

**STRIKING THE BALANCE BETWEEN  
COMPETITION AND FAIRNESS: SHERMAN  
ANTITRUST ACT SECTION TWO AND  
UTILITY MONOPOLIES IN RENEWABLE  
ENERGY**

*Mackinlee Rogers\**

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\* Executive Technical Editor, *Mississippi Law Journal*, Vol. 91; Staff Editor, *Mississippi Law Journal*, Vol. 90; J.D. Candidate, May 2022, University of Mississippi School of Law; B.A., Political Science, B.A., Sociology, May 2019, University of Missouri.

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## INTRODUCTION

Natural disasters, pandemics, and other catastrophes often successfully expose weaknesses in infrastructures. On August 29, 2021, Hurricane Ida slammed into the Louisiana gulf coast—sixteen years to the day the deadly Hurricane Katrina pummeled the exact region.<sup>1</sup> After Hurricane Katrina, the state of Louisiana invested billions into its infrastructure to guard against a similar

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<sup>1</sup> Jackie Salo, *Hurricane Ida Makes Landfall in Louisiana, Slamming Region*, N.Y. POST (Aug. 29, 2021, 1:16 PM), <https://nypost.com/2021/08/29/hurricane-ida-makes-landfall-along-the-gulf-coast/> [https://perma.cc/552H-9BVH].

disaster, and Hurricane Ida put those investments to the test.<sup>2</sup> Thankfully, the levee systems, which failed disastrously during Hurricane Katrina, held;<sup>3</sup> however, all eight high-voltage transmission lines into New Orleans failed and left hundreds of thousands of people in the dark for weeks.<sup>4</sup> Hurricane Ida's catastrophic damage to the power grid forced hospitals, businesses, and citizens to either rely on generators or go without electricity and air conditioning during the peak of the August heat.<sup>5</sup>

After Hurricane Katrina, how could this happen again? Some place the blame upon the shoulders of Entergy Corporation.<sup>6</sup> Entergy Corporation is a regional monopoly that enjoys dominance of a power market that stretches across Texas, Louisiana, Mississippi, and Arkansas.<sup>7</sup> Entergy Corporation is no stranger to widespread disasters. A winter storm in February 2021 debilitated many of Entergy's power plants, and due to too few transmission lines to deliver power from other areas of the country, customers experienced significant, widespread outages.<sup>8</sup>

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<sup>2</sup> Mychael Schnell, *Hurricane Ida Makes Landfall in Louisiana as Category 4 Storm*, HILL (Aug. 29, 2021, 1:54 PM), <https://thehill.com/policy/energy-environment/569918-hurricane-ida-makes-landfall-in-louisiana-as-category-4-storm/> [<https://perma.cc/9YWD-MQEN>].

<sup>3</sup> See *id.*

<sup>4</sup> Jon Schuppe, *Hurricane Ida Power Grid Failure Forces a Reckoning over Entergy's Monopoly in the South*, NBC NEWS, <https://www.nbcnews.com/news/us-news/hurricane-ida-power-grid-failure-forces-reckoning-over-entergy-s-n1279971> [<https://perma.cc/U9XX-RZRM>] (Sept. 29, 2021, 12:34 PM); see also Sophie Kasakove, *Three Weeks After Hurricane Ida, Parts of Southeast Louisiana Are Still Dark*, N.Y. TIMES (Sept. 18, 2021), <https://www.nytimes.com/2021/09/18/us/ida-louisiana-power-outages.html> [Perma.cc link unavailable]; Stephan Bisaha, *Thousands in Louisiana Are Still Without Power 1 Month After Ida Landfall*, WWNO (Sept. 29, 2021, 11:40 AM), <https://www.wwno.org/news/2021-09-29/thousands-in-louisiana-are-still-without-power-1-month-after-ida-landfall> [<https://perma.cc/ZA39-F4UD>]; New Orleans Ed. Team, *Ida Knocks Out Transmission Sources into New Orleans*, ENTERGY NEWSROOM (Aug. 29, 2021), <https://www.entergynewsroom.com/article/ida-knocks-out-transmission-sources-into-new-orleans/> [<https://perma.cc/PY2A-T35R>].

<sup>5</sup> Matthew Daly, *EXPLAINER: Hit by Ida, New Orleans Faces Weeks Without Power*, NBC N.Y., <https://www.nbcnewyork.com/news/national-international/explainer-hit-by-ida-new-orleans-faces-weeks-without-power/3248227/?amp> [<https://perma.cc/S9XJ-QC5X>] (Aug. 30, 2021, 11:35 PM).

<sup>6</sup> See Schuppe, *supra* note 4.

<sup>7</sup> *Id.*

<sup>8</sup> See MISO ENERGY, THE FEBRUARY ARCTIC EVENT 4-5 (2021).

Entergy, as an established utility company, stands to lose from a more competitive energy market.<sup>9</sup> The transformation of the energy market, such as increased investment into renewable energy sources and new transmission lines, would likely pose a severe challenge for regional monopolies such as Entergy. Entergy and other regional monopolies are investor-owned utilities, and their business models rely on control of fossil fuel power plants and transmission lines.<sup>10</sup> Notwithstanding stated support of renewable energy and increased grid support, this blatant conflict of competing interests often leads to regional monopolies advocating against renewable energy sources.<sup>11</sup>

For example, Entergy blocked the widespread adoption of solar power by fighting against new transmission lines that would bring renewable energy into the company's territory.<sup>12</sup> In reference to outages caused by Hurricane Ida, the Executive Director of the Southern Renewable Energy Association, Simon Mahan, stated: "If we had a more robust large-scale transmission of solar across Louisiana and into Texas, you'd just have another tool to prevent major power outages. . . . You could have had more lines serving New Orleans."<sup>13</sup> The result, it seems, is that Entergy's quest to preserve and protect its monopoly power results in its grid being more vulnerable during natural disasters.

