utility lobbyists were pressing for passage of bills that would continue fossil fuel dependence and add to rate base).

203. Customers' distributed solar systems are typically not owned by the utility, so expenses associated with any program promoting their installation are operating costs for the utility and are not included in the utility's rate base. Alexandra Aznar & Joyce McClaren, *Phrase of the Day: Rate Base*, NREL TRANSFORMING ENERGY: STATE, LOC., & TRIBAL GOV'TS BLOG (Sept. 16, 2015), https://www.nrel.gov/state-local-tribal/blog/posts/phrase-of-the-day-rate-base.html [https://perma.cc/9LAW-9QSU].

204. Joel B. Eisen & Heather E. Payne, *Rebuilding Grid Governance*, 48 B.Y.U. L. REV. 1057, 1119–20 (2023).

205. Jeff St. John, *Why Does Duke Energy's Carbon Plan Shortchange Solar?*, CANARY MEDIA (Sept. 19, 2022), https://www.canarymedia.com/articles/utilities/why-does-duke-energys-carbon-plan-shortchange-solar [https://perma.cc/BB96-2ZP7]; Ethan Howland, *Exelon Expects $173M Loss Related to ComEd Bribery Lawsuit as SEC Lobbying Investigation Continues*, UTIL. DIVE (May 4, 2023), https://www.utilitydive.com/news/exelon-comed-bribery-lawsuit-sec-ferc-earnings-offshore-wind/649400/ [https://perma.cc/VE49-G4RF].

206. Naureen Malik, *Why Natural Gas Makes the US Power Grid Vulnerable*, BLOOMBERG (June 27, 2023), https://www.bloomberg.com/graphics/2023-natural-gas-biggest-us-power-source-also-most-vulnerable/#xj4y7vzkg [https://perma.cc/P3R4-HBZ5]; St. John, *supra* note 205.

207. *See, e.g.*, Gautama Mehta, *Georgia Power Wants More Fossil Fuel Generation. This Contradicts Its Parent Company's Goal*, THE TELEGRAPH (Jan. 17, 2024, 5:40 PM), https://www.macon.com/news/state/georgia/article284309838.html [https://perma.cc/VN87-GS3W].

208. Herman K. Trabish, *Duke, SCE, Other Grid Modernization Proposals Faced Big Cost Questions, More Regulator Scrutiny in 2021*, UTIL. DIVE (Jan. 4, 2022), https://www.utilitydive.com/news/duke-sce-other-grid-mod-proposals-confronted-big-cost-questions-in-2021-a/610977/ [https://perma.cc/HT2F-74BH] (noting that

the only way in which utilities block action on emissions reductions. For example, they actively work to prevent other firms from building out clean energy, aiming to extend their monopolies to these businesses.[209] They oppose or attempt to minimize the ability of nonutility firms to deploy more renewable energy.[210] They block widespread adoption of DERs by their customers through a variety of different actions.[211] These include demanding high fees for customers who adopt rooftop solar[212] and delaying approvals of interconnection by their customers with distributed energy resources.[213]

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there is no evidence that grid modernization has paid off because "utility spending on grid modernization has not lowered rates or significantly increased demand-side flexibility").

209. *See, e.g.*, Scott Weiser, *Xcel Wants to Bill Customers $140 Million to Build Massive, Company-Owned EV Charging Network*, DENVER GAZETTE (Aug. 15, 2023), https://denvergazette.com/news/business/xcel-proposing-to-build-company-owned-ev-charging-network/article_a97b9606-fcbb-11ed-9542-c7879af920fd.html [https://perma.cc/RE4U-HLC8].

210. *See, e.g.,* Press Release, InflueneMap, Utilities Lobbying to Slow Energy Transition in United States (Apr. 14, 2022), https://influencemap.org/site//data/000/018/2022_-_04_US_utilities_report.pdf [https://perma.cc/8FWN-XRVF]; *see also* VA. CODE Ann. § 56-585.5(c) (2022) (limiting distributed solar to one percent of the utility's RPS requirement).

211. *See, e.g.*, Jeff St. John, *The Fight over California Community Solar: 'It's Everyone vs. Utilities'*, CANARY MEDIA (Sept. 5, 2023), https://www.canarymedia.com/articles/solar/the-fight-over-california-community-solar-everyone-vs-the-utilities [https://perma.cc/7BTW-N8SH] (discussing the different arguments presented by utility companies); *see also* Davi Pomerantz (@DavidPomerantz), X (Sept. 14, 2023, 4:52 PM), https://twitter.com/davidpomerantz/status/1702425154431889732?s=43&t=LNPLnREHmYkQUYDJtENVxw [https://perma.cc/QFN8-Y6WB] (discussing a utility witness who said: "Utilities prioritize shareholder profits over customer-sided [sic] renewables").

212. Ryan Kennedy, *Georgia Power Proposes to Apply $200 Rooftop Solar Interconnection Fee to Its Customers*, PV MAG. (Oct. 24, 2022), https://pv-magazine-usa.com/2022/10/24/georgia-power-proposes-to-slam-customers-with-200-rooftop-solar-interconnection-fee/ [https://perma.cc/J35X-NCAE]; Iulia Gheorghiu, *Arizona Legislature Advances Bill Restricting Retail Competition in Effort to Promote Reliability*, UTIL. DIVE (Apr. 21, 2022), https://www.utilitydive.com/news/arizona-legislature-advances-bill-restricting-retail-competition-in-effort/622409/ [https://perma.cc/WX87-C4BL]. For a typical PUC order*,* see Me. Pub. Util. Comm'n, Order Approving Stipulation (June 15, 2023), https://mpuc-cms.maine.gov/CQM.Public.WebUI/MatterManagement/MatterFilingItem.aspx?FilingSeq=119524&CaseNumber=2023-00039 [https://perma.cc/5AK3-E78D].

213. Joel B. Eisen, Felix Mormann & Heather Payne, *Virtual Energy*, U. ILL. L. REV. 134 (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4386321 [https://perma.cc/T2PN-AWJ9]; Emma Foehringer Merchant, *Frustrated by Outdated Grids, Consumers Are Lobbying for Control of Their Electricity*, INSIDE CLIMATE NEWS (May 5, 2023), https://insideclimatenews.org/news/05052023/electric-

Sometimes they compete with third parties, using their guaranteed rate of return to stifle competition.[214]

Utilities often tell PUCs that deploying more distributed energy is inconsistent with their obligation to keep costs to consumers as low as possible, downplaying any argument that doing so would reduce costs and address climate change. A variation on this theme is claiming that integrating clean energy leads to higher electricity prices, when the primary reason for higher rates is that utilities have been guaranteed excessive profits.[215] The prospect of higher rates for consumers is also a frequent argument by ESG's critics, who claim that consumers would suffer if utilities did anything other than pursue the bottom line.[216] The fact that this approach yields utilities excessive double-digit rates of return goes unmentioned.

Utilities often argue that the reliability of the electric grid would suffer if more DERs are deployed, which would be incompatible with their responsibility to keep the lights on. As we have observed elsewhere, this scare tactic prevails because there is no counterfactual.[217] The electric grid does not rely on a diversity of smaller-scale resources, so it is exceedingly difficult for a utility's opponents to prove that things will work out just fine when the grid includes more customer-sited solar and batteries. And, as one of us has forcefully argued, utility arguments completely miss the point about what reliability even is and how it should be measured.[218] Rather than focusing on reliability from a utility perspective based on averages, reliability should be customer-centric: focused on the quality of

grid-customer-control/ [https://perma.cc/T8M2-NY48] (discussing a Maine utility's attempt to deflect criticism from slow interconnections).

214. We are not the first to address whether monopoly utilities should venture into businesses that are not monopolies. *See, e.g.*, Troy Rule, *Utility Mission Creep*, 56 U.C. DAVIS L. REV. 591, 593 (2022) (explaining that an increasing number of utilities are offering products and services in markets where utilities were never intended to operate).

215. Mitchell Armentrout, *Record-Setting Rate Hike Sought by ComEd Is More Than $914M Too High, Utility Watchdog Says*, CHI. SUN TIMES (May 23, 2023, 3:20 PM), https://chicago.suntimes.com/business/2023/5/23/23734536/comed-rate-hike-citizens-utility-board-914-million [https://perma.cc/JSD7-GC2D].

216. H. COMM. ON OVERSIGHT & ACCOUNTABILITY, TESTIMONY OF SEAN D. REYES, UTAH ATTORNEY GENERAL 5 (May 10, 2023), https://oversight.house.gov/wp-content/uploads/2023/05/Reyes-Testimony.pdf [https://perma.cc/82T6-FNNE].

217. Eisen, Mormann & Payne, *supra* note 213, at 116–17.

218. Heather E. Payne, *Reliance and Reliability* (forthcoming 2024) (manuscript at 4) ("One of the main challenges with reliability—as it is currently defined—is that regulators view reliability from the point of view of a utility.").

service that customers experience. As the switch to more electric devices and appliances continues, this way of thinking about reliability will become even more important, and utilities' claims about reliability even more problematic.

b. Social

IOUs are far from making sufficient progress in the environmental arena, but they also abuse the regulatory scheme in ways that fail to adhere to the "S" (social) part of ESG. Social ESG criteria address "the relationships [a] company has and the reputation it fosters with people and institutions in the communities where [it does] business. Social ESG includes labor relations and diversity and inclusion."[219] The EEI template calls for utilities to report on "social risks and opportunities such as diversity, equity, and inclusion (DEI), [and] human capital management."[220] This is obviously important, and one of us has noted previously that energy industries have a long way to go before their workplaces are diverse.[221] But PUCs have little direct involvement with these critical issues.

Now consider the other major part of "S": how a utility engages with its customers and the public. Nothing in the EEI template recommends that utilities report on any efforts aimed at maintaining good customer service.[222] Notably, the only references to customers are phrased in terms of utilities' "plans to assure the continued reliability and affordability of energy for customers, and plans to ensure future recovery of capital expenditures and other costs."[223] As we have noted, "reliability" is a fig leaf that covers for utilities' anti-consumer actions, and it is striking that even this brief mention of customers is paired with utilities' ability to recover their costs—meaning, to earn a profit. Profits seem more important than customer satisfaction. Indeed, public surveys demonstrate how little interest utilities have in good relationships with their customers. In a 2022 Gallup poll, electric and gas utilities had a positive rating of

219. *Supra* text accompanying notes 75–76.

220. EDISON ELEC. INST., *supra* note 107, at 5.

221. Shelley Welton & Joel Eisen, *Clean Energy Justice: Charting an Emerging Agenda*, 43 HARV. ENV'T L. REV. 307, 332–39 (2019).

222. *See generally* EDISON ELEC. INST., *supra* note 107 (containing no recommendation that utilities report on good customer service).

223. *Id.* at 5.

just 29%.[224] Only the legal profession, the pharmaceutical industry, the federal government, and the oil and gas industry fared worse—and not by much.[225] A whopping 46% of respondents had a negative view of utilities.[226]

None of this is surprising. One recent article states that "Utilities have historically been far more concerned with engineering and efficiency than they have been with delighting customers and managing relationships."[227] Part of this is due to utilities' monopoly status; there is no reason to provide good service if your customers cannot go elsewhere.[228] Consumers are acutely aware that utilities have asked their PUCs for hefty rate increases in recent years to justify their massive spending; increasing rates are fueled by utility profit.[229] This is hardly the end of it. As one of us has discussed, utilities use their customers' data inappropriately,[230] refuse to provide data (especially if it might help customers purchase competing products or services),[231] or raise data concerns that don't exist.[232] In the unusual cases where PUCs have cut utility profits over bad customer service, utilities respond not by treating customers better but by pressuring courts to reverse these decisions.[233] Companies that are genuinely interested in satisfying their customers do not do any of this.

Another important dimension to "S" involves the increased attention energy justice scholars and some policymakers pay to how utilities take advantage of their lower-income customers

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224. *Business and Industry Sector Ratings*, GALLUP https://news.gallup.com/poll/12748/business-industry-sector-ratings.aspx [https://perma.cc/VS32-J52C].

225. *See id.*

226. *Id.*

227. John Hazen, *Utilities Can Weather Volatility by Investing in Customer Satisfaction*, T&D WORLD (Feb. 27, 2023), https://www.tdworld.com/smart-utility/article/21260776/utilities-can-weather-volatility-by-investing-in-customer-satisfaction [https://perma.cc/9BW5-9BGS]; *see also* Payne, *Private*, *supra* note 182, at 1028–29.

228. *See* Payne, *Private*, *supra* note 182, at 1030.

229. *See* Shelley Welton, *Grid Modernization and Energy Poverty*, 18 N.C. J. L. & TECH. 565, 580 (2017).

230. Heather Payne, *Sharing Negawatts: Property Law, Electricity Data and Facilitating the Energy Sharing Economy*, 123 PENN ST. L. REV. 355, 362–63 (2019).

231. *See id.* at 362.

232. *See id.* at 378; Eisen, Mormann & Payne, *supra* note 213, at 127–28 (utilities raise data concerns to thwart third-party aggregators).

233. Matthew Casey, *AZ Appeals Court: Regulators Did Not Have Power to Cut APS Profits Over Bad Customer Service*, KJZZ (Mar. 8, 2023, 10:07 PM), https://kjzz.org/content/1840851/az-appeals-court-regulators-did-not-have-power-cut-aps-profits-over-bad-customer [https://perma.cc/9BW5-9BGS].

and people of color. This is an area where the regulatory system is just beginning to adapt,[234] so there is plenty of room for utilities to act badly. As one of us has discussed, utilities are quick to disconnect service for nonpayment, especially, but not exclusively, during the COVID-19 pandemic, and to defend these heartless policies before PUCs.[235] During the pandemic, utilities garnished wages and sent accounts to collection before contacting customers,[236] while their CEOs were making record pay.[237]

Rate increases above the rate of inflation[238] contribute to the well-demonstrated and high energy burden already faced by

234. *See, e.g.*, Gabriel Chan & Alexandra B. Klass, *Regulating for Energy Justice*, 97 N.Y.U. L. REV. 1426, 1463 (2022); Richard J. Wallsgrove, *Restorative Energy Justice*, 40 UCLA J. ENV'T. L. & POL'Y 133, 135 (2022); Welton & Eisen, *supra* note 221, at 315–16; Shalanda H. Baker, *Anti-Resilience: A Roadmap for Transformational Justice Within the Energy System*, 54 HARV. C.R.-C.L. L. REV. 1, 25–26 (2019).