Similarly, would a more competitive energy market with increased grid reliability have prevented or lessened the widespread outages following the 2021 winter storm or after

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<sup>9</sup> The Electric Reliability Council of Texas is a competitive market, which provides Texans with the option to choose their power providers. Kenneth W. Anderson, *Fix ERCOT, Yes, but Don't Throw Out the Competitive Electricity Market*, DALL. MORNING NEWS (Apr. 16, 2021, 1:30 AM), <https://www.dallasnews.com/opinion/commentary/2021/04/16/fix-ercot-yes-but-dont-throw-out-the-competitive-electricity-market/> [<https://perma.cc/N6YE-Q8BV>]. In this sense, "competitive" refers to actions taken to foreclose other market players. See Schuppe, *supra* note 4.

<sup>10</sup> Schuppe, *supra* note 4.

<sup>11</sup> See *Renewable Energy*, ENTERGY, <https://www.entergy.com/renewable-energy/> [<https://perma.cc/W3XW-899N>] (last visited May 30, 2022); *Improving Reliability*, ENTERGY, <https://www.entergy.com/brightfutureenola/improving-reliability/> [<https://perma.cc/5A2U-MHV6>] (last visited May 30, 2022).

<sup>12</sup> Schuppe, *supra* note 4.

<sup>13</sup> *Id.*

Hurricane Ida?<sup>14</sup> It seems that a robust, large-scale transmission system could have prevented or lessened the impact of both disasters.<sup>15</sup> However, in 2019, Entergy and other utilities lobbied Texas lawmakers to pass a right of first refusal law to protect them from competition.<sup>16</sup> Resistance to providing access to transmission facilities and investment in new transmission lines for renewable energy appears to be in direct contrast with the public good.

It must be acknowledged that since the 1990s, the energy industry has undergone a transformation that seems to lend itself towards competition.<sup>17</sup> In the energy generation industry and wholesale market, it is especially true that the energy industry has generally become a competitive market.<sup>18</sup> However, merely authorizing competition within a market does not immediately render it a market with effective competition.<sup>19</sup> Where regulators or policymakers fail to address and remove securely engrained aspects of the historical monopoly structure, the authorization of competition may be lip service at best.<sup>20</sup> The energy generation wholesale market has seen success since the transformation began.<sup>21</sup> Today, we see evidence of improved renewable energy technology, incumbent firms' active resistance to include renewable

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<sup>14</sup> See *5 Ways Alternative Fuels Aid Response to Hurricanes and Natural Disasters*, OFF. ENERGY EFFICIENCY & RENEWABLE ENERGY (Sept. 20, 2017), <https://www.energy.gov/eere/articles/5-ways-alternative-fuels-aid-response-hurricanes-and-natural-disasters> [<https://perma.cc/USN4-5AFA>]; Kayla Matthews, *4 Ways Renewable Energy Can Help in an Emergency*, BLUE & GREEN TOMORROW (June 13, 2018), <https://blueandgreentomorrow.com/energy/ways-renewable-energy-help-emergency/> [<https://perma.cc/YCC6-PG4J>].

<sup>15</sup> See Schuppe, *supra* note 4.

<sup>16</sup> See *Protect the Integrity of Texas Transmission Development*, E&E NEWS (July 8, 2019), [https://legacy-assets.eenews.net/open\\_files/assets/2019/07/08/document\\_ew\\_05.pdf](https://legacy-assets.eenews.net/open_files/assets/2019/07/08/document_ew_05.pdf) [<https://perma.cc/AZ4S-HWLF>]. The right of first refusal law essentially blocks outside power companies from building transmission lines in the utilities' territories. See TEX. UTIL. CODE ANN. §§ 37.051(a), 37.053(a), 37.055, 37.056, 37.057, 37.151, 37.154(a) (West 2019).

<sup>17</sup> See Seth Blumsack, *Deregulation or Restructuring?*, PENNSSTATE DEP'T ENERGY & MIN. ENG'G, <https://www.e-education.psu.edu/eme801/node/534> [<https://perma.cc/6XK3-EZUG>] (last visited May 30, 2022).

<sup>18</sup> *Id.*

<sup>19</sup> See SCOTT HEMPLING, *REGULATING PUBLIC UTILITY PERFORMANCE: THE LAW OF MARKET STRUCTURE, PRICING AND JURISDICTION* 147 (2d ed. 2021).

<sup>20</sup> See *id.*

<sup>21</sup> See Blumsack, *supra* note 17.

energy generators into the transmission markets, policymakers' and regulators' lack of protection, and the growing climate crisis.<sup>22</sup> In light of these circumstances, renewable energy competitors should not be foreclosed from either the energy transmission market or the energy generation market.

This Comment focuses on the historical structure of the energy sector, its relationship with regulatory bodies, and current issues facing the energy industry, coupled with discussion and consideration of potential Sherman Antitrust Act Section 2 claims against utility monopolies. This Comment then puts forth and advocates for the implementation of a balancing test for courts to use when considering possible claims brought against utility monopolists. Part I focuses on market structure, monopolies, and applicable regulatory law. Part II provides a general overview of the energy industry. Part III discusses current issues facing the energy industry. Part IV analyzes the Sherman Antitrust Act of 1890 and possible antitrust scrutiny under Sherman Antitrust Act Section 2. Part V provides possible solutions to protecting and ensuring effective competition in the energy market and renewable energy sector and ultimately advances a balancing test under an independent monopoly leveraging claim.

## I. MARKET STRUCTURE, MONOPOLIES, COMPETITION, AND REGULATORY LAW

For almost a century, the energy industry was built upon vertically integrated utilities, which were regulated by state public utility commissions.<sup>23</sup> The energy industry had long been viewed as natural monopolies, which occur when a single firm can provide generation, transmission, and distribution services more efficiently than multiple firms competing to provide the same services.<sup>24</sup> The economic benefits of this structure were the foundation of the justification for its continued acceptance and use.<sup>25</sup> However, the

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<sup>22</sup> See discussion *infra* Part III.

<sup>23</sup> Seth Blumsack, *Electricity Industry Structure and Regulation*, PENNSTATE DEP'T ENERGY & MIN. ENG'G, <https://www.e-education.psu.edu/eme801/node/529> [<https://perma.cc/6K7M-HUDN>] (last visited May 30, 2022).

<sup>24</sup> *Id.* Firms exhibiting natural monopoly traits are often referred to as "vertically integrated" firms. *Id.*

<sup>25</sup> See *id.*

recent emergence of deregulated energy markets, advancing technology, and renewable energy generation have somewhat upended traditional assumptions regarding the extent the distribution of electricity could, or should, be a competitive market.<sup>26</sup>

Despite gradual deregulation, this structure persists and creates entry barriers for potential market players hoping to enter into the energy market.<sup>27</sup> In regulated industries, organizational structure is a function of available technologies and regulatory framework.<sup>28</sup> Technological advances in the energy industry have made diversification of energy generation possible, which provides ample support for regulatory unbundling of energy generation from transmission.<sup>29</sup> Nevertheless, the traditional organizational structure remains the prominent, often-preferred structure.<sup>30</sup> Although no longer necessary, the regulatory bodies overseeing the energy industry are still structured to favor the traditional framework.

#### *A. Regulated Utilities as Traditional Vertically Integrated Entities*

The energy industry's history of being dominated by government-protected monopolies poses special challenges for ensuring effective competition for the renewable energy sector.<sup>31</sup> A "vertically integrated" firm owns most or all of its own supply chain, which gives the firm access to a variety of products and services.<sup>32</sup> Vertical integration has both beneficial and harmful aspects. The primary benefit of a vertically integrated energy market is reliability; however, an important opportunity cost of a vertically

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<sup>26</sup> See *id.*

<sup>27</sup> See Blumsack, *supra* note 17.

<sup>28</sup> See Blumsack, *supra* note 23.

<sup>29</sup> See *id.*

<sup>30</sup> See Tony Clark et al., *The Vertically Integrated Utility: A Time-Tested Approach for Delivering Customer Benefits and Ensuring State Flexibility in Achieving Energy Policy Goals*, WILKINSON BARKER KNAUER, LLP (Oct. 27, 2020), <https://www.wbklaw.com/wp-content/uploads/2020/10/Vertically-Integrated-Utility-White-Paper-10.26.20.pdf> [<https://perma.cc/4DDB-5EMT>].

<sup>31</sup> See HEMPLING, *supra* note 19, at 147.

<sup>32</sup> See Lynne Kiesling, *Implications of Smart Grid Innovation for Organizational Models in Electricity Distribution*, in 3 SMART GRID HANDBOOK 1624-25 (Chen-Ching Liu et al. eds., 2016).

integrated market is innovation.<sup>33</sup> On the other hand, vertical integration poses a risk to consumers as it can result in “vertical foreclosure.”<sup>34</sup> Vertical foreclosure results when a vertically integrated firm’s participation in downstream markets has an anticompetitive impact on that downstream, related market.<sup>35</sup>

Although it is no longer technically necessary for the utility to remain vertically integrated, the governing regulatory institutions are still tailored to an energy market of “bundled energy and distribution transactions.”<sup>36</sup> Professor Lynne Kiesling argues vertical integration has been harmful to the energy market, specifically pointing to reliability and product quality.<sup>37</sup> Professor Kiesling also raises issue with the regulatory environment surrounding the energy market:

Technological change has created the potential for shifts of the transactional boundary of the firm and for market creation, but regulatory institutions reinforce the use of antiquated or sub-optimal, but known and familiar, technology. These institutions fail to integrate new technologies adequately into regulatory planning. The investment in existing electro-mechanical technology . . . reduces the incentives to develop technology . . .<sup>38</sup>

While there are practical, significant benefits and justifications for the vertical integration of firms, there are also potential drawbacks. These drawbacks have the potential to harm consumers and the competitive process and must not be taken lightly. Because of the perilous nature of those harms, technological advances and any applicable regulatory framework should be considered when analyzing whether a vertically integrated firm’s benefits outweigh its harm.

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<sup>33</sup> 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/5BRH-94RC].

<sup>34</sup> Kiesling, *supra* note 32, at 1625.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1622.

<sup>37</sup> *Id.* at 1625.

<sup>38</sup> *Id.* at 1626 (emphasis omitted).