235. Joel B. Eisen, *COVID-19 and Energy Justice: Utility Bill Relief in Virginia*, 57 U. RICH. L. REV. 155, 164, 179 (2022); *see also* Tom Perkins, *US Utilities Shut Off Power to Millions Amid Record Corporate Profits – Report*, GUARDIAN (Jan. 30, 2023), https://www.theguardian.com/us-news/2023/jan/29/us-utilities-shut-off-power-to-millions-amid-record-profits?CMP=oth_b-aplnews_d-1 [https://perma.cc/YG6K-AVP6] (explaining how large utility companies have cut power to millions of low-income customers despite spending millions of dollars on stock and executive salaries); Will Wade & Mark Chediak, *A 'Tsunami of Shutoffs': 20 Million US Homes Are Behind on Energy Bills*, BLOOMBERG (Aug. 23, 2022, 8:05 PM), https://www.bloomberg.com/news/articles/2022-08-23/can-t-pay-utility-bills-20-million-us-homes-behind-on-payments-facing-shutoffs [https://perma.cc/73K4-GDQK] (narrating stories of families whom had their electricity shut off for failure to pay during the COVID-19 pandemic); Brett Marsh, *Unplugged: Why Utilities Are More Likely to Disconnect Black, Latino, and Indigenous Households*, GRIST (Sept. 6, 2022), https://grist.org/climate-energy/energy-equity-elusive-black-latino-indigenous-households/ [https://perma.cc/F8UB-MN9] (describing the disproportional impact utility disconnection has on minority households).

236. *E.g.*, Stephen Singer, *Connecticut Regulators Fine Avangrid's Gas, Electric Utilities $4.5M over COVID-19 Payment Program*, UTIL. DIVE (Nov. 2, 2022), https://www.utilitydive.com/news/connecticut-regulators-pura-fine-avangrid-covid/635548/ [https://perma.cc/5MUD-T7A4].

237. Joe Smyth, *Utility CEOs Received $2.7 Billion in Executive Compensation from 2017–2021*, ENERGY AND POL'Y INST., (Jan. 8, 2023), https://energyandpolicy.org/utility-ceos-received-2-7-billion-in-executive-compensation-from-2017-2021/ [https://perma.cc/936G-3R3L] (noting that the PG&E CEO made $51.2 million in 2021 and that multiple CEOs received over $20 million in annual pay that same year).

238. Stephen Singer, *Electricity Prices Surged 14.3% in 2022, Double Overall Inflation: US Report*, UTIL. DIVE (Jan. 19, 2023), https://www.utilitydive.com/news/electricity-prices-inflation-consumer-price-index/640656/ [https://perma.cc/2R6T-U9HK]; Payne, *Private*, *supra* note 182, at 1019.

lower-income households and people of color.[239] And equity concerns do not just involve high utility rates. In one heartbreaking example of just how broken the current regulatory system is from a justice perspective, Georgia Power was allowed to keep twenty percent of its excess profit in the settlement of its 2022 rate case. [240] As one advocate noted, that amount, calculated to be $58 million, is "almost enough to eliminate the balance on every single past due customer account."[241] But rather than use those funds to pay off the accounts of the customers suffering financial hardship, regulators approved the utility's plan to keep the money[242] and earn more profit for shareholders.

Energy assistance programs, such as income-based rate programs like Percentage of Income Payment Plans, in a number of states, do not reach as many lower-income consumers as they could.[243] A recent report found that in Detroit, DTE Energy had overinvested in more resilient equipment in whiter, wealthier areas, resulting in more outages in low-income communities and communities of color.[244] Utilities have canceled programs to help these

239. SANYA CARLEY, KLEINMAN CTR. FOR ENERGY & POL'Y, ENERGY INSECURITY DURING THE TIME OF COVID 1, 2 (Apr. 2023), https://kleinmanenergy.upenn.edu/wp-content/uploads/2023/04/KCEP-Digest55-Energy-Insecurity-Covid.pdf [https://perma.cc/P8GY-CTSV].

240. Pub. Svc. Comm'n, Georgia Power Company's 2022 Rate Case, Order Adopting Settlement Agreement as Modified 1, 38 (Dec. 30, 2022) https://psc.ga.gov/search/facts-document/?documentId=192550 [https://perma.cc/2MUV-CMSV].

241. Daniel Tait (@taitdl), X (July 14, 2023, 4:13 PM), https://twitter.com/taitdl/status/1679947247243460609?s=43&t=LNPLnREHmYkQUYDJtENVxw [https://perma.cc/N2NR-4GQS].

242. Ga. Pub. Svc. Comm'n, Georgia Power Company's 2022 Rate Case, Order Adopting Settlement Agreement as Modified 1, 38 (Dec. 30, 2022), https://psc.ga.gov/search/facts-document/?documentId=192550 [https://perma.cc/2MUV-CMSV].

243. *See* Eisen, *supra* note 235, at 187. For a description of one state's program, see Alex Kuffner, *Pay What You Can? Proposal Could Help Low-Income Rhode Islanders with Gas, Electric Bills*, PROVIDENCE J. (May 3, 2023, 5:18 PM), https://www.providencejournal.com/story/news/environment/2023/05/02/rhode-island-energy-backed-bill-would-cut-some-electricity-bills-pipp-low-income/70164676007/ [https://perma.cc/6CPL-LWN7].

244. Tom Perkins, *'Utility Redlining': Detroit Power Outages Disproportionally Hit Minority and Low-Income Areas*, THE GUARDIAN (Oct. 6, 2022, 6:00 AM), https://www.theguardian.com/inequality/2022/oct/06/detroit-power-outages-impact-minority-low-income-neighborhoods?CMP=share_btn_tw [https://perma.cc/MW8W-4UMG] (discussing no financial consequences for "utility redlining" with poor reliability in minority Detroit neighborhoods).

communities when the PUC did not fully approve of their pending rate increase.[245] Utilities are slow to deploy energy efficiency and community solar efforts in low-income communities,[246] which could most benefit from them. Finally, pollution from utility power plants disproportionately impacts communities of color.[247]

In a striking omission, nothing in the EEI template mentions energy justice. The only language that comes close is a vague statement about reporting on "[p]lans for engagement with the local communities in which the company operates."[248] This is alarming because equity concerns with utility rates and performance are widespread and drawing more public attention.

c. Governance

Utilities' behavior also undermines their good governance commitments. Recall that ESG governance criteria include the "internal system of practices, controls, and procedures" that a utility "adopts in order to govern itself, make effective decisions, comply with the law, and meet the needs of external stakeholders."[249] One dimension of this for utilities is their commitment of organizational resources to achieve

245. *See, e.g.*, Andrew Hazzard, *Xcel Energy Cuts Funding for Resiliency Stations at Minneapolis Sites Serving Diverse Neighborhoods*, SAHAN J. (June 13, 2023), https://sahanjournal.com/climate-environment/xcel-cuts-resilient-minneapolis-funding-minneapolis-community-centers/ [https://perma.cc/3JDL-Q2D2]; Mike Hughlett, *Minnesota Regulators Blast Xcel for Halting Projects After Rate Case Decision*, STARTRIBUNE (Aug. 3, 2023, 6:08 PM), https://www.startribune.com/minnesota-public-utilities-commission-blasts-xcel-energy-plan-to-halt-energy-projects/600294673/ [https://perma.cc/SFA2-9RKB].

246. Alison F. Takemura, *Low-Income Families Don't Get a Fair Share of Energy-Efficiency Funds*, CANARY MEDIA (Dec. 2, 2022), https://www.canarymedia.com/articles/energy-equity/low-income-families-dont-get-a-fair-share-of-energy-efficiency-funds [https://perma.cc/NAR8-2U46]; Press Release, Am. Coun. For An Energy-Efficient Econ., Report: Despite Progress, Low-Income Households Underserved by Utilities' Efficiency Programs (Nov. 18, 2022), https://www.aceee.org/press-release/2022/11/report-despite-progress-low-income-households-underserved-utilities [https://perma.cc/EU9U-FMFV]; Maria Gallucci, *Energy Equity: Bringing Solar Power to Low-Income Communities*, YALE ENV'T 360 (Apr. 4, 2019), https://e360.yale.edu/features/energy-equity-bringing-solar-power-to-low-income-communities [https://perma.cc/4N5S-Q7B6].

247. *See generally* Christopher W. Tessum et al., *$PM_{2.5}$ Polluters Disproportionately and Systemically Affect People of Color in the United States*, 7 SCI. ADVANCES (2021), https://www.science.org/doi/10.1126/sciadv.abf4491 [https://perma.cc/L5X3-HKWQ].

248. EDISON ELEC. INST., *supra* note 107, at 5.

249. Henisz et al., *supra* note 75, at 1.

environmental and other objectives. The EEI template calls for reporting on the "[m]anagement and oversight of ESG/sustainability."[250] As we have demonstrated, utilities often fall far short in their clean-energy and net-zero promises, which constitutes a failure to meet both environmental and governance objectives.[251]

Another important dimension of governance is that the corporation involves a wide range of stakeholders in decision-making and is transparent to the public and to regulators about its purpose and actions. The EEI template says little about this subject, so it is not featured in IOUs' ESG reports much, if at all.[252] The template does address "reputational risk,"[253] stating that "[t]o proactively manage reputational risk, we are encouraging companies to provide greater transparency regarding public policy engagement practices."[254] Of course, a corporation's good reputation is one of its most important assets.[255] A scholar on this subject has observed that corporate behavior that compromises reputation is that which, regardless of the legality of the company's actions, appears "cavalier, or worse, affirmatively willing to compromise, as to people's health or well-being, or the law."[256] Unfortunately, IOUs act in ways that closely fit this description and are seriously damaging to any likelihood that they would be perceived as good companies. The most obvious examples are the recent high profile utility corruption scandals. In one breathtakingly sweeping corruption scandal, Larry Householder, the former Speaker of the Ohio House of Representatives, colluded with the Ohio-based utility FirstEnergy, taking sixty million dollars in bribes in return for assuring the passage of legislation to bail out the utility's power

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250. EDISON ELEC. INST., *supra* note 107, at 2.

251. *See supra* Part I.B.

252. *See* EDISON ELEC. INST., *supra* note 107, at 2, 5 (recommending a sample introductory note to inform stakeholders about ESG information, but not recommending stakeholder commenting on stakeholder interests in the report proper).

253. *Id.* at 5. For a discussion of reputational risk, see generally Robert G. Eccles et al., *Reputation and Its Risks*, HARV. BUS. REV. (2007), https://hbr.org/2007/02/reputation-and-its-risks [https://perma.cc/4JEG-PHRE] (providing an overview of company reputational interests and offering a five-step reputation management system).

254. EDISON ELEC. INST., *supra* note 107, at 4.

255. *See* Hill, *supra* note 28, at 1200–01.

256. *Id.* at 1199.

plants and roll back Ohio's clean energy standard.[257] One article called this the "largest criminal conspiracy in Ohio government political history,"[258] and Householder received a twenty-year prison sentence for his part in it.[259]

Nor was this the only example of bribery aimed at influencing public officials to make decisions favorable to a utility.[260] In one recent case, a utility paid the legal bills for executives who were enmeshed in bribery investigations, and no one divulged how much was paid.[261] This and the FirstEnergy scandal are hardly isolated examples. In another case, the utility Florida Power & Light (FP&L) employed underhanded tactics to shield its involvement in purchasing another utility.[262] One reported move involved deploying a consulting group as a middleman to make a job offer for a sham nonprofit to a city council member in return for a favorable vote of approval.[263] FP&L also publicly denied that it had been served with a subpoena, although documents later proved that it had been.[264] FirstEnergy's transgression just happened to be larger in scale. A recent study found that, in states where utilities are allowed to make political contributions, utilities receive higher returns on equity in the regulatory process,

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257. Michael Wines, *A $60 Million Bribe. A $1.3 Billion Bailout. A 20-Year Prison Sentence*, N.Y. TIMES (June 29, 2023) https://www.nytimes.com/2023/06/29/us/ohio-speaker-bribery.html [https://perma.cc/7LZ8-96PV].

258. Bill Bush, *'Dark Money' Can Easily Fuel Bribery Schemes*, COLUMBUS DISPATCH (July 26, 2020), https://www.dispatch.com/story/news/crime/2020/07/26/lsquodark-moneyrsquo-can-easily-fuel-bribery-schemes/112742468/ [https://perma.cc/PB22-982K].

259. Wines, *supra* note 257.

260. *See, e.g.*, Jon Seidel et al., *Jury Convicts All Four Defendants in ComEd Bribery Trial — and Fires a Warning Shot at Michael Madigan*, CHI. SUN-TIMES (May 2, 2023), https://chicago.suntimes.com/2023/5/2/23697452/jurors-reach-verdict-in-comed-bribery-trial [https://perma.cc/R5AY-DM5D]; Ethan Howland, *Exelon Expects $173M Loss Related to ComEd Bribery Lawsuit as SEC Lobbying Investigation Continues*, UTIL. DIVE (May 4, 2023), https://www.utilitydive.com/news/exelon-comed-bribery-lawsuit-sec-ferc-earnings-offshore-wind/649400/ [https://perma.cc/VM8X-VNUA].

261. Dave McKinney, *Exelon is Paying the Legal Tab for Two Former Executives Convicted in ComEd Bribery Scheme*, WBEZ CHI. (May 15, 2023), https://www.wbez.org/stories/exelon-paid-legal-bills-for-convicted-comed-executives/bfc96db8-91ee-45ad-9d7b-ceef276a700e [https://perma.cc/DG53-WADP].

262. Nate Monroe, *In JEA Investigation, Feds Interviewed Former FPL CEO and Sent Subpoena to Company*, FLA. TIMES-UNION (May 16, 2023), https://www.jacksonville.com/story/news/columns/nate-monroe/2023/05/15/fbi-agents-interviewed-former-fpl-ceo-during-jea-investigation/70220839007/ [https://perma.cc/8533-8MMS].

263. *Id.*

264. *Id.*

which "translates to approximately $4 million in additional revenue annually" for the average utility.[265]

In a twist unique to utilities, state regulatory schemes ensure that customers will pick up the tab for this nefarious activity. If bribery results in increased profits for a utility but this is discovered after the conclusion of a rate case, there may be no means to force the utility to disgorge its ill-gotten profits. The utility law principle called the "filed rate doctrine" limits the circumstances under which a rate order may be overturned.[266] Customers also wind up footing the bill for bribery in other ways. After the ComEd bribery scandal became public, insurance premiums for Exelon—ComEd's parent company—rose due to the bribery convictions.[267] Who will pay these increased expenses? Unbelievably, their customers; these utilities pressured their PUCs to pass through the increased expenses to them.[268]

Utilities also act to influence others in ways that, if divulged publicly, would be contrary to any ideals of good governance. These include the use of dark money;[269] ghostwriting comments for public officials;[270] charitable donations to induce group

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265. Mark Van Orden, *Why States Should Prohibit Utility Political Contributions*, UTIL. DIVE (Dec. 19, 2023), https://www.utilitydive.com/news/why-states-should-prohibit-utility-political-contributions/702835/ [https://perma.cc/QSD4-ALV9] ("These results imply a staggering return on political investment . . . .").

266. Aspen-Jade Tucker, *Bright Lights and Dark Money: How States Can De-Energize an Electric Utility's Corrupting Power*, 46 ENVIRONS: ENV'T L. & POL'Y J. 135, 166 (2023). For general descriptions of the filed rate doctrine, see generally Joshua C. Macey, *Zombie Energy Laws*, 73 VAND. L. REV. 1077, 1117–21 (2020) (criticizing the doctrine and arguing for its removal); Jim Rossi, *Why the Filed Rate Doctrine Should Not Imply Blanket Judicial Deference to Regulatory Agencies*, 34 ADMIN. & REG. L. NEWS 11 (2008) (explaining the doctrine and arguing for a more tempered approach by courts when applying deference to regulatory agencies).

267. Steve Daniels, *ComEd Wants You to Help Pay for its Pricier Post-Scandal Insurance*, CRAIN'S CHI. BUS. (July 10, 2023), https://www.chicagobusiness.com/utilities/comed-four-scandal-customers-could-help-pay-utilitys-do-insurance-hike [https://perma.cc/6U22-LV88].

268. *Id.*

269. *See, e.g.*, Mario Ariza, *Power Companies Quietly Pushed $215m into US Politics via Dark Money Groups*, THE GUARDIAN (June 15, 2023, 6:00 PM), https://www.theguardian.com/us-news/2023/jun/15/us-power-companies-political-lobbying-donations-nonprofit [https://perma.cc/N7KV-EUA6]; *see also* Troy A. Rule, *Buying Power: Utility Dark Money and the Battle over Rooftop Solar*, 5 LSU J. ENERGY L. & RESOURCES 1 (2017) (examining the effects of campaign finance law developments in the solar energy market and prescribing legal and policy remedies to prevent undue influence).

270. Matt Kasper, *Records Request Reveal Exelon Behind Public Officials'*

leaders to work against the interests of their members;[271] and ratepayer funds to fight against governance,[272] regulatory, or legislative[273] measures that would benefit the ratepayers, the public, and the environment but hurt shareholders (and therefore protect the utilities' current business model).[274] Utilities also use ratepayer funds for litigation, advertising, sponsorships, charity, and lobbying (and parties).[275] Utilities

Statements in Response to Watchdog Investigation, ENERGY AND POL'Y INST. (Jan. 17, 2018), https://energyandpolicy.org/records-request-reveal-exelon-behind-public-officials-statements/ [https://perma.cc/Y6A9-WG5N].

271. *E.g.*, Maria Alejandro Ariza & Kristi E. Swartz, *Power Companies Paid Civil Rights Leaders in the South. They Became Loyal Industry Advocates*, ENERGY NEWS NETWORK (Jan. 12, 2024), https://energynews.us/2024/01/12/power-companies-paid-civil-rights-leaders-in-the-south-they-became-loyal-industry-advocates/ [https://perma.cc/PF7F-VUXE].

272. Emma Foehringer Merchant, *Frustrated by Outdated Grids, Consumers Are Lobbying for Control of Their Electricity*, INSIDE CLIMATE NEWS (May 5, 2023), https://insideclimatenews.org/news/05052023/electric-grid-customer-control/ [https://perma.cc/YB44-3VBS] (describing Maine's IOUs spending $15.5 million to defeat a ballot proposal to organize a state-owned utility); Amanda Gokee, *'Epic Fail': PUC Decision on Grid Modernization Sends Advocates Back to Square One*, N.H. BULL (Feb. 11, 2022, 5:46 AM), https://newhampshirebulletin.com/2022/02/11/epic-fail-puc-decision-on-grid-modernization-sends-advocates-back-to-square-one/ [https://perma.cc/7Q4A-VYCX] (describing a New Hampshire proposal that would have had greater stakeholder involvement but which utilities opposed).

273. Beth LeBlanc, *Michigan Democratic Lawmakers: Pay Utility Customers by the Hour for Outages*, DET. NEWS (Apr. 13, 2022, 1:43 PM), https://www.detroitnews.com/story/news/local/michigan/2022/04/13/michigan-democratic-lawmakers-pay-utility-customers-hour-outages/7304087001/ [https://perma.cc/4VVN-7AHR] (noting how Michigan utilities spent $55 million in "political" or "civic" spending on lawmakers when reliability was awful); Leslie Bonilla Muniz, *Utilities Notch Legislative Wins*, IND. CAP. CHRON. (May 15, 2023, 7:00 AM), https://indianacapitalchronicle.com/2023/05/15/utilities-notch-legislative-wins/ [https://perma.cc/8YZS-CJ2S] (reporting on Duke getting special measures passed through the legislature to pass on costs of coal ash cleanup to ratepayers). This legislative action is also why we reject calls that actions like decarbonization should only be undertaken by corporations if mandated by the government.

274. Ethan Howland, *In Win for Avangrid, FERC Orders NextEra to Install Seabrook Circuit Breaker, Opening Path for NECEC Line*, UTIL. DIVE (Feb. 2, 2023), https://www.utilitydive.com/news/-avangrid-ferc-nextera-seabrook-necec-transmission/641928/ [https://perma.cc/RA7K-WJKT] (reporting that NextEra donated $20 million to groups to stop a transmission line from Quebec because it would lower prices in New England); Mario Alejandro Ariza et al., *Leaked: US Power Companies Secretly Spending Millions to Protect Profits and Fight Clean Energy*, THE GUARDIAN (July 27, 2022), https://www.theguardian.com/environment/2022/jul/27/leaked-us-leaked-power-companies-spending-profits-stop-clean-energy [https://perma.cc/C3PH-6ZDR].

275. *See, e.g.*, Jason Plautz, *States Challenge Utility Costs Backed by 'Fleet of Lawyers'*, ENERGYWIRE (Apr. 6, 2023), https://www.eenews.net/articles/states-

claim, or attempt to claim, each of these as operating expenses (which, remember, are passed through to customers) and thereby force their customers to pay for them. Obviously, utilities do not disclose their underhanded activities in their ESG reporting.

One recent focus has been on how utilities force their customers to subsidize their political advocacy by compelling their customers to pay the utilities' dues for membership in trade associations. Utilities include as operating expenses their payments for membership dues in groups such as the EEI, which are essentially political organizations advocating against the interests of utilities' customers.[276] In one notorious example, utilities were extremely secretive about whether they were forcing their customers to fund their membership in the Utility Air Regulatory Group (UARG).[277] UARG was devoted to rolling back environmental laws, such as updated regulations aimed at decreasing harmful air pollution.[278] It disbanded in 2019 following regulatory and Congressional scrutiny,[279] but

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challenge-utility-costs-backed-by-fleet-of-lawyers/ [https://perma.cc/7C28-LDK2]; Conroy, *supra* note 134; Tom Johnson, *JCP&L to Pay Back Customers After Audit*, N.J. SPOTLIGHT NEWS (Mar. 23, 2023), https://www.njspotlightnews.org/2023/03/audit-indicates-jcpl-owes-customers-nearly-10-million/ (reporting that FirstEnergy owes New Jersey customers $10 million for lobbying, sports sponsorships, advertising, etc., that those customers were incorrectly charged for); Rubin & Platcha, *supra* note 151 (noting that at least $36 million charged to ratepayers was actually in violation of state law).

276. *Paying for Utility Politics: How Ratepayers are Forced to Fund the Edison Electric Institute and Other Political Organizations*, ENERGY & POL'Y INST., https://energyandpolicy.org/utility-ratepayers-fund-the-edison-electric-institute/ [https://perma.cc/TYL5-6UYB]. In another case, Xcel Energy initially tried to charge ratepayers for membership to a group so blatantly focused on investors' interests that it's literally in the group's name: "Minnesota Utility Investors." Karlee Weinmann, *Xcel-Funded Group Urges Minnesota Regulators to Increase Profits for Xcel*, ENERGY & POL'Y INST. (July 9, 2023), https://energyandpolicy.org/xcel-funded-shareholder-group-pushing-rate-increase/ [https://perma.cc/K64M-3ZDJ].

277. Matt Kasper, *UWAG and USWAG: The Secretive Utility Groups that also Target EPA Safeguards Remain After Utility Air Regulatory Group Disbands*, ENERGY & POL'Y INST. (May 13, 2019), https://energyandpolicy.org/uwag-and-uswag-the-secretive-utility-groups-that-target-epa-rules/ [https://perma.cc/UKF2-X4XD] ("Several utilities, including American Electric Power, Arizona Public Service, and Tucson Electric Power, admitted that they forced their customers to fund UARG expenses (and therefore the legal challenges to the Clean Air Act). Others, such as Ameren, DTE Energy, Dominion, and Duke Energy did not provide details about the source of UARG funding.").

278. *Id.*

279. Zack Colman, *Industry Group Tied to EPA Air Chief Dissolves*, POLITICO (May 10, 2019, 5:49 PM), https://www.politico.com/story/2019/05/10/epa-air-chief-3238271 [https://perma.cc/94GB-WM2X].

not before winning a major victory at the Supreme Court.[280] UARG was an "unincorporated, voluntary, ad-hoc coalition[] that [did] not disclose individual utility members,"[281] so it would have been difficult, if not impossible, for individual customers to discern whether their utility was a UARG member and whether they were subsidizing membership dues.

With UARG out of the picture, other secretive coalitions have taken up the slack. In 2022, an Indiana-based advocacy group sued Duke Energy over its policies for disposal of coal ash and learned only through discovery that Duke was forcing customers to pay for membership dues in the Utility Solid Waste Activities Group (USWAG).[282] USWAG is a utility trade group that uses legal pressure and litigation to weaken environmental laws.[283] Duke was hiding these expenses from its customers and burying them in the overall expenditure for its coal ash project. As a result, it was trying to earn a profit on its USWAG membership dues, as the spending for its coal ash project was rate-based.[284] This kind of egregious bad behavior has started to prompt some states to take a closer look at this form of utility spending. Colorado, Connecticut, and Maine have recently acted to block some of this spending, but most states have not yet done so.[285] Forcing utilities' customers to foot the bill for anti-environmental advocacy runs contrary to good governance principles, but it is still prevalent.

B. *More Targeted ESG Standards Would Not Work*

Consider how more rigorous private sector ESG standards might address the regulatory system's shortcomings. More robust criteria would focus more closely on the types of decisions utilities make, such as making investments in new

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280. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014) (holding that the EPA exceeded its statutory authority and that "it would be patently unreasonable—not to say outrageous—for [the] EPA to insist on seizing expansive power that it admits the statute is not designed to grant").

281. Kasper, *supra* note 277. The full list of utilities that contributed to UARG has never been identified.

282. IND. UTIL. REG. COMM'N, CAUSE NO. 45749, POST-HEARING BRIEF OF CITIZENS ACTION COALITION OF INDIANA 11 (Jan. 6, 2022), https://iurc.portal.in.gov/_entity/sharepointdocumentlocation/9ad1f029-2090-ed11-aad1-001dd8070a7e/bb9c6bba-fd52-45ad-8e64-a444aef13c39?file=45749--%20CAC%20Post-Hearing%20Brief--1-6-23%20(1).pdf [https://perma.cc/8SRL-92Y2].

283. *Id.* at 11–12.

284. IND. UTIL. REG. COMM'N, CAUSE NO. 45749, SUBMISSION OF CAC'S PUBLIC DIRECT TESTIMONY 43–44 (Oct. 13, 2022).

285. Pomerantz, *supra* note 145.

power plants. And utilities would be required to report on and follow their commitments, lest they be as hortatory as those at present and subject to increased potential for greenwashing. Would utilities make this sort of commitment if it were not mandatory? That is doubtful. As we noted in Part I, utilities and their allies in Congress have reacted strongly to the mandatory elements of the SEC's proposed climate risk disclosure rule.

Beyond that, reporting is one thing, but overseeing whether utilities are complying is quite another. Who would take on that task—and would they succeed? There are many ways in which a state utility regulation's structure would make it more difficult to oversee targeted ESG criteria. Obtaining full information about a utility's financial position relies on understanding the complex linkages between utility commitments, proposals to PUCs, and PUC decision-making. The regulation system poses numerous roadblocks to doing this. The PUC process is notoriously lacking in transparency.[286] There is an "information asymmetry" between PUCs and utilities when utilities seek cost recovery for their proposed investments.[287] Utilities obfuscate and withhold relevant information, for example, by overclaiming that information is confidential.[288] Or they simply fail to provide information that regulators have demanded, prompting legal battles to obtain it.[289] As a result, documents available to the public in a regulatory docket are not usually sufficient to convey a broader understanding of how actions taken by a PUC might impact the utility's bottom line.

The PUC process is not designed for outsiders to evaluate it in a timely manner, either. Rate cases are not always held annually, and indeed some utilities can go years without one.[290] Once one is held, it can take many months, if not years, to complete.[291] PUC decisions, therefore, take place on a completely different timescale from investing decisions, which are made in days and weeks. Technical language used in regulatory documents is often impenetrable and dense.

286. *See* Shelley Welton, *Decarbonization in Democracy*, 67 UCLA L. REV. 56, 101–03 (2020).

287. Werner & Jarvis, *supra* note 186, at 4.

288. *See* Payne, *supra* note 230, at 362.

289. Avery G. Wilks, *SCANA CEO Addison Concedes Utility Withheld Info from PSC*, THE STATE (Nov. 8, 2018, 6:58 PM), https://www.thestate.com/news/politics-government/article221281765.html [https://perma.cc/GK2U-ZTLH].

290. LAZAR ET AL., *supra* note 99, at 40–41.

291. *Id.*; Payne, *Game Over*, *supra* note 182, at 88.

Information made public in a regulatory docket often lags actions taken in real time and fails to capture the full extent of negotiations and other actions taken by the parties. If investors wanted to dive in directly, they could not easily become parties to most PUC proceedings, given typical rules governing intervention. As one of many examples, the Arizona Corporation Commission, the subject of several recent investigations, has limited ways to intervene in ongoing proceedings.[292]

It would be challenging for all but the most sophisticated investors to understand the multi-year ramifications of rate cases and other outcomes in PUC proceedings. The time scale of the resulting decisions is daunting, sometimes featuring approval of utility plans to build power plants over a multi-year timeframe. Oversight of whether a utility was measuring up to relevant standards would therefore take place over many years. For example, one of Georgia Power's two new nuclear reactors at Plant Vogtle in Georgia came online eight years later than originally planned, at a cost of fifteen billion dollars more than the original estimate.[293] As of the writing of this Article, the other reactor is not yet complete.