Historic vertical integration of the energy market and any potential lasting impacts are of particular concern when considering the transition into a market favorable to renewable energy. One fear stems from successive monopolies achieving “full integration”:

Successive monopolies can involve “full integration” in the sense that the second monopoly utilizes the entire output of the first. Such full integration can raise or prolong barriers to entry into either stage if the integrated monopolist refuses (or is expected to refuse) to deal with a single-stage new entrant who would otherwise enter that stage, and the resulting necessity for a new entrant to enter both stages simultaneously actually impedes entry.<sup>39</sup>

The energy industry’s past, the traditional market structure, and regulatory preference for this structure pose significant obstacles for potential competitors seeking to enter the rapidly growing renewable energy sector of the energy market. An important issue that must be addressed is how can the renewable energy sector be made into an effectively competitive market, which would benefit consumers greatly.

## II. ENERGY INDUSTRY OVERVIEW

A general overview of the history, components, and structure of the United States’ electricity industry will be useful in understanding how historic markets and modern markets relate to one another and the resulting implications. Historically, much of the focus in the electricity industry has been on traditional activities, such as electricity transmission service, wholesale electric generation, and retail electricity and gas.<sup>40</sup> As the energy industry evolves due to new technology and necessity, these traditional activities are no longer the only players in the energy industry. Today’s modern economy presents new challenges for these traditional activities and leads to tension between “new-world opportunities” and “old-world players.”<sup>41</sup> Evolving technology and

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<sup>39</sup> 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 756c3(A), at 22-23 (4th ed. 2015).

<sup>40</sup> HEMPLING, *supra* note 19, at 211.

<sup>41</sup> *Id.*

customer preferences spur new products and services, which give “older-world” industries the opportunity to offer new opportunities for market entry.<sup>42</sup>

### A. *History of the Energy Industry*

There are three critical energy market activities that are vital to the successful production and delivery of electricity: (1) generation—the conversion of energy from a nonrenewable or renewable source into electric current; (2) transmission—the long-distance transportation of electric current from generation sources to a substation;<sup>43</sup> and (3) distribution—the delivery of electricity from transmission substations to consumers.<sup>44</sup> Prior to the 1980s, the energy market was primarily served by local, vertically integrated utilities, and each utility owned and operated the means for energy generation, the mode of transmission, and the distribution facilities required to deliver electricity to the consumer.<sup>45</sup> This market structure partly resulted from the Public Utility Holding Company Act of 1935, which required the dismantling and separation of the existing electric utility holding companies into hundreds of smaller holding company systems.<sup>46</sup> The Act also contained a “single integrated public-utility system” requirement, further commanding that each resulting holding company system be confined to a “single integrated public-utility system.”<sup>47</sup> However, in 2005, Congress repealed the Public Utility Holding Company Act of 1935 with the passage of the Energy Policy Act of 2005.<sup>48</sup> The Energy Policy Act of 2005 permits any entity to “own any type of utility asset and perform any type of electric service function, in any location.”<sup>49</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> “The primary function of substations is to provide an interconnection between transmission lines extending to other geographic areas and between parts of the system that may be operating at different voltages.” John A. Palmer, *Electric Power Substations*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/environment/encyclopedias-almanacs-transcripts-and-maps/electric-power-substations> [https://perma.cc/AEX2-2EJS] (last visited May 30, 2022).

<sup>44</sup> HEMPLING, *supra* note 19, at 87-88.

<sup>45</sup> *Id.* at 88.

<sup>46</sup> Public Utility Holding Company Act of 1935, ch. 687, 49 Stat. 803 (repealed 2005).

<sup>47</sup> *Id.* § 11(b)(1), at 820.

<sup>48</sup> Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594.

<sup>49</sup> HEMPLING, *supra* note 19, at 93.

In the 1990s, Congress sought to introduce competition to the wholesale generation markets and passed the Energy Policy Act of 1992.<sup>50</sup> Ultimately, the 1992 Act encouraged little wholesale competition,<sup>51</sup> and as a result, the Federal Energy Regulatory Commission (“FERC”) issued its landmark Order No. 888 in 1996.<sup>52</sup> Order No. 888 required all transmission-owning public utilities to offer transmission customers access “on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider’s uses of its system.”<sup>53</sup>

Since 1996, Congress and FERC have amended their transmission policies several times,<sup>54</sup> but the amendments have continued to shift towards the goal of bringing competition to wholesale generation markets.<sup>55</sup> The amendments, and FERC’s actions, seek to make wholesale competition effective by focusing on the “old-world” assets of generation and transmission.<sup>56</sup> Recently, FERC has aimed at barriers that new-world technologies

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<sup>50</sup> Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776. For a detailed examination of the Act, see HEMPLING, *supra* note 19, at 91.

<sup>51</sup> HEMPLING, *supra* note 19, at 91.

<sup>52</sup> See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385).

<sup>53</sup> *Id.* at 21,548.

<sup>54</sup> See Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594; Regional Transmission Organizations, 65 Fed. Reg. 810 (Jan. 6, 2000) (codified at 18 C.F.R. pt. 35); Preventing Undue Discrimination and Preference in Transmission Service, 72 Fed. Reg. 12,266 (Mar. 15, 2007) (codified at 18 C.F.R. pts. 35, 37); Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49,842 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35).

<sup>55</sup> HEMPLING, *supra* note 19, at 92-93.

<sup>56</sup> *Id.* at 211.

and “players” face,<sup>57</sup> specifically, demand response,<sup>58</sup> frequency regulation,<sup>59</sup> variable energy integration,<sup>60</sup> and storage.<sup>61</sup>

Today, the energy market takes numerous different market structure forms. The wholesale generation market is legally competitive;<sup>62</sup> however, authorized competition does not ensure *effective* competition, which results from a market structure that rewards merit, not necessarily mere market power.<sup>63</sup> Additionally, physical distribution remains a state-regulated monopoly provided by traditional utilities.<sup>64</sup> Lastly, transmission services remain “largely”<sup>65</sup> a monopoly and are provided by Regional Transmission Organizations (“RTOs”) in RTO regions and consistent with quality-of-service standards established by the regulator.<sup>66</sup> In non-

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<sup>57</sup> *Id.*

<sup>58</sup> See Wholesale Competition in Regions with Organized Electric Markets, 73 Fed. Reg. 64,100 (Oct. 28, 2008) (codified at 18 C.F.R. pt. 35); Planning Resource Adequacy Assessment Reliability Standard, 76 Fed. Reg. 16,250 (Mar. 23, 2011) (codified at 18 C.F.R. pt. 40). Allowing demand response resources to compete in generation markets produces three benefits: (1) “demand response will displace higher-cost generation [and thus lower] the total supply cost to consumers”; (2) “demand response that can enter the market on the same terms as generation [will generate competition among] generation competitors to lower their prices”; and (3) “by allowing the system operator to balance supply and demand . . . during unexpected generation outages,” system reliability will increase. HEMPLING, *supra* note 19, at 212.

<sup>59</sup> See Frequency Regulation Compensation in the Organized Wholesale Power Markets, 76 Fed. Reg. 67,260 (Oct. 31, 2011) (codified at 18 C.F.R. pt. 35).

<sup>60</sup> Integration of Variable Energy Resources, 77 Fed. Reg. 41,482 (July 13, 2012) (codified at 18 C.F.R. pt. 35). FERC required RTOs to allow all generators to schedule at fifteen-minute intervals to allow solar and wind generators to adjust their schedules within each hour. HEMPLING, *supra* note 19, at 214.

<sup>61</sup> Electricity storage is “a resource capable of receiving electric energy from the grid and storing it for later injection of electric energy back to the grid.” Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators, 83 Fed. Reg. 9,580, 9,586 (Mar. 6, 2018) (codified at 18 C.F.R. pt. 35). In Order No. 841, FERC found that RTO market rules designed for traditional generators failed to sufficiently value storage quality. *Id.* at 9,582. FERC responded by requiring each RTO to establish market rules that recognized the unique “physical and operational characteristics” of storage. *Id.*

<sup>62</sup> HEMPLING, *supra* note 19, at 94.

<sup>63</sup> See *id.* at 142.

<sup>64</sup> See *id.* at 95.

<sup>65</sup> Professor Hempling draws attention to the usage of “largely” because of the emerging possibilities for storage as a competitor to transmission. *Id.* at 94 n.29.

<sup>66</sup> *Id.* at 94.

RTO regions, transmission services are provided by “traditional utilities, along with some independent transmission companies.”<sup>67</sup>

History shows that for much of the past century, the energy market structure was a monopoly market structure and dominated by “traditional” public utilities.<sup>68</sup> New technologies, new services, and new market entrants have brought into question the previous understanding and relevancy of “traditional” public utilities.<sup>69</sup> There are numerous examples of these emerging aspects of the energy industry that raise questions regarding previous understandings, such as third-party solar leasing, renewable energy transmission, and regional transmission organizations.<sup>70</sup>

### III. CURRENT ISSUES IN THE ENERGY INDUSTRY

The present-day energy market presents unique challenges to potential competitors hoping to enter the renewable energy sector. A brief discussion of such issues provides context as to how the traditional market structure has hindered the advancement of renewable energy by foreclosing the market to hopeful and highly qualified entrants.

#### A. *New Technologies Create Opportunities and Tensions*

Electricity transmission, service, wholesale electricity generation, and retail electricity are considered “traditional activities.”<sup>71</sup> These traditional industries will offer new opportunities for market entry as technology and customer preferences give rise to new products and services.<sup>72</sup> However, the traditional market players will certainly attempt to interfere with any “new-world” opportunities.<sup>73</sup> In the context of renewable energy generation, two areas exhibit new-world opportunities and tension: wholesale electricity markets and electricity distribution.<sup>74</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 14.

<sup>69</sup> *See generally id.*

<sup>70</sup> *See id.* at 78-84.

<sup>71</sup> *Id.* at 211.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

*B. Integrating New Resources*

“[T]he sun doesn’t always shine, and the wind doesn’t always blow,” is a common phrase among critics of renewable energy.<sup>75</sup> Those critics are partially right—the issue renewable energy generators face is not the variability of the sun or the wind; rather, it is the lack of sufficient means of storing generated power.<sup>76</sup> Any source of energy generation must be reliable in order to provide beneficial contribution to the grid, and to be a reliable source of energy generation, the source must be able to provide continuous generation.<sup>77</sup>

For the vast majority of renewable energy’s existence, the inability to store generated energy hindered its viability and reliability as a source of energy generation.<sup>78</sup> Energy generated from nonrenewable sources does not face a similar issue.<sup>79</sup> Despite the finite nature of nonrenewable energy sources and the infinite abundance of renewable energy sources, nonrenewable energy sources provide levels of reliability that renewable energy sources simply cannot.<sup>80</sup>

Grid operators have to meet constantly changing electricity demand with the matching amount of incoming power. While fossil fuel power plants can be ramped up or down as needed, solar and wind are less controllable sources, which is why energy storage is an essential part of planning for a grid that relies on solar and wind.<sup>81</sup>

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<sup>75</sup> Wayne Hicks, *Declining Renewable Costs Drive Focus on Energy Storage*, NAT’L RENEWABLE ENERGY LAB’Y (Jan. 2, 2020), <https://www.nrel.gov/news/features/2020/declining-renewable-costs-drive-focus-on-energy-storage.html> [<https://perma.cc/7UWV-CUBR>].