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292. Ariz. Corp. Comm'n, *How to Intervene in a Case*, https://www.azcc.gov/hearing/how-to-intervene-in-a-case#:~:text=A%20person%20that%20wants%20to,schedules%20the%20case%20for%20hearing [https://perma.cc/QG22-UT7L] ("Intervention is not automatic. You will not be granted intervention unless you have demonstrated a direct and substantial interest in the outcome of the case and that your intervention would not unduly broaden the issues before the Commission in the case."); *see, e.g.*, Joe Dana, *'It's Unethical, That's for Sure': Complaint Filed Against New Arizona Corporation Commissioner*, 12NEWS (Feb. 24, 2023, 7:30 AM EST), https://www.12news.com/article/news/local/arizona/ethics-complaint-filed-against-arizona-corporation-commissioner-kevin-thompson/75-ab920dba-8ac9-4e6d-a195-c73352277a0f [https://perma.cc/DXJ2-HCN3]. Comments are also difficult; those wishing to comment must be pre-registered before an open meeting starts, they have a maximum of three minutes which can be adjusted by the Chair, they may not cede time to another speaker, and any signs they bring are limited in size. ARIZ. CORP. COMM'N, RULES FOR PUBLIC COMMENT, https://www.azcc.gov/docs/default-source/hearings-files/rules-for-public-comment-5-23.pdf?sfvrsn=7e2369bf_1 [https://perma.cc/VX6M-FFDS]; *see also* Ryan Randazzo, *APS acknowledges spending millions to elect Corporation Commission members, after years of questions*, AZCENTRAL (Mar. 29, 2019, 9:10 PM), https://www.azcentral.com/story/money/business/energy/2019/03/29/arizona-public-service-admits-spending-millions-2014-corporation-commission-races/3317121002/ [https://perma.cc/KM6U-BV2E] (reporting that Arizona commissioners are elected and that utilities influence elections and, therefore, the commissioners).

293. Zach Bright, *What Vogtle's Stumbling Finish Means for U.S. Nuclear Energy*, ENERGYWIRE (July 31, 2023), https://www.eenews.net/articles/what-vogtles-

PUC decisions can feature multiple provisions that overlap in effect. The California PUC's 2021 order in the Southern California Edison rate case was 694 pages long, with hundreds of findings and determinations.[294] The need to oversee and monitor how these provisions intersect with one another during their implementation would challenge even the most diligent investor. Beyond all this, the litany of utility abuses described above has made it problematic to take utility commitments in PUC proceedings seriously. Often, utilities come back years later with new or revised projects, proposing substantially increased costs to be passed on to customers.[295] Targeted ESG criteria would somehow have to account for the foreseeability of such actions, which would be challenging if not impossible.

In Part I, we described how utilities engage in greenwashing. Misrepresentations about PUC proceedings can make tracking their progress even more difficult. There is nothing unique about the mere fact that utilities greenwash on subjects such as their commitments to deploy more clean energy; other energy corporations have done the same. In 2021, the Federal Trade Commission took action against Chevron, accusing it of misrepresenting its efforts to invest more in renewable energy and reduce GHG emissions.[296] Shell has faced regulatory action in Europe for advertising claims it made about being net zero.[297]

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stumbling-finish-means-for-u-s-nuclear-energy/#:~:text=Georgia%20Power%20announces%20a%20series,price%20tag%20surpasses%20%2430%20billion [https://perma.cc/WVH3-F6L5].

294. *See* Cal. Pub. Util. Comm'n, *Proposed Decision on Test Year 2021 General Rate Case for Southern California Edison Company*, 1 (Aug. 19, 2021), https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M400/K807/400807458.PDF [https://perma.cc/N466-BSJ4] (making 788 findings of fact, 269 conclusions of law, and issuing thirty-seven orders).

295. As an example, before a single wind turbine was placed in the Atlantic Ocean off the cost of Virginia, the estimated price tag of Dominion Energy's 2.6 GW offshore wind project increased to $9.8 billion. Charlotte Rene Woods & Michael Martz, *SCC Backs Millions in Rate Increases for Dominion's Offshore Wind Project*, RICH. TIMES-DISPATCH (Aug. 6, 2022), https://richmond.com/news/state-and-regional/govt-and-politics/scc-backs-millions-in-rate-increases-for-dominions-offshore-wind-project/article_d0d3d113-bbad-5305-bf27-35e5a6421465.html [https://perma.cc/4Z7Z-7QL4]. A subsequent agreement lessened ratepayer responsibility for any eventual cost overruns beyond that but still left them on the hook for the full $9.8 billion plus 50% of overages up to $11.3 billion. Ethan Howland, *Dominion Settles with Walmart, Others on Potential Cost Overruns for $9.8B Offshore Wind Project,* UTIL. DIVE (Oct. 31, 2022), https://www.utilitydive.com/news/dominion-virginia-scc-cost-overrun-offshore-wind/635343/ [https://perma.cc/22LT-3G3K].

296. Shanor & Light, *supra* note 132, at 2039.

297. *See* Sarah George, *Shell's Carbon Offsetting Ad is Greenwashing, Rules*

In other industries, false corporate claims about carbon neutrality and other forms of greenwashing are common.[298] But when utilities greenwash about matters such as their net zero commitments, the complexities of the regulatory system make it easier for them to obscure their lack of progress and make it more difficult for the public to understand what is really happening.

In summary, any effort to craft more targeted ESG standards for utilities would raise serious problems with oversight and enforcement. Benchmarking the utility's efforts over a period of years requires flexible and adaptable oversight of how the utility has lived up to its commitments and how to bypass its slick public relations messages. This would be challenging.

C. *Shortcomings of Reforming Cost-of-Service Regulation to Accomplish ESG Objectives*

If more-focused ESG standards would not work, what about reforming the regulatory scheme more directly? This is a consistent focus in much of the existing literature by energy law scholars on improving the process of public utility regulation to enhance utilities' environmental performance. Roughly speaking, the energy law literature's policy prescriptions focus on accomplishing the sorts of goals that the ESG literature advocates. Surveying this broad and growing area, it is readily apparent that even though it does not typically acknowledge

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Dutch Watchdog, EURACTIV (Sept. 2, 2021), https://www.euractiv.com/section/all/news/shells-promotion-of-carbon-offsets-is-greenwashing-rules-dutch-watchdog/ [https://perma.cc/2P6E-5CRB]; Maxine Joselow, *Oil Giant Shell Accused of 'Greenwashing' and Misleading Investors*, WASH. POST (Feb. 1, 2023, 8:03 AM), https://www.washingtonpost.com/politics/2023/02/01/oil-giant-shell-accused-greenwashing-misleading-investors/# [https://perma.cc/7KZ3-DXWR]. Shell faces a complaint regarding their RES reporting on renewable energy filed with the SEC in the United States as well. Drew Newman, *SEC Receives Complaint of Alleged Greenwashing by International Energy Company*, CADWALADER CLIMATE (Feb. 10, 2023) https://www.cadwalader.com/cwt-climate/index.php?eid=145&nid=32#:~:text=On%20February%201%2C%202023%2C%20Global,violations%20of%20the%20federal%20securities [https://perma.cc/LNB3-UKA8].

298. *See, e.g.*, Ed Davey, *Glendale Woman Sues Delta Air Lines Over Claims of Carbon Neutrality*, L.A. TIMES (May 30, 2023, 3:34 PM), https://www.latimes.com/business/story/2023-05-30/glendale-woman-sues-delta-air-lines-over-claims-of-carbon-neutrality [https://perma.cc/3GV2-GYZN]. For an international perspective, see generally Matthew Rimmer, *A Submission on Greenwashing to the Senate Environment and Communications References Committee* (June 7, 2023), https://ssrn.com/abstract=4471406 [https://perma.cc/KRE9-75XU] (answering a greenwashing inquiry by the Australian Senate).

that it harmonizes within the ESG literature, it operates on something of a parallel track. In theory, then, reforming how PUCs regulate utilities might accomplish many objectives ESG advocates seek.

For example, Professor Jonas Monast argues in his article *Precautionary Ratemaking* that PUCs have and should use the authority to force utilities to reduce risks from climate change.[299] Ideas such as this have considerable appeal. Redefining the "public utility" concept[300] and adapting regulation to the times is consistent with our preferred means of resolving major problems. PUCs were created to be independent from utilities, so it is natural to assume that they can be improved to provide better oversight of utilities. We agree wholeheartedly with Monast and others who argue that the traditional regulatory approach has failed, so some other approach is necessary. Utilities can use traditional regulation as a shield against meeting ESG objectives—and it is not (currently) PUC's job to stop them. A respected treatise notes that PUCs are economic regulators, not environmental agencies.[301] Indeed, rate regulation principles would continue to provide incentives to utilities to avoid pursuing a robust ESG agenda.

For example, consider the fate of innovations trying to encourage utilities to invest in distributed energy resources and energy efficiency. Scholars have actively advocated for changes to the basic cost-of-service formula, such as performance-based regulation (PBR)[302] that could bring greener options onto a level playing field with large fossil-fuel power plants. These innovations aim to promote specific outcomes through incentives, such as bonuses to utilities that invest in energy efficiency. But none of these innovations have been altogether successful; their designs are insufficient to make enough headway against the basic incentives of the rate regulation formula and utilities are adept at gaming PUC proceedings to

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299. *See* Jonas J. Monast, *Precautionary Ratemaking*, 69 UCLA L. REV. 520, 522 (2022).

300. *See* William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614, 1620 (2014).

301. *See* LAZAR ET AL., *supra* note 99, at 34.

302. *See id.* at 89. Performance-based regulation ties utility revenues to metrics other than the utility's costs. Regulators using economic inducement to attempt to influence utility behavior is not new. *See* Paul L. Joskow & Richard Schmalensee, *Incentive Regulation for Electric Utilities*, 4 YALE J. ON REG. 1, 10 (1986).

avoid improving.[303] For example, PBR often simply results in regulators paying utilities extra profit to perform the basic requirements of providing utility service.[304] It pays utilities for achieving metrics such as meeting customer service levels,[305] reliability thresholds,[306] and responding to interconnection requests,[307] all of which should be commonplace without added incentives. Effective implementation also requires performance data that only the utility has, and obtaining that information—and verifying the quality of it—can be difficult for regulators.[308] Utilities are adept at finding loopholes in innovative programs to gain more profit from incentive structures—sometimes, even if they mismanage the programs and do not deserve the

303. *See* Steve Weissman, *Ensuring Better Regulatory Outcomes – The Need for Careful Consideration of Performance-Based Ratemaking Policies*, CTR. FOR SUSTAINABLE ENERGY 1, 2 (2023); *see also* Evan Popp, *After Referendum, Maine Advocates and Lawmakers Look to Bolster Utility Accountability and Performance*, ENERGY NEWS NETWORK (Jan. 9, 2024), https://energynews.us/2024/01/09/after-referendum-maine-advocates-and-lawmakers-look-to-bolster-utility-accountability-and-performance/ [https://perma.cc/XK2B-RK8V] (noting that PBR can lead to unintended consequences and that "utilities generally like performance metrics that are 'easily achievable, so they end up getting some bonus, like an enhanced rate of return, for stuff they were already doing'").

304. Herman K. Trabish, *Upheaval in Utility Regulation Emerging Nationally as Hawaii Validates a Performance-Based Approach*, UTIL. DIVE (July 5, 2022), https://www.utilitydive.com/news/upheaval-in-utility-regulation-emerging-nationally-as-hawaii-proves-a-perfo/625529/ [https://perma.cc/H9GV-NQHT].

305. Stephen Singer, *Connecticut Adopts Performance-Based Regulation as Eversource Raps Investor Environment*, UTIL. DIVE (Apr. 27, 2023), https://www.utilitydive.com/news/connecticut-performance-based-regulation-eversource-avangrid/648717/ [https://perma.cc/YN8W-VBTQ].

306. Stephen Singer, *Connecticut Drafts a Performance-Based Regulation System Following Utilities' Storm Response*, UTIL. DIVE (Feb. 6, 2023), https://www.utilitydive.com/news/connecticut-performance-based-regulation-eversource-avangrid-pura/642000/ [https://perma.cc/N3P6-ZBMK].

307. Trabish, *supra* note 304.

308. Popp, *supra* note 303.

premiums.[309] Other innovations, such as restructuring[310] and retail choice,[311] have not brought the desired outcomes.

No current idea for reforming utility rates addresses foundational concerns with the utility's underlying corporate structure. A utility's corporate structure and mission are largely irrelevant in a rate case, except for economic inquiries such as the evaluation of potential anti-competitive impacts of utility companies pursuing mergers. No utility is required to have any mission other than seeking the highest profits because no state's utility law specifies otherwise. Instead, the process largely takes corporate form as a given, rather than aiming to change it in any measurable way.[312] Thus, the problem remains. With the built-in incentives to maximize profits and minimize climate change policies, utilities only answer to their shareholders. As recently as 2020, the CEOs of many IOUs still had compensation structures tied to anti-clean energy benchmarks.[313] More utility CEOs now have their compensation tied to some ESG-related goals or outcomes, but much of this linkage is so vague that it is unlikely to result in progress.[314]

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309. Kavya Balaraman, *SCE Mismanaged Energy Efficiency Program, California Regulators Find, Ordering $76M Customer Rebate*, UTIL. DIVE (Dec. 2, 2022), https://www.utilitydive.com/news/sce-mismanage-energy-efficiency-program-california-regulators-order-rebate/637810/ [https://perma.cc/QFD8-TX7U].

310. Shelley He et al., *How Does Restructuring of Electricity Generation Affect Renewable Power?*, 43 ENERGY L.J. 125, 125–26 (2022) (finding little impact); Severin Borenstein & James Bushnell, *The U.S. Electricity Industry After 20 Years of Restructuring* 1, 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 21113, 2015), https://www.nber.org/papers/w21113 [https://perma.cc/AT37-Z73D].

311. Lynne Kiesling, *Electricity Restructuring and the Failure to Quarantine the Monopoly*, KNOWLEDGE PROBLEM (Feb. 16, 2023), https://knowledgeproblem.substack.com/p/electricity-restructuring-and-the?utm_source=substack&utm_medium=email [https://perma.cc/Q47M-YUTY].

312. *See* Singer, *supra* note 306 (describing how PBR is seeking to have utilities align profit motives to policy goals but is not mentioning changing corporate structure).

313. *See Pollution Payday: Analysis of Executive Compensation and Incentives of the Largest U.S. Investor-Owned Utilities* ENERGY AND POL'Y INST. (Sept. 22, 2020), https://energyandpolicy.org/utilities-executive-compensation-analysis/ [https://perma.cc/EUF6-R9XE].

314. Merel Spierings, *Linking Executive Compensation to ESG Performance,* HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 27, 2022), https://corpgov.law.harvard.edu/2022/11/27/linking-executive-compensation-to-esg-performance/ [https://perma.cc/S4FK-V3VW]. Bonuses tied to measures like profit might also encourage risky utility behavior. *See, e.g.*, Tim McLaughlin & Tom Hals, *Hawaiian Electric CEO's Bonus Lacked Incentive to Cut Wildfire Risk, Documents Show*, REUTERS (Aug.

Regulators have not succeeded at ensuring that public utilities actually work in the public interest. To a certain extent, that might be because of who regulators are. A recent study found that 25% of PUC commissioners from 2000 to 2020 had experience in the utility or fossil fuel industry.[315] Perhaps more concerning, 50% of PUC commissioners over the same period took a job with a utility or in an industry-adjacent role such as consulting after leaving the commission.[316] The revolving door between utilities and PUCs leads to more decisions favoring the industry,[317] and adds a challenge to changing PUC decision-making.[318] To address regulatory capture, one remedy is to remove PUC commissioners, whom consumers and investors cannot influence for the most part. PUC members obtain their positions through a wide variety of methods, including direct election in some states.[319] These selection methods provide less basis for leverage than the sway an investor might have over a corporate board to be more responsive to ESG issues. In states with direct PUC elections, utilities outspend the public to elect their preferred candidates[320] and candidates with previous political connections have an advantage over others.[321]

All of this illustrates the amplifying effects described above, in which the operations and structures of rate regulation empower utilities to obscure and downplay ESG concerns in proceedings before PUCs.[322] And as we and others have pointed

25, 2023), https://www.reuters.com/business/environment/hawaiian-electric-ceos-bonus-lacked-incentive-cut-wildfire-risk-documents-show-2023-08-25/ [https://perma.cc/ZL4T-DGMT].

315. Jared Heern, *Who's Controlling our Energy Future? Industry and Environmental Representation on United States Public Utility Commissions*, 101 ENERGY RES. AND SOC. SCI. 1, 4 (2023).

316. *Id.*

317. Sammy Roth, *The Revolving Door at Public Utilities Commissions? It's Alive and Well*, L.A. TIMES (June 8, 2023, 6:00 AM), https://www.latimes.com/environment/newsletter/2023-06-08/the-revolving-door-at-public-utilities-commissions-its-alive-and-well-boiling-point?utm_id=100364&sfmc_id=2600589 [https://perma.cc/2RJY-4756].

318. As we discuss in Part III, this is also a reason to be wary of entrusting PUCs with the sole responsibility for ensuring that purpose-driven utilities live up to the mandates enshrined in their new corporate charters. *See infra* Part III.

319. Heern, *supra* note 315, at 5.

320. Randazzo, *supra* note 292.

321. In states with elected PUC commissioners, sixty-five percent of them have "experience with electoral politics." Heern, *supra* note 315, at 5.

322. And because climate change has become politicized, some elected

out, the proceedings are tilted in favor of utilities, so it is not reasonable to expect positive change. The country needs a different approach.

III. A COMPREHENSIVE SOLUTION TO THE INTERSECTION OF ESG OBJECTIVES AND UTILITY REGULATION: CHANGING UTILITIES' CORPORATE FORM

Translating ESG into the electric utility landscape is a less than perfect fit, given utilities' monopoly power and the shortcomings of traditional rate regulation. In Part II, we demonstrated that neither improving ESG standards nor making changes to the cost-of-service regulatory system alone will be sufficient to achieve ESG goals. No set of ESG criteria can be designed to bring enough progress to meet climate goals and avoid utilities' worst abuses. However, it would also be insufficient to change the system of rate regulation that locks in above-average profits and allows for other forms of anti-competitive and anti-consumer behavior by utilities, unless its rules were fundamentally rewritten. Utilities' corporate form continues to mandate that utilities do one thing: maximize shareholder returns,[323] which utilities have done all too well.[324]

To make measurable progress, we need a solution that addresses both aspects of the problem: (1) the utility's ability to exercise its monopoly power and resist environmentally beneficial change and (2) the amplifying effects of state regulation that make change more difficult. Any system that attempts to hold utilities accountable must address these interconnected problems or it will fail. In this Part, we advocate for remaking utilities as purpose-driven entities, with independent oversight and verification of their ESG efforts.[325]

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commissions are more than willing to oblige. *See, e.g.*, Robert Walton, *Arizona's Chief Utility Regulator Bashes ESG, Says it's Not a Factor When Weighing Utility Plans*, ESG DIVE (Dec. 14, 2023), https://www.esgdive.com/news/arizona-corporation-commission-ESG-coal-gas-OConnor/702319/ [https://perma.cc/DR8E-KSA5].

323. The economist Milton Friedman once stated that, "the social responsibility of business is to increase its profits." Friedman, *supra* note 24.

324. This is also borne out by the fact that, of thirteen potential challenges facing IOUs, "economic regulation" and "market structure" were ranked twelfth and thirteenth, the two least important potential challenges. MARIO AZAR ET AL., BLACK & VEATCH, 2021-2022 ELECTRIC REPORT 6, https://webassets.bv.com/2021-11/21_SDR_Electric_Report.pdf [https://perma.cc/7TPM-F96J]. When queried about grid development, the availability of capital was ranked near the bottom of the list of concerns. *Id.* at 7.

325. Outside of the utility context, this is not the first time that proposals for

We outline the elements of purpose-driven utilities and then describe some implementation challenges.

First, we define the core purpose, which must include specific criteria for organizational strategy and decision-making to make progress toward deploying more clean energy and making other innovations in a fast-changing electric grid. Next, we define how the utility would reform its charter to one that considers the interests of various stakeholders, including employees, partners, customers, and shareholders. This would involve considerable changes to utility decision-making processes, and we discuss some required specifics about organization and strategy. New corporate charter provisions would require that diverse viewpoints be heard and acted upon as investment decisions are being planned and carried out, which is well beyond what is currently typical in utility decision-making. Finally, there is a need for enforcement because utility actions with respect to their new purpose cannot simply be hortatory. PUC orders should contain provisions for oversight and supervision, and other stakeholders should have enforceable rights to ensure that utilities are complying with their newly redefined responsibilities.

Which utilities should transform into utilities with purpose? The answer is a bit complicated. Some utility firms own both businesses regulated by PUCs and businesses that are unregulated and that compete with other firms without PUC oversight. We propose that the mandate to become purpose-driven utilities apply only to regulated monopoly utilities. As we describe below, doing so in a detailed and thorough way would alleviate concerns we identify with the rate regulation process. It would also help reverse a recent trend in the utility industry, in which firms with both regulated and unregulated businesses are selling the latter because the monopoly businesses have higher rates of return set by PUCs.[326] As we

changing the corporate form to better meet stakeholders' interests have been advanced. *See, e.g.*, Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 NW. U. L. REV. 425, 425 (2022) (proposing that high-profile companies in bankruptcy should be reconstituted as public benefit corporations with the goal of paying all victim claims fully).

326. Robert Walton, *Consolidated Edison Sells Renewable Energy Businesses to Germany's RWE for $6.8B*, UTIL. DIVE (Oct. 3, 2022), https://www.utilitydive.com/news/consolidated-edison-sells-renewable-energy-businesses-german-rwe-con-edison/633167/ [https://perma.cc/VKN6-L8TX]; Stephen Singer, *Eversource Set to Announce Decision on Sale of Stake in Offshore Wind Joint Venture With Orsted*, UTIL. DIVE (May 8, 2023), https://www.utilitydive.com/news/eversource-offshore-

explain, a purpose-driven utility should not earn higher rates of return in regulated businesses than in unregulated ones because that means regulators are providing more profit for utilities than the market otherwise would. We conclude that changing utilities' corporate structures would move more risk onto utility shareholders, where it properly belongs.[327]

This sweeping change would be a superior means for utilities to accomplish ESG objectives. Creating purpose-driven utilities is also consistent with the work of scholars who have argued for utilities to pursue the public interest within the regulatory scheme,[328] although it goes further by addressing the underlying concern about corporate form. The time is also right for this change because of technological innovation in the electric grid. The grid is no longer all large plants and long lines owned by monopoly utilities, and utilities' corporate form should reflect that new reality.[329] On the other hand, we are not so pollyannaish as to think that significant changes to corporate forms and ideologies are going to be easy. As has been noted, "business law lacks a durable commitment mechanism to enable long-term pursuit of multiple objectives beyond profit."[330]

Some scholars have contemplated going further still by making utilities publicly owned, removing the profit motivation.[331] While public power may be effective at solving

wind-orsted-new-england/649605/ [https://perma.cc/85ZP-RFNT] (explaining how Eversource sold its stake in offshore wind to focus on its regulated businesses); Larry Pearl, *Utilities Including AEP and Duke Are Unloading Renewables, Other Assets*, UTIL. DIVE (June 23, 2023), https://www.utilitydive.com/news/aep-duke-nisource-pge-utility-renewables-asset-sales/653583/ [https ://perma.cc/WK3K-L3BB]. For more on the mechanics of how IOUs act to favor regulated businesses in their portfolios, see Kovvali & Macey, *supra* note 199, at 2140.

327. *See* Marianne Lavelle, *Soaring West Virginia Electricity Prices Trigger Standoff Over the State's Devotion to Coal Power*, INSIDE CLIMATE NEWS (Nov. 20, 2022), https://insideclimatenews.org/news/20112022/soaring-west-virginia-electricity-prices-trigger-standoff-over-the-states-devotion-to-coal-power [https://perma.cc/7YVJ-JDL4] (discussing transfers in 2012 and 2013 by AEP and FirstEnergy of coal plants from their unregulated subsidiaries to their regulated subsidiaries, which adversely impacted ratepayers).

328. Boyd, *supra* note 300, at 1622.

329. Eisen, Mormann & Payne, *supra* note 213, at 109; David Roberts, *Power Utilities Are Built for the 20th Century. That's Why They're Flailing in the 21st.*, VOX (Sept. 9, 2015, 9:10 AM), https://www.vox.com/2015/9/9/9287719/utilities-monopoly [https://perma.cc/JY3P-ASXH].

330. Emilie Aguirre, *Beyond Profit*, 54 U.C. DAVIS L. REV. 2077, 2084 (2021).

331. *See, e.g.*, Shelley Welton, *Public Energy,* 92 N.Y.U. L. REV. 267, 274–75 (2017).

some of these challenges,[332] we do not consider full public ownership practical given the current landscape and the urgent need for transitions on our grid.[333] Public ownership by itself also will not solve all of the issues identified above; indeed, the failures we describe above are often present in publicly-owned systems.[334] And while others have suggested that corporations should adopt "a general corporate duty to act sustainably,"[335] we do not see that as promising due to definitional and enforcement concerns. Therefore, we propose a more workable solution that will solve many of the same challenges. Eventually, all utilities could eventually adopt this reform, even though we focus on IOUs where PUCs today can directly require utilities to change.

A. *The Purpose-Driven Corporate Form*

For some time now, scholars have advocated for moving corporations beyond simple profit maximization.[336] And the idea of a social corporation—one that is "uniquely committed to simultaneously earning profits for shareholders and creating social and environmental benefits"[337] and brings a broader group of stakeholders into corporate decision-making—is hardly new. As early as 1851, states organized certain corporations as public benefit corporations (PBCs).[338] The PBC

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332. *See, e.g.*, Julian Spector, *Kauai Became a Clean Energy Leader. Its Secret? A Publicly Owned Grid*, CANARY MEDIA (Nov. 7, 2023), https://www.canarymedia.com/articles/clean-energy/kauai-is-a-clean-energy-leader-its-secret-a-publicly-owned-grid [https://perma.cc/F5KU-YC8Y].

333. *See, e.g.*, Popp, *supra* note 303 (discussing the defeat of a ballot measure to replace Maine IOUs with a new public power entity).

334. *See, e.g.*, *Ex-San Francisco Utilities Head Found Guilty of Fraud in Wide-Ranging Federal Corruption Probe*, ENERGYCENTRAL (July 17, 2023), https://energycentral.com/news/ex-san-francisco-utilities-head-found-guilty-fraud-wide-ranging-federal-corruption-probe [https://perma.cc/GS65-4SU8]; Joshua Basseches (@JoshuaBasseches), X (Aug. 16, 2023, 9:35 PM), https://twitter.com/joshuabasseches/status/1691987039359479850?s=43&t=LNPLnREHmYkQUYDJtENVxw [https://perma.cc/AHM2-YBQY] (noting that "many consumer-owned utilities have worse energy profiles & there's no evidence that, generalizably, private utilities do worse on emissions").

335. Beate Sjafjell, *Time to Get Real: A General Corporate Law Duty to Act Sustainably* 2 (University of Oslo Faculty of Law Research Paper No. 2022-48) (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4224255 [https://perma.cc/BKD5-87JG].

336. *See, e.g.*, Esposito, *supra* note 29, at 642; Elhauge, *supra* note 29, at 763.

337. Esposito, *supra* note 29, at 681–82.

338. *See* Schulz v. State, 84 N.Y.2d 231, 243–45 (1994) (describing the history of state public benefit corporations in New York dating to the 1846 state constitution).

structure aims to keep a traditional corporate form but redefine it to "provide a better structure for specifying and monitoring credible, long-term commitments to non-shareholder interests."[339] Much more recently, corporations have chosen to be organized as "B-corporations" (B-corps), recognizing that their operations and decisions should include a wider group of stakeholders than the typical shareholder- and profit-driven corporate form allows.[340]

1. PBCs and B-corps: Description and Benefits

PBCs, also known as social purpose corporations, must take social considerations, in addition to the standard profit motive, into account when making decisions.[341] Instead of just shareholders, they must also consider a broader group of stakeholders and the specific public benefit for which they are organized.[342] A corporation becomes a PBC by filing new or revised articles of incorporation with the state entity that registers corporations.[343] Some state laws contain explicit provisions under which an existing corporation may reincorporate as a PBC.[344] In 2021, Veeva Systems, a computer software company, became the first publicly traded company and largest ever to convert to a PBC.[345] As required of a PBC,

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339. Elizabeth Pollman & Robert B. Thompson, *Corporate Purpose and Personhood: An Introduction*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 2 (2021).

340. Michael Bell, *What is a Certified B Corporation?*, HARV. BUS. SERVS., INC. (June 12, 2023) https://www.delawareinc.com/blog/what-is-a-certified-bcorporation/#:~:text=A%20Certified%20B%20Corp%20is,countries%20across%20153%20different%20industries [https://perma.cc/YFA7-9QFS]

341. Ellen Kennedy, *What Are Public Benefit Corporations (PBCs)?*, KIPLINGER (Oct. 15, 2021) https://www.kiplinger.com/investing/esg/603598/what-are-public-benefit-corporations-pbcs [https://perma.cc/W3BV-TBUF].