<sup>76</sup> *See id.*

<sup>77</sup> *See* Rob Wile, *Solar Power Could Be a Total Game-Changer – But They Still Need to Figure Out One Thing*, BUS. INSIDER (Nov. 18, 2013, 10:14 AM), <https://www.businessinsider.com/renewable-energy-storage-problem-2013-11> [<https://perma.cc/6UWJ-C8SA>].

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* Reliability is the most important aspect of an electric grid. *See id.* An electric grid cannot function if it cannot balance supply and demand, and an imbalance can lead to voltage fluctuations, among other more serious consequences. *Id.*

<sup>81</sup> Dan Gearino, *100% Renewable Energy Needs Lots of Storage. This Polar Vortex Test Showed How Much.*, INSIDE CLIMATE NEWS (Feb. 20, 2019),

The future appears to be sunny for renewable energy storage, but will this prolonged encumbrance have long-term, unanticipated consequences on the renewable energy sector? It seems likely that established utility monopolies would have reaped the benefits of monopoly power in the nonrenewable energy sector during this “waiting period.” As the controllers of a “superior” resource—nonrenewable energy sources and technologies—during this time, such monopolies would not have suffered harm from the lack of adequate renewable energy storage, which not only could have allowed them to benefit from the previous lack of adequate storage, but also could enable them to reap a dual advantage from the quickly advancing storage technology.<sup>82</sup> If so, these monopolies’ profits and additional power accumulation during the innovation period may position them in a more advantageous situation in both the nonrenewable energy generation sector and the renewable energy generation sector.

### C. Electricity Distribution

Electricity distribution is another area where new technologies present opportunities for competitive entry, but incumbents’ market position, desire to sell in both monopoly and competitive markets, and unearned advantages in the newly competitive markets must be addressed.<sup>83</sup> A current concern for renewable energy generators is the lack of adequate and sufficient transmission lines, coupled with incumbent utilities’ documented resistance to integration.<sup>84</sup>

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<https://insideclimatenews.org/news/20022019/100-percent-renewable-energy-battery-storage-need-worst-case-polar-vortex-wind-solar/> [<https://perma.cc/CN94-JMUT>].

<sup>82</sup> For comparison, the oil and gas industry anticipated and patiently waited for the renewable energy sector to take off. Chevron had a solar project powering its operations in an oil field in 2003. Eric Rosenbaum, *What Big Oil’s Solar Energy Projects Reveal About Its Climate Strategy*, CNBC, <https://www.cnbc.com/2021/08/15/how-solar-power-can-become-a-small-part-of-big-oils-future.html> [<https://perma.cc/9Q47-FUUG>] (Aug. 16, 2021, 8:24 AM). “[A]ll the big oil and gas companies [in the United States] have at least a few solar power projects, whether they developed them on their own or signed . . . power purchase agreements with project developers . . .” *Id.*

<sup>83</sup> HEMPLING, *supra* note 19, at 218.

<sup>84</sup> See *Barriers to Renewable Energy Technologies*, UNION CONCERNED SCIENTISTS, <https://www.ucusa.org/resources/barriers-renewable-energy-technologies> [<https://perma.cc/6JRD-T6AD>] (Dec. 20, 2017).

“Transmission refers to the power lines and infrastructure needed to move electricity from where it’s generated to where it’s consumed.”<sup>85</sup> Energy generated from renewable sources, such as wind and solar, are “relative newcomers,” and transmission and distribution infrastructure existing today were “built to serve large fossil fuel and nuclear power plants.”<sup>86</sup> This reality results in renewable resources being forced to compete with wealthier and more established industries that benefit from existing infrastructure built specifically for them.<sup>87</sup>

Solar and wind project developers have expressed their concerns over the challenges they face when attempting to connect solar projects to the power grid.<sup>88</sup> In May 2021, there was more than 750 gigawatts of power generation sitting in “interconnection queues.”<sup>89</sup> If and when the would-be generators are allowed to proceed through the queue, it is possible “they may be charged high fees to cover the cost of transmission upgrades needed to support their projects.”<sup>90</sup> Transmission upgrade costs, both potential and actual, have led to renewable projects dropping out of generator interconnection queues.<sup>91</sup>

Alarming, proposed transmission solutions are unlikely to be constructed in the near future, which stems directly from the structure of traditional transmission planning.<sup>92</sup> For decades, transmission planning focused on the needs of traditional transmission owners.<sup>93</sup> Although times are changing, transmission

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Miranda Willson, *FERC Launches First Transmission Reforms in a Decade*, E&E NEWS: ENERGYWIRE (July 16, 2021, 7:43 AM), <https://www.eenews.net/articles/ferc-launches-first-transmission-reforms-in-a-decade/> [<https://perma.cc/EWG9-X3K6>].

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Rao Konidena, *Renewable Developers Are Bearing the Brunt of Siloed Transmission Planning*, RENEWABLE ENERGY WORLD (Mar. 5, 2021), <https://www.renewableenergyworld.com/wind-power/renewable-developers-are-bearing-the-brunt-of-siloed-transmission-planning/> [<https://perma.cc/KDC4-ZYYW>].

<sup>92</sup> *Id.* Transmission planning typically consists of the planning authority compiling a plan for a transmission line to meet increased demand, retiring existing capacity, and replacing the old transmission line. *Id.*

<sup>93</sup> *Id.*



planning appears to still be focused on what the transmission owner wants, not what the renewable energy developer needs.<sup>94</sup>

On the other hand, when a new capacity request is submitted, the responsibility to pay for the transmission upgrade falls upon the entity requesting to interconnect, and in turn, the incumbent transmission owner bears the responsibility to construct the upgrade.<sup>95</sup> Some RTOs permit an entity seeking to interconnect to construct any necessary upgrade, but it is conditioned upon the incumbent transmission owner's agreement.<sup>96</sup>

A related, equally concerning issue revolves around the construction likelihood of long-distance power lines. The building of additional long-distance power lines may be integral to renewable energy's success; however, power lines "are becoming harder to build in the [United States]."<sup>97</sup> For renewable energy to be successful nationwide, renewable energy generators must have the ability to send electricity generated from renewable sources in states with an abundance of wind or solar to regions that lack wind or sun.<sup>98</sup> If that is not feasible, those regions have no choice but to turn to electricity generated from nonrenewable sources.

#### *D. Legal and Regulatory Tensions*

A renewable energy generator also faces legal and regulatory barriers to its entry into the market. Before a renewable energy generator is able to begin construction on generation facilities or transmission infrastructure, it may have to apply for various types of permits or fulfill other legal or regulatory requirements.<sup>99</sup>

Professor Joshua Macey argues that "zombie energy laws" are laws that "were originally designed to protect consumers by . . .

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Scott Carpenter, *Activists Not Only Slow Oil Pipelines, But Also Power Lines Needed for Renewable Energy*, FORBES (July 9, 2020, 6:30 AM), <https://www.forbes.com/sites/scottcarpenter/2020/07/09/oil-pipelines-hit-a-dead-end-so-do-power-lines-needed-for-renewable-energy/?sh=7a36f282540e> [<https://perma.cc/ZU59-F2PB>].

<sup>98</sup> *Id.*

<sup>99</sup> See Joshua C. Macey, *Zombie Energy Laws*, 73 VAND. L. REV. 1077, 1115 (2020) ("Numerous academics have shown that protective transmission line siting laws benefit incumbents . . . and reduce competition.").

preventing utilities from exploiting their market power. Today, however, they protect incumbent fossil fuel generators . . . .”<sup>100</sup> “Zombie energy laws” “allow incumbents to raise prices and . . . prevent clean energy companies from competing with incumbent fossil fuel generators.”<sup>101</sup>

For example, companies that wish to build energy infrastructure must receive a certificate of public convenience and necessity before beginning construction.<sup>102</sup> In 2011, the Arkansas Public Service Commission blocked a \$3.5 billion wind development project after Entergy, which serves as a utility in Arkansas, filed an objection arguing that the development project company “was not legally authorized to build transmission lines” in the state.<sup>103</sup> Entergy successfully argued that only public utilities can build transmission lines in the state and that “Arkansas law defines ‘public utility’ as a company that ‘own[s] or operat[es] in [Arkansas] equipment or facilities for . . . transmitting . . . power to or for the public for compensation.’”<sup>104</sup>

This is not an isolated event as other renewable energy projects have struggled with similar obstacles. The American Electric Power Company was forced to walk away from a proposed \$4.5 billion wind project after Oklahoma regulators determined that the state did not have a need for additional electricity.<sup>105</sup> Similarly, in Illinois, Iowa, Kentucky, and Missouri, regulators have thwarted clean energy development efforts by denying certificates because the developers did not qualify as utilities or

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<sup>100</sup> *Id.* at 1077.

<sup>101</sup> *Id.* at 1082.

<sup>102</sup> *Id.* at 1099. “A certificate of public convenience and necessity is a license issued by a regulatory body that allows the [permit holder] to operate in a particular area.” *Id.* The requirement of obtaining a certificate of public convenience and necessity before constructing new energy infrastructure may “protect incumbents . . . and obstruct green energy projects.” *Id.* at 1112-13.

<sup>103</sup> *Id.* at 1113.

<sup>104</sup> *Id.* (alterations in original) (quoting ARK. CODE ANN. § 23-1-101(9)(A)(i) (2020)); *see also In re The Application of Plains and Eastern Clean Line LLC for a Certificate of Public Convenience and Necessity to Construct, Own and Operate as an Electric Transmission Public Utility in the State of Arkansas*, No. 10-041-U, 2011 Ark. PUC LEXIS 9 (Ark. Pub. Serv. Comm’n Jan. 11, 2011).

<sup>105</sup> Macey, *supra* note 99, at 1114-15.

because the regulators determined that there was not a demand for the project.<sup>106</sup>

Such stumbling blocks are not insignificant and undoubtedly hinder renewable energy developers' ability to enter the energy market. Developers seem to be fighting an uphill battle on the infrastructure and regulatory front. If these issues persist, it raises the question of whether there should be another avenue to protect consumers, the competitiveness of the energy market, and the incentive to innovate.

#### IV. MONOPOLIES, REGULATED UTILITIES, AND ANTITRUST LAW

##### A. *The Sherman Antitrust Act of 1890*

The social, political, and economic environment that brought about the Sherman Antitrust Act of 1890 was a perfect combination of “[p]opular attitudes, the economy, [the rapid] growth of the nation, . . . past fears of power, the concentration of power, the Civil War, [and the then-recent] development and use of corporations.”<sup>107</sup> Senator John Sherman of Ohio first introduced a resolution in 1888 that would later be finalized as the Sherman Antitrust Act.<sup>108</sup> After all this time, it remains true that the United States' policy is that free-market forces and competition maximize the wealth of the nation.<sup>109</sup>

The Sherman Antitrust Act consists of two important sections, commonly referred to as “Section 1” and “Section 2.”<sup>110</sup> Section 1 of the Sherman Antitrust Act prohibits contracts, combinations, and conspiracies that unreasonably restrain interstate trade.<sup>111</sup> Actions prohibited by Section 1 include agreements among competitors to fix prices, rig bids, and allocate customers.<sup>112</sup> Section 2, on the other hand, prohibits efforts to monopolize a market, if achieved through anticompetitive conduct rather than superior products or

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<sup>106</sup> *Id.* at 1115.