342. *Id.*

343. *See, e.g.*, Me. Bureau of Corps., Elections, and Comm'ns, *How to Tell Whether Your Nonprofit Corporation is a Public Benefit Corporation or a Mutual Benefit Corporation*, https://www.maine.gov/sos/cec/corp/determining.html#:~:text=Is%20designated%20as%20a%20public,exempt%20organization%20upon%20dissolution%3B%20or [https://perma.cc/2BU4-PDYJ]

344. States such as Delaware have recently made it easier for existing companies to convert into PBCs by amending their certificates of incorporation. Amy L. Simmerman et al., *Converting to a Delaware Public Benefit Corporation: Lessons from Experience*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 18, 2022), https://corpgov.law.harvard.edu/2022/02/18/converting-to-a-delaware-public-benefit-corporation-lessons-from-experience/ [https://perma.cc/MNM6-AVVM].

345. *See 2023 Public Benefit Corporation Report*, VEEVA (2023) https://www.veeva.com/wp-content/uploads/2023/05/2023-Public-Benefit-Corporation-Report.pdf [https://perma.cc/KV5Z-J9ZG].

the company filed a revised certificate of incorporation to include a public benefit purpose.[346]

The purpose and form of a PBC are spelled out in specified state statutory provisions. At last count, twenty-nine states have this type of law and others have legislation in the pipeline.[347] Laws authorizing PBCs vary from state to state, but, generally speaking, they allow for corporate forms providing for multiple purposes beyond strict shareholder primacy.[348] The PBC maintains its status as long as it is organized under the relevant statutory provision and shows a basic commitment toward its public goals; nothing more is required. This organizational structure has been adopted only in a very limited way: while "[m]ore than 3,000 companies are registered as public benefit corporations," that is only "approximately 0.01% of American businesses."[349] And of that number, even fewer are for-profit corporations: Patagonia and ice cream manufacturer Ben & Jerry's stand out as examples.[350] So while becoming a PBC and rejecting the idea of pure shareholder primacy is an option in a majority of states, profit-driven corporations have rarely taken this step.

One shortcoming of PBCs is that there is usually no automatic enforcement to ensure a PBC achieves the purpose for which it was incorporated, aside from the use of derivative actions by stockholders in some states.[351] Delaware is a popular state for incorporation due to other benefits accruing to corporations.[352] Under its PBC law, the only statutory enforcement requirement for a PBC is a periodic report by the corporation to its stockholders.[353] Other states allow "benefit enforcement proceedings" or similar actions to claim that PBCs

346. *See id.*

347. Esposito, *supra* note 29, at 688–93.

348. *See, e.g.*, VA. CODE ANN. § 13.1-787 (2022).

349. Maria Stracqualursi, *The Rise of the Public Benefit Corporation: Considerations for Start-Ups*, B.C. LEGAL SVC. LAB (Mar. 2017), http://bclawlab.org/eicblog/2017/3/21/the-rise-of-the-public-benefit-corporation-considerations-for-start-ups [https://perma.cc/8MQL-4PF8].

350. *See Public Benefit Corporation*, CORNELL L. SCH. LEGAL INFO. INST. (Nov. 2020), https://www.law.cornell.edu/wex/public_benefit_corporation#:~:text=Some%20well%2Dknown%20examples%20of,and%20crowd%2Dfunding%20website%20Kickstarter [https://perma.cc/ZHD4-LP9P].

351. Stracqualursi, *supra* note 349.

352. Chauncey Crail et al., *Why Incorporate in Delaware? Benefits & Considerations*, FORBES (Feb. 15, 2024), https://www.forbes.com/advisor/business/incorporating-in-delaware/ [https://perma.cc/P9JK-YJP2].

353. *See* 8 DEL. CODE ANN. tit. 8 § 366 (2022).

are not fulfilling their purpose.[354] Critically, though, standing to bring such an action is ordinarily limited to directors, shareholders, and owners of stock in a parent of the PBC—customers are not usually entitled to sue.[355] And relief is typically limited to injunctive relief to preclude the PBC from continuing to do the act that runs contrary to its articles of incorporation.[356]

In contrast to the PBC, the B-corp form is administered by a private sector firm, the non-profit organization B Lab.[357] A B-corp is a corporation that B Lab has certified after a review of the company's social and environmental performance as well as its transparency and accountability.[358] The goal is to certify those companies that meet "high standards of verified performance," accountability to all stakeholders, and transparency by making a wide variety of information publicly available.[359] To maintain certified B-corp status, a corporation must renew its assessment at least every three years and update it if the corporation has an initial public offering or a change of control.[360] This has proven popular: in 2023, there were 7,228 certified B-corps in 161 industries and ninety countries worldwide.[361]

In theory, requiring IOUs to become B-corps could solve many of the issues we identified in Parts I and II. By requiring the consideration of the interests of all stakeholders—including ratepayers and the environment, not just shareholders—B-corp status would legally bind utilities to a different paradigm. This could improve environmental performance, especially given the third-party verification requirements; improve social performance, especially in relation to ratepayers, the communities in which facilities are located, and employees;[362]

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354. *See, e.g.*, VA. CODE ANN. § 13.1-790 (2022).

355. *See, e.g.*, DEL. CODE ANN. tit. 8 § 367 (2022) (limiting to those who have purchased at least two percent of corporate stock).

356. Alanna Potter, *Purpose or Profit?: The Rise of Public Benefit Corporations in the Technology Industry*, 20 DUKE L. & TECH. REV. 90, 109 (2023).

357. *Make Business a Force for Good*, B LAB, https://www.bcorporation.net/en-us/ [https://perma.cc/HHF4-UKPS].

358. *Measuring a Company's Entire Social and Environmental Impact*, B LAB, https://www.bcorporation.net/en-us/certification/ [https://perma.cc/ZU27-KHWA].

359. *Id.*

360. *Id.*

361. *Make Business a Force for Good*, *supra* note 357.

362. James Mackintosh, *Shareholders Reign Supreme Despite CEO Promises to Society*, WALL ST. J. (Feb. 10, 2022, 7:40 AM), https://www.wsj.com/articles/share

and improve customer satisfaction and governance performance due to greater public trust through increased transparency and reduced information asymmetry. However, B-corps are not a panacea.[363] As one commentator notes, "B Corporation certification 'realistically offers only moral, rather than legal, assurances to non-shareholder constituencies and social interests.'"[364] This leads to the criticism that any B-corp certification is for branding more than for changing the actual decision-making of the organization.[365]

2. Drawbacks to PBCs and B-corps

With both the PBC and B-corp forms, drawbacks remain. One involves enforceability. The other focuses on long-term control.

As to enforceability, whether a business is organized as a PBC or certified as a B-corp, stakeholders other than shareholders and directors (in the case of a PBC) have no right of action to enforce the directors' duties to them.[366] This is slightly better for PBCs than B-corps but insufficient to allow for true accountability.

As to long-term control, both forms resemble other for-profit corporations in that only shareholders can change the board or the corporate charter.[367] This could undermine the ability to fulfill the corporation's purpose over time. Similarly, any decision will impact various stakeholders in different ways. Indeed, the stakeholder capitalism literature recognizes that there will be tradeoffs among different groups on almost every

holders-reign-supreme-despite-ceo-promises-to-society-11644496644?campaign_id=4&emc=edit_dk_20220211&instance_id=52830&nl=dealbook&regi_id=95594363&segment_id=82366&te=1&user_id=f961f9c4b4fb056fceafd24ca83cdc0e [https://perma.cc/7TE9-DQPH].

363. Esposito, *supra* note 29, at 696. *See generally* Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 ST. MARY'S L.J. 617 (2013) (analyzing the corporate governance structure created by the Model Benefit Corporation Legislation and discussing the inherent conflicts and problems it has created).

364. Esposito, *supra* note 29, at 696.

365. *Id.*

366. Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That for-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 150 n.45 (2012) ("Moreover, it is not clear to what extent the B Corporation concept is designed to give standing to other constituencies to sue to enforce the directors' duty to them.").

367. *Id.* (citing various provisions of Delaware corporate law).

issue.[368] However, nothing in these innovative forms guides the corporation's officers and directors on what weight to give any particular impact. Rather, this "would seem to be a matter entrusted to the judgment of the directors (albeit a calculus not so easily called a 'business judgment') and would be difficult for courts to second guess."[369] This provides continued cover to allow the corporation to claim that any action is tangentially related to its corporate purpose and thereby continue to avoid accountability.[370] And this would not address the problems we have identified with utilities' current profit-making incentives.

B. *The Purpose-Driven Utility*

Utilities' monopoly power can and must be refocused to contribute to the fight against climate harm and other ills. But simply mandating that IOUs either become PBCs or register as B-corps will not solve the challenges that we have identified. While we applaud the spirit and intent of both these corporate forms, neither is wholly sufficient to transform IOUs into purpose-driven utilities. Utilities could easily take the utmost advantage of the drawbacks in the PBC and B-corp forms: the lack of enforceability, the ability to shape long-term control through shareholder votes, and the lack of accountability through ambiguity. Therefore, any new corporate form adopted to reshape IOUs, curb the abuses we have identified, and truly provide services in the public interest must address these shortcomings.

That the most high-profile contemporary innovations in purposeful corporate forms would not work hardly causes us to fall into doomerism and despair. Instead, we propose that IOUs adopt a new corporate form—the purpose-driven utility—with provisions uniquely suited to the operational context of monopoly utilities. Some parts of the purpose-driven utility would have functions similar to their counterparts in PBCs and B-corps, such as a requirement that the duty of the corporate board fundamentally change. Other parts would be new, such as providing additional avenues for a broader stakeholder group to challenge specific actions. These components serve as

368. This makes the idea of only pursuing win-win-win purposes a farce, because they will rarely occur in practice. RANJAY GULATI, DEEP PURPOSE: THE HEART AND SOUL OF HIGH-PERFORMANCE COMPANIES 6 (HarperCollins 2022).

369. Strine, Jr., *supra* note 366, at 150 n.45.

370. *Id.* (*citing* Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932)).

a backstop for a PUC's enforcement of the utility's revised corporate charter.

1. The Utility's Purpose

We begin by defining a purpose-driven utility's core mission: its purpose. A proper corporate purpose "is often the driving force behind high-performance companies."[371] As "a unifying vision for all of a company's stakeholders, including its employees, customers, partners, and shareholders," the purpose "drives ethical behavior and creates an essential check on actions that go against the best interest of stakeholders."[372] By contrast, failing to embrace a broader purpose has "turned firms into arid, unfeeling places fueled by the narrow pursuit of profit," which "has exacted a heavy toll on the planet and people."[373] A broader corporate purpose for IOUs could be a cornerstone of transforming our energy system to act swiftly and decisively toward addressing climate change, energy justice, and other considerations. This is even more important for IOUs because their customers have no choice.

Unfortunately—as amply demonstrated earlier in this Article—the purposes that IOU monopoly utilities have chosen to embrace have not appropriately served the public interest. All within the energy sphere are familiar with what most IOUs would call their purpose: their ESG commitments usually have some variant of a responsibility to provide safe, affordable, and reliable service.[374] On the surface, this resembles the type of broad purpose that companies have been moving toward in recent years.[375] Companies have been creating flexible statements that can accommodate change because the companies have a broader understanding—beyond narrow, specific statements of purpose—of what goes into value creation over time.[376]

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371. Larry Fink, *Foreward to* GULATI, *supra* note 368, at xi.

372. *Id.* at xii.

373. GULATI, *supra* note 368, at xxi.

374. *See, e.g.*, *Corporate Sustainability*, PG&E CORP., https://www.pgecorp.com/corp/responsibility-sustainability/corporate-responsibility-sustainability.page [https://perma.cc/VT66-4FG3] ("PG&E's commitment to sustainability begins with our customers. They have told us—and we agree—that our responsibilities as an energy provider go beyond delivering energy that is safe, reliable, affordable and clean.").

375. *See generally* David J. Berger, *Reconsidering Stockholder Primacy in an Era of Corporate Purpose*, 74 BUS. LAW. 659 (2019) (discussing the shift to broader corporate purposes in recent years).

376. Dorothy S. Lund & Elizabeth Pollman, *Corporate Purpose* 1, *in* OXFORD

Why isn't this sufficient for utilities? After all, no one would credibly oppose "safe" or "reliable" service, and certainly not if it was "affordable," too. Consider, though, what is left out. "Safe, affordable and reliable service" is only about delivering the utility's product. It says nothing about the utility's stakeholders, other than as instrumentalities to that end. It looks at purpose functionally, as "a tool that [leaders] can wield."[377] And that is exactly what most utility executives do with that purpose: wield it to stifle competition, deflect blame, and stand behind its words to delay or defer progress.[378] It allows IOUs to continue a singular focus on corporate profit at the expense of all else. That must change.

When social good is presented as an alternative track to financial performance and not integral to it, most corporations and the vast majority of IOUs put a priority on the latter, with performance for shareholders outweighing all other considerations.[379] Defining a more proper purpose is even more important when dealing with investments that occur over a long time horizon—as typical utility investments do.[380] Because assets have long lives, a misguided purpose or one that does not adequately consider all facets of the public interest can become a scourge for decades—to customers, to the community where the asset is spewing pollution, and to the planet—to nearly everyone, in short, except the shareholders who benefit. The question then becomes how to transform IOU monopoly utilities into high-performance companies with purposes that are truly in the public interest.

In contrast to the type of purpose IOUs currently adopt, deep purpose binds stakeholders together.[381] What we propose would do exactly that: bind the goals of monopoly IOUs to the rest of the stakeholders who are harmed by IOUs' current profit-driven focus. At its core, such a corporation stands for and acts on something bigger than its economic bottom line. It aims to set an overall purpose along with measurable goals to put that

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HANDBOOK OF CORPORATE LAW AND GOVERNANCE (2d ed. Forthcoming 2023); Pollman & Thompson, *supra* note 339, at 1.

377. GULATI, *supra* note 368, at 1.

378. Eisen & Payne, *supra* note 204, at 1103.

379. GULATI, *supra* note 368, at 6. While some of "these leaders strive to serve society, they tend to perceive shareholder value as a performance baseline or nonnegotiable, and social value and purpose as (sometimes) negotiable. They limit their pursuit of social value projects to those where the economic payoffs are also clear." *Id.*

380. *See* Larry Fink, *Foreward to* GULATI, *supra* note 368, at xiii.

381. GULATI, *supra* note 368, at 1.

purpose into action and maximize positive impact. This would replace the maxim that "the first duty of a public company is to remunerate shareholders"[382] with a more inclusive purpose.

Instead of broad, easily manipulated statements such as "safe, affordable, and reliable service," IOUs should be required to adopt statements that are more targeted to the full range of responsibilities for which they have been granted their monopolies. These include having more ambitious goals for serving the public interest. An IOU's purpose should "delineate an ambitious, longer-term goal for the company" and "give this goal an idealistic cast, committing the firm to fulfillment of broader social duties."[383] The purpose must be defined specifically enough that it can be legally enforced by a variety of stakeholders and not just shareholders (which we discuss more fully below), creating an enforceable right by stakeholders for failure to meet the purpose. A purpose that is only vague and aspirational is difficult to enforce.[384] Adopting a relevant and meaningful purpose would also be a powerful incentive for the IOU's employees. The fact that "humans need purposeful work and the ability to integrate work with their personal reasons for being"[385] has been well established. Enshrining a purpose as an IOU's core mission would give employees compelling reasons to work as part of a community, with something more than simple economic self-interest motivating them.

Some may argue that a corporation cannot change its purpose to be anything other than maximizing shareholder value. But a majority of states now have "constituency statutes," which allow corporate boards to consider the interests of a variety of corporate stakeholders.[386] A typical form of this statute allows a director to "consider the interests of the corporation's employees, suppliers, creditors and customers[;] the economy of the state, region and nation[;] community and societal considerations[;] and the long-term and short-term interests of the corporation."[387] These statutes allow corporations to balance the needs of all constituencies, rather

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382. *Id.* at 187.

383. *Id.* at 2.

384. Pollman & Thompson, *supra* note 339, at 3.

385. GULATI, *supra* note 368, at 66.

386. Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land*, 42 LOY. L.A. L. REV. 765, 768 (2009).

387. MASS. GEN. LAWS ch. 156B, § 65 (2023).

than simply maximizing value for shareholders.[388] The bottom line is that, in terms of defining the core purpose for which the utility is incorporated, nothing we are proposing is a new idea. Instead, it is just a refinement on what is allowed under existing law.

This change is necessary for the long-term survival of utilities themselves, whether they acknowledge it or not. Climate attribution (linking companies to their climate harms) is becoming more clear every day.[389] It is well documented that utilities—much like Exxon and other oil companies—knew about the harm their businesses were causing our climate system.[390] Because they are rate regulated businesses, and therefore are able to pay dividends to shareholders at a higher rate and more regularly than many other corporate entities, it may be that IOUs will continue to have supportive shareholders. But this is by no means certain. Climate risk is investment risk—and utilities have an amazing amount of climate risk, with more accruing every day. To continue and maintain any social license to operate, a change in stakeholder focus and purpose is needed.

2. Organization and Strategy

To articulate a corporate purpose is one thing, to accomplish it is quite another altogether. As Larry Fink, the CEO of BlackRock, has noted, "delivering on one's purpose for multiple stakeholders means reshaping a business's core operations."[391] Merely doing what is convenient is not enough: that is simply treating a larger societal purpose as secondary to delivering for shareholders, thinking of these two as separate.[392] As we demonstrated above, that will not divert a company from its sole focus on profits. This leads to two questions: (1) who are a utility's stakeholders, and (2) what operations should purpose-driven utilities change?

388. Lund & Pollman, *supra* note 376, at 5.

389. Marco Grasso & Richard Heede, *Time to Pay the Piper: Fossil Fuel Companies' Reparations for Climate Damages*, 6 ONE EARTH 459, 461 tbl. 1 (2023), https://www.cell.com/one-earth/fulltext/S2590-3322(23)00198-7 [https://perma.cc/HZ2Y-EJKT].

390. Shannon Hall, *Exxon Knew About Climate Change Almost 40 Years Ago*, SCI. AM. (Oct. 26, 2015), https://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/ [https://perma.cc/A8ZS-5PY5].

391. Larry Fink, *Foreward to* GULATI, *supra* note 368, at xiv.

392. GULATI, *supra* note 368, at 5.

In our view, stakeholders would include ratepayers, employees, suppliers, the communities where utilities operate, others involved in the broader utility ecosystem, and shareholders. Bringing this diverse group of stakeholders together means that decisions would consider numerous different impacts on companies, communities, and the planet. Consider a specific type of decision: how a utility should respond to the impacts of long interconnection times on integrating renewable energy into the grid.[393] This would involve considering impacts on companies because they should want to reduce GHG emissions at the lowest cost (and utility-scale renewables are the cheapest form of electricity right now); on communities because continuing fossil fuel generation maintains pollution sources in those neighborhoods which would otherwise go away; and on the planet because every bit of GHG emissions that we keep out of the environment benefits us all.

How should IOUs' operations be reconfigured to accomplish these goals? Key to a purposeful organization is the development of metrics that are not solely financial and recognizing that meeting those non-financial goals and targets is just as important as meeting financial performance benchmarks. Financial and social metrics must be given the same weight; they must merge with each other, and integrated reporting must be adopted. This involves tradeoffs and recognizing that there will be multiple conflicting goals that need to be accomplished at the same time. For IOUs, these goals should include metrics focused on a wide range of stakeholders, including the environment and all the inhabitants of the planet, not just those who work for, receive service from, or invest in the particular utility. As we write this, unprecedented heat waves are gripping three continents and the oceans.[394] It is well past time for corporations to recognize, whether they want to or not, that we are all connected. Thus, organizational objectives should be meant to remove shareholders from their position of

393. Brad Plumer, *A Bottleneck on the Grid Threatens Clean Energy. New Rules Aim to Help*, N.Y. TIMES (July 27, 2023), https://www.nytimes.com/2023/07/27/climate/electric-grid-ferc-bottleneck.html [https://perma.cc/S32K-DTMX]; Improvements to Generator Interconnection Procedures and Agreements, 18 CFR Part 35, Order No. 2023 (Fed. Energy Reg. Comm'n July 28, 2023) (final rule) (addressing the problem).

394. Laura Paddison, *Global Heat In 'Uncharted Territory' As Scientists Warn 2023 Could Be The Hottest Year On Record*, CNN (July 8, 2023, 4:05 AM), https://www.cnn.com/2023/07/08/world/extreme-global-temperature-heat-records-climate/index.html [https://perma.cc/R8VJ-C5W6].

primacy and make them one member of the entire group of stakeholders, and certainly not the first stakeholder considered in all instances.

What form would these metrics take? Consider one example: enforceable promises to reduce GHG emissions. Net zero promises and other commitments that IOUs make in their ESG disclosures to reduce carbon emissions are not intrinsically problematic. In a previous article, we argued that a utility's lodestar should be "resource agnosticism"—preferring low-cost solutions for meeting new demand without preferring any one source of electricity generation and while accounting for environmental externalities.[395] In theory, a utility's net zero commitment would prompt it to follow this path. But the incentives built into state regulation, combined with the lack of enforceability and the resulting lack of follow through, send utilities in the other direction. And this is without considering other ways they can bypass their promises, such as using tools including carbon offsets and not counting Scope 3 emissions. The solution is to make those GHG commitments mandatory in the corporate charter and therefore enforceable. A typical statement of this sort would also disclaim any use of offsets to achieve the goals, describe at least one feasible pathway to achieving the goals, and include interim targets that could be used to mandate course correction should the utility miss its milestones. As we discuss below, this would introduce opportunities for stakeholders to enforce both short-term and long-term commitments of resources by utilities against the commitments contained in their charters.

3. Stakeholder Involvement and Enforcement

For most public corporations, the pressure associated with ESG reporting may lead to outcomes with positive impacts on their stakeholders. But, as noted above, the primary ways in which corporations can be prompted to act in the social good—such as avoiding potential for harm to their reputational risk—do not deter IOUs because their customers have no ability to choose alternate providers.[396] So, where that may constrain the

395. Eisen & Payne, *supra* note 204, at 1113 (terming this "central to discussions of every governance process and every individual project and [believing it should] serve as the benchmark against which an existing governance institution is measured").

396. Pressure by large corporations to procure clean energy may lead to progress toward decarbonization. Vandenbergh et al., *supra* note 20, at 1. However, many

rent-seeking actions of other corporations, it cannot do so here. The other main force that could exert this pressure—government regulation—has been ineffective.[397] Therefore, the typical avenues of holding corporations accountable are wholly inadequate for monopoly utilities. With the change in corporate form, a change in oversight must also occur.

First and foremost, this requires democratic engagement with a utility's stakeholders.[398] This is a principal difference between the PUC and the B-corp, which does not change stakeholder involvement in decision-making. The utility must commit to mechanisms by which major decisions, such as timetables and cost commitments for power-plant building, will be made by consumers and the company working together. As an example, consider how integrated resource planning could be conducted differently from how it is now. A majority of states have IRP processes in place that, broadly speaking, require a utility to show how they are going to provide service and spend money toward that goal.[399] The process is "integrated" because, in theory, all sources of supply and demand are considered. Supply-side resources (building a new power plant) and demand-side resources (demand response and energy efficiency measures) are supposed to be treated on a level playing field. The IRP process involves several different steps, including identifying the utility's goals and objectives and deciding on the resources (such as new power plants) that it will put in place. As part of this analysis, the utility conducts load (demand) forecasting, develops planning scenarios and models to assess various ways that the utility can meet demand while satisfying the defined constraints, and outlines scenarios for how new resources will be integrated into its existing system. The final output is a plan for deploying supply-side and demand-side resources over a period of several years, usually as spelled out in a state statute.

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manufacturing facilities, data centers, and the like are being built in places with either no or low renewable portfolio standards and that have not restructured to provide a choice to those organizations, so this is insufficient to force a full change in utility behavior. *Id.* at 27.

397. *See supra* Section II.A.2.

398. Eisen & Payne, *supra* note 204, at 1118.

399. LAZAR ET AL., *supra* note 99, at 73–75; for one state's example, see Donald M. Kreis, *Warning: A Pillar of Utility Regulation May Be About To Topple*, INDEPTHNH.ORG (Mar. 2, 2023), https://indepthnh.org/2023/03/02/warning-a-pillar-of-utility-regulation-may-be-about-to-topple/ [https://perma.cc/CM2W-EQJU] (discussing a New Hampshire utility's IRP).

IRPs have considerable shortcomings, but a process led with citizen involvement from the outset could address many of them. First, as we have noted, utilities often constrain the breadth of the analysis by making forecasts, building models, and compiling data largely out of public sight.[400] Involving a broader group of stakeholders in the modeling and analysis stage could deter the utility from making questionable assumptions about the future. Additionally, because they are plans (the "P" in IRP), IRPs aren't binding. Utilities can—and do—walk away from the commitments they have made.[401] But if a utility's corporate charter contained a net zero pledge, citizens would be able to both prevent the utility from bypassing its pledge in its integrated resource plan and use the language of the charter to hold the utility's feet to the fire if it attempted to build power plants not specified in the plan.

We believe utilities must commit to the broadest possible involvement by outside stakeholders. At the same time, we acknowledge that participatory governance is excellent in theory but faces considerable implementation challenges.[402] One involves resources and capacity-building for proper participation. At present, intervenors do the best they can to work within the current structure to put forward the public interest. However, for all the reasons we mentioned above, they are far under-resourced compared to utilities, so they often focus on a limited number of issues, such as reducing rates or minimizing the impacts of service disconnection. State statutes limit intervenors' ability to take part in PUC proceedings.[403] Even where intervenors can take part, they often find it prohibitively expensive to do so.[404] Intervenor compensation is incredibly limited and only available in a small number of

400. Eisen & Payne, *supra* note 204, at 1119–20.

401. Karen Uhlenhuth, *Evergy's Conflicting Power Plans Undermine Stakeholder Input, Critics Say*, ENERGY NEWS NETWORK (Nov. 10, 2021), https://energynews.us/2021/11/10/evergys-conflicting-power-plans-undermine-stakeholder-input-critics-say/ [https://perma.cc/L4Y4-S9XU].

402. Jaime Alison Lee, *Turning Participation into Power: A Water Justice Case Study*, 28 GEO. MASON L. REV. 1003, 1004 (2021); Heather Payne, *A Long Slog: What a Ten Year Hydroelectric Relicensing Process Demonstrates about Public Participation and Administrative Regulation Theories*, 53 IDAHO L. REV. 41, 44 (2017).

403. *See* NAT'L ASS'N REGUL. UTIL. COMM'RS, STATE APPROACHES TO INTERVENOR COMPENSATION 1, 5, 11 (Dec. 2021), https://pubs.naruc.org/pub/B0D6B1D8-1866-DAAC-99FB-0923FA35ED1E [https://perma.cc/S85D-7GUZ].

404. *See id.* at 4.

states.[405] Contrast these facts with the utility's situation: with the exception of the three states mentioned above (Colorado, Connecticut, and Maine), utilities can charge ratepayers for all the costs (including those relating to expert testimony) associated with getting more profit from their customers in PUC proceedings.[406] Utilities should remedy this power imbalance by providing resources for consumer involvement in decision-making, and this should be embodied in their new corporate charters.[407] We have previously argued that there are "numerous ways in which it is difficult for laypersons to understand the complex issues involved in this field of law" and numerous barriers to their participation.[408] Without a commitment to address these issues, the ideal of broad-based participation cannot be achieved.

Another issue that must be addressed is information asymmetry. As we have noted, intervenors and others cannot participate meaningfully in PUC proceedings because IOUs withhold data.[409] This information asymmetry leads to a lack of accountability. Let us be clear: there is absolutely no reason that an IOU should be able to withhold information from public disclosure. Because they are not in a competitive situation, there is no compelling business reason that information is blocked. The reason information is withheld is to further the dominant position of the IOU and to make meaningful participation by other stakeholders more difficult. Therefore, any information that a monopoly IOU would like to reference, rely on, or otherwise use in any way in any proceeding must be publicly accessible without any additional consideration or confidentiality restrictions—and in whatever form all other docket materials are available in, including online.[410] Without removing the information asymmetry that exists, IOUs will continue to evade accountability and profit from the ambiguity.

405. See *id.* at 5, 11.

406. *See id.* at 4.

407. Aneil Kovvali & Joshua C. Macey, *The Corporate Governance of Public Utilities*, 40 YALE J. ON REGUL. 569, 605 (2023) (calling for "ratepayers to have direct involvement in corporate governance matters").

408. Eisen & Payne, *supra* note 204, at 1114.

409. See *supra* Section II.B.

410. Kovvali & Macey, *supra* note 407, at 604–05 (calling for information sharing). This includes information such as utility models. If the information is in proprietary software and the utility wants to use them, then licenses, computing time, and the like must be made available for other stakeholders, with all assumptions disclosed as well.