<sup>107</sup> AUSTIN T. STICKELLS, *FEDERAL CONTROL OF BUSINESS: ANTITRUST LAWS* 103 (1972).

<sup>108</sup> *Id.* at 105.

<sup>109</sup> *See* CHRISTOPHER L. SAGERS, *ANTITRUST: EXAMPLES & EXPLANATIONS* 4 (Vicki Been et al. eds., 1st ed. 2011).

<sup>110</sup> *Id.* at 3.

<sup>111</sup> *See* 15 U.S.C. § 1.

<sup>112</sup> SAGERS, *supra* note 109, at 3.

services.<sup>113</sup> Additionally, Section 2 prohibits attempted monopolization and conspiracies to monopolize.<sup>114</sup> Section 2 “makes it illegal for any one large business to try to exclude all or most of its competitors from the marketplace.”<sup>115</sup> This Comment focuses solely on the Sherman Antitrust Act’s Section 2.

### *B. Antitrust Scrutiny and Regulated Utilities*

The Supreme Court’s decision in *Otter Tail Power Co. v. United States* made clear that antitrust law is as applicable to the energy industry as it is to any other.<sup>116</sup> An industry’s status as “regulated” provides no protection or exemption from antitrust law.<sup>117</sup> Historically, regulated industries, such as the energy industry, have enjoyed exemptions and implied immunities to antitrust laws.<sup>118</sup> Exemptions and immunities were based upon the idea that regulated industries are subject to perpetual regulation; however, this notion is changing as regulated industries are deregulated.<sup>119</sup>

The mere fact that the government allows a utility to operate a monopoly does not justify a utility claiming immunity from antitrust law’s prohibition on monopolizing. There are two landmark Supreme Court cases that support this principle: *Otter Tail Power Co. v. United States*<sup>120</sup> and *Parker v. Brown*.<sup>121</sup> Importantly, *Otter Tail Power Co.* addressed federal regulation, whereas *Parker* addressed state regulation.<sup>122</sup>

Otter Tail Power Company (“Otter Tail”), a vertically integrated electric utility, sought to maintain a lawful monopoly in response to many municipalities’ attempts to replace Otter Tail with municipally owned power systems that would directly serve

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<sup>113</sup> See 15 U.S.C. § 2.

<sup>114</sup> See *id.*

<sup>115</sup> SAGERS, *supra* note 109, at 3.

<sup>116</sup> 410 U.S. 366, 373-74 (1973).

<sup>117</sup> *Id.* at 374-75.

<sup>118</sup> Ray S. Bolze et al., *Antitrust Law Regulation: A New Focus for a Competitive Energy Industry*, 21 ENERGY L.J. 79, 93 (2000).

<sup>119</sup> *Id.*

<sup>120</sup> 410 U.S. 366.

<sup>121</sup> 317 U.S. 341 (1943).

<sup>122</sup> HEMPLING, *supra* note 19, at 152.

residents.<sup>123</sup> Otter Tail declined to cooperate with the municipalities, and the company unlawfully used its “strategic dominance in the transmission of power[.] . . . to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply.”<sup>124</sup>

Although Otter Tail enjoyed a natural monopoly in the retail electricity supply market, competition for the “opportunity” to provide that service was still within the realm of possibility.<sup>125</sup> The Court found that Otter Tail had unlawfully sought to maintain its monopoly by preventing such possible competition.<sup>126</sup>

The Supreme Court’s decision in *Parker v. Brown* provides a critical distinction as *Parker* established the “state-action immunity doctrine,” which exempts from federal antitrust trust law “(a) certain state regulatory actions that authorize private anticompetitive conduct; and (b) private anticompetitive conduct that complies with or is compelled by those state regulatory actions, even where the private conduct would otherwise violate federal antitrust law.”<sup>127</sup> For private actors to qualify under the doctrine, it must be “clear that the challenged anticompetitive conduct is undertaken pursuant to ‘the State’s own’ regulatory scheme.”<sup>128</sup> Although the state-action immunity doctrine could be a likely consideration in the context of renewable energy generation, this Comment does not attempt to address nor analyze utility state-action immunity claims other than to acknowledge the general principle that utilities with a state-protected monopoly have been deemed to not meet the “two-part test” for state-action immunity.<sup>129</sup>

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<sup>123</sup> *Otter Tail Power Co.*, 410 U.S. at 368-72. Otter Tail maintained exclusive franchises that serviced retail consumers in towns across Minnesota, North Dakota, and South Dakota. *Id.* at 368-70.

<sup>124</sup> *Id.* at 377 (quoting *United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 60 (D. Minn. 1971)).

<sup>125</sup> HEMPLING, *supra* note 19, at 154.

<sup>126</sup> *Otter Tail Power Co.*, 410 U.S. at 377 (“Otter Tail used its monopoly power in the towns in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws.”).

<sup>127</sup> HEMPLING, *supra* note 19, at 152 (citing *Parker v. Brown*, 317 U.S. 341 (1943)).

<sup>128</sup