Finally, we endorse a commitment in the charter to maintain a separate board of directors for the regulated monopoly utility. This would provide an independent body to implement the new purpose that would exist separately from the board of any parent utility company, which may also own unregulated businesses. This board should have broad representation of different stakeholders, including employees and members of the public.[411] Crucially, it should not have a majority from the monopoly utility itself nor should more than one seat be held by anyone from a parent corporation or anyone with a joint appointment (a situation that would often come up for the monopoly utility because the CEO of the monopoly utility is often also a vice president of the parent holding company). Because individuals on the board of directors would still be fiduciaries to the regulated monopoly utility, with the potential for liability from the fiduciary relationship,[412] the wording of this provision in the charter will be key.

This participation by members of the public is also crucial due to the information asymmetry issues discussed above. As members of the board, individuals would have the right to access information that utilities typically keep close or affirmatively hide. These individuals would have the ability to ensure that all that data is available to the PUC, intervenors, and members of the public for full disclosure and comprehensive decision-making. The ability to have this data-sharing would be an additional incentive for the utility to properly disclose, because not doing so would risk disclosure by an independent board member with the added disgrace that the utility was attempting to hide or not disclose the applicable data.

4. PUC Actions (Creating the Purpose-Driven Utility and Oversight of It) and Legal Authority to Do So

State PUCs should establish the initial requirements for purpose-driven utilities and should oversee whether a utility

411. While employee representation on boards is atypical in the United States, it is common in other countries. Andrea Garnero, *What We Do and Don't Know About Worker Representation on Boards*, HARV. BUS. REV. (Sept. 6, 2018), https://hbr.org/2018/09/what-we-do-and-dont-know-about-worker-representation-on-boards [https://perma.cc/D3TN-P9NQ].

412. Tom Gosling & Iain MacNeil, *Can Investors Save the Planet? - NZAMI and Fiduciary Duty*, 18 CAP. MKTS. L.J. 172, 172, 175–77 (2023) (discussing how asset managers would want explicit mandates from clients to work toward sustainability targets given standard fiduciary duty law).

has complied with its new charter. One main purported benefit of shareholder primacy is that without it there would be no credible oversight of business managers.[413] For regulated utilities, that rationale does not hold true if PUC oversight is robust. The alternative of outsourcing oversight to a private sector organization has the same limitations of relying on the private sector that we identified above. Ascertaining whether the utility has properly created a purpose-driven charter and is complying with it presents novel challenges. Combined with the complexity of utility regulation, it would be even more difficult for any entity other than a PUC to adequately determine whether a utility is acting under its new mandate for the benefit of all of its stakeholders.

Creating a new purpose for the utility requires a reconfigured role for the PUC. At first, it would decide to ratify the new corporate charter. To refocus IOUs as purpose-driven utilities, they would first reincorporate as corporations designed to serve the public interest, and then the PUC would re-register these new corporations as the utilities holding the monopoly franchises. In keeping with the discussion above, each utility's certificate of incorporation and charter would be required to include the specific purpose to consider the interests of various stakeholders, including employees, partners, customers, and shareholders. After that, the PUC must take an active role in policing the utility's accomplishment of the goals outlined in the purpose, rather than simply reacting to the utility's proposals. To enable continuing oversight, each PUC should create a new form of regulatory proceeding that would take place ideally on an annual basis, or even more frequently than that. This proceeding would be designed to resemble other situations where PUCs have ongoing oversight, such as overseeing implementation of state renewable portfolio standards.[414]

The PUC's primary responsibility in these proceedings would be to evaluate compliance with the terms of the charter in light of the utility's proposals for capital projects and other improvements to its system. In evaluating whether all stakeholders have been represented in the development of the utility's agenda going forward, regulators will also need to be mindful of a gloss of participation from stakeholders rather than true engagement. It cannot be that the squeaky wheel gets

413. Pollman & Thompson, *supra* note 339, at 3.

414. *See, e.g.*, VA. CODE ANN. § 56-585.5 (2022) (providing for annual reviews of utilities' compliance with the state's RPS).

the grease—priority cannot simply be given to those interests who make themselves the loudest.[415] This is consistent with the additional intervenor and stakeholder provisions we suggest in this section.

No new statutory authority is necessary in any state for the PUC to require utilities to change their charters and to oversee compliance. Instead, PUCs would use the broad authority they already have over monopoly utilities' rates and terms of service. A typical statutory provision gives a PUC "general supervision over the rates charged and service rendered by all public utilities in this State," and all power necessary to accomplish this task.[416] The PUC may usually act through rulemaking or adjudication orders in individual cases to "require all companies under its supervision to establish and maintain such public services and facilities as may be reasonable and just."[417] We have criticized the breadth of the "just and reasonable" standard as enabling the utility to take actions to the detriment of its various stakeholders, but it is precisely this breadth that also allows a PUC to act proactively to dictate the utility's new terms and conditions of service. So, for example, states that have taken bold actions to spur more clean energy innovation, such as New York, have relied on this authority as justification for their actions.[418] For this reason, while legislative action might spur PUCs to act, we do not believe it is necessary or desirable.

As long as the terms the PUC specifies are related to the provision of service by the utility, the PUC normally has broad latitude to operate. All of the provisions that we have proposed relate directly to the utility's provision of service. For example, an updated corporate purpose enables the utility to take actions relating to its rates and services far into the future in a principled way and to be guided in decision-making by its new priorities. As a result, statutes providing defined powers to

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415. Sjafjell, *supra* note 335, at 6; *see also* Michael Zschokke, *Meaningful Participation for Clean Energy Justice*, 21–23 (May 9, 2023) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4423667 [https://perma.cc/UJP6-PTZU].

416. N.C. GEN. STAT. § 62-32 (2023).

417. GA. CODE ANN. § 46-2-20(c) (2024).

418. New York's "Reforming the Energy Vision" blueprint began in 2015. N.Y. Pub. Serv. Comm'n, Order Adopting Regulatory Policy Framework and Implementation Plan, 14-M-0101, at 12 (Feb. 26, 2015); Joel B. Eisen, *Dual Electricity Federalism Is Dead, But How Dead and What Replaces It?*, 8 GEO. WASH. J. OF ENERGY & ENV'T. L. 3, 13 (2016).

PUCs would therefore have enough flexibility to encompass the type of change we envision for utilities.

An additional benefit of this type of reorganization may be a change in the attitude of the PUC itself. A PUC may be more willing to develop more innovative policies to bring about emissions reductions or deploy more carbon-free alternatives when it has already undertaken the analysis that would support requiring an individual utility to incorporate those requirements in its basic decision-making. This type of institutional rewiring may be especially valuable if a PUC has been or is captured, for it would empower the PUC to break free of entrenched thinking.

5. Oversight by the Public

One sticking point remains. In Part II, we discussed the limitations of the existing regulatory system and of PUC commissioners as decisionmakers. In the previous section, we assigned considerable responsibilities to the very decision-makers whose actions we often question. Given the lack of a compelling, credible alternative, that makes sense. But that means that there must be a meaningful way to enforce the commitments that a utility has made, either directly or within proceedings at the PUC. Customers must have an enforceable right to sue the utility directly or bring an action before the relevant PUC to enforce compliance.

Given the questions about whether a corporate charter is a contract and can therefore be enforced with contract law principles,[419] we provide a more direct means when customers choose to enforce directly rather than through a proceeding at the PUC: a citizen-suit provision adopted in the articles of incorporation for monopoly utilities. This must be a right open to customers. Given how incumbent entities have warped agency processes to their advantage, customers must have the ability to go directly to the courthouse to sue; waiting for an agency review process that may never conclude is unacceptable. Likewise, any right to enforce might be illusory if either the PUC or the courts placed a burden of proof on the customer bringing the enforcement action that sets the bar too high. Therefore, we propose that the PUC's order creating purpose-driven utilities should state that the customer must only plead a prima facie case that the utility is not complying with a commitment. The utility would then have the burden to prove

419. Lund & Pollman, *supra* note 376, at 4.

that it is actually living up to the commitments it has made. Again, this is not a new concept in law,[420] but it is a new concept for how customers interact with monopoly IOU utilities. As with citizen suits like those available under federal environmental laws,[421] if a customer or ratepayer is a prevailing party, then attorney's fees would be paid. Adopting orders or regulations should also make clear that these fees are to be paid by the utility shareholders and not by ratepayers. Any funds spent defending against such actions must also be solely funded by monopoly shareholders, not ratepayers.

6. Implications for Existing Corporate and Utility Law

Scholars have discussed features of corporate law that may stand in the way of fully realizing the vision of an ongoing, broad stakeholder-based corporate form.[422] While it is beyond the scope of this Article to evaluate all of them, one issue that PUCs and courts may need to address is the potential impact of the business judgment rule. This rule generally holds "that boards and management have substantial discretion in shaping corporate strategy and implementing it."[423] On the surface, that might seem an impediment to some of the more focused proposals we offer. However, one solution flows directly from what has already been proposed: having a specific corporate purpose. Under the doctrine flowing from the Delaware Court of Chancery's *In re Caremark International Inc. Derivative Litigation*[424] decision, some directors may be held liable for breaches of their fiduciary duties to corporations for failing to provide adequate oversight with respect to "mission-critical risks," that is, risks that pose existential threats to a business.[425]

Caremark set forth the general standard for holding directors liable for losses by corporations. It provides in relevant part that,

420. *See* Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413, 413, 427 (1997).

421. *See* David E. Adelman & Jori Reilly-Diakun, *Environmental Citizen Suits and the Inequities of Races to the Top*, 92 U. COLO. L. REV. 377, 379, 406, 446 (2021).

422. *See* Lund & Pollman, *supra* note 376.

423. Bijan Avaz, *The Promise and Perils of Regulating ESG*, THE REGUL. REV. (May 28, 2023), https://www.theregreview.org/2023/05/28/sunday-spotlight-the-promise-and-perils-of-regulating-esg/ [https://perma.cc/95NC-DX2A].

424. 698 A.2d 959, 971 (Del. Ch. 1996).

425. *Id.* at 971.

> Generally[,] where a claim of directorial liability for corporate loss is predicated upon ignorance of liability creating activities within the corporation, . . . only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability.[426]

In the recent *Marchand v. Barnhill*[427] decision, the Delaware Supreme Court found this lack of good faith when officers and directors failed to monitor corporate operations.[428] *Marchand* involved an outbreak of listeria at a Blue Bell ice cream plant.[429] The court discussed two factors in evaluating the lawsuit against Blue Bell's directors: first, that the company made only one product—ice cream—and so a threat to food safety was an existential threat to the company,[430] and second, that the company was heavily regulated, in this case, by the Food and Drug Administration.[431] Accordingly, the failure to monitor food safety could not be indemnified and was not covered by the business judgment rule.[432] The decision describes *Caremark* lawsuits as tough to win but not when a board has "no system of board-level compliance monitoring and reporting."[433]

IOUs are similar to ice cream manufacturers in that they provide one product: electricity. And, of course, they are heavily regulated. Therefore, a utility board's failure to put a system in place to ensure that the utility is indeed reducing GHG emissions may not be covered by the business judgment rule. That failure may well be viewed as ignoring an existential threat to the utility, if its survival depends on making a successful transition to clean energy. However, those tasked with monitoring enforcement should recognize that there still may be a predisposition to pay only passing service to these new commitments and use tools like the business judgment rule to

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426. *Id.*

427. 212 A.3d 805, 809 (Del. 2019).

428. *Id.* at 809.

429. *Id.* at 807.

430. *Id.* at 809; Trautman & Newman, *supra* note 1, at 107.

431. *Marchand*, 212 A.3d at 810; Katherine M. King, *Marchand v. Barnhill's Impact on the Duty of Oversight: New Factors to Assess Directors' Liability for Breaching the Duty of Oversight*, 62 B.C. L. REV. 1925, 1956–57, 1968 (2021).

432. Trautman & Newman, *supra* note 1, at 107.

433. *Marchand*, 212 A.3d at 822.

then ignore them. PUCs and courts should be on the lookout for this behavior and not allow it.

Another obstacle in corporate law is the typical corporation's system of shareholder voting. Depending on what must be submitted for a vote, if that matter is only presented to shareholders, those shareholders—acting in their self-interest—might undermine the broad stakeholder considerations built into the purpose-driven utility's charter. Several specifics of our proposal may mitigate this potential harm. First, the new composition of the utility's board, with broader representation, should serve as a check on harmful proposals brought to shareholders by the board. Second, a vote that goes against the commitments that a utility has made in its charter could be challenged by a member of the public as doing precisely that. A vote should be set aside (and attorney's fees paid by the shareholders) if it is found that the shareholders did, indeed, vote to repudiate prior commitments or move the corporate form back in any way to one that could continue the abuses set out in this Article. Finally, if a utility's shareholders were to attempt to violate the charter, the PUC could use its oversight powers to pursue administrative remedies, including, presumably as a last resort, revoking the utility's franchise. Given these guardrails, a change in shareholder voting rules is not necessary at this point in time. However, we raise the issue so PUCs and others may be aware that this and other changes to corporate law may need to take place.

This discussion has centered on some aspects of state utility law—the just and reasonable standard, the laws governing specific utility processes such as IRPs, and so forth—and there will undoubtedly be others that are impacted by the utility's change in corporate form. Again, it is not our aim to examine all of these intersections, but one deserves mention at this time. PUCs will need to reexamine their fundamental assumptions around prudency. As we mentioned earlier, the prudent investment standard is the benchmark for deciding whether a PUC will approve a specific proposed expenditure. At this time, PUCs do not typically delve in-depth into whether prudency is met. Instead, it is effectively assumed in virtually all cases when reviewing both capital investments and operational expenses. PUCs will need to reinvigorate their prudency analyses to ensure that actions are prudent in light of the new commitments that IOUs have undertaken through transforming into purpose-driven utilities.

CONCLUSION

Regulated monopoly utilities have an outsized adverse impact on our climate, but their basic corporate structures have not changed for decades. We envision a transformed electric grid where purpose-driven utilities act more in the public interest with broad stakeholder engagement and reformed corporate structures that put teeth into what up until now are vague, unenforceable promises by our largest utilities.

As one commentator has put it when discussing the need for companies to take more responsibility for our collective welfare: "We're also at a sobering, do-or-die moment: if we don't make profound changes now, humanity risks suffering through violent upheaval and even extinction because of economic, environmental, and political crises of its own making."[434] Investor-owned monopoly utilities currently act like every other profit-driven corporation, but they should not. They can continue in their current inadequate, profit-focused form or they can be part of the solution to the myriad crises we face. We prefer the latter.

434. GULATI, *supra* note 368, at xxi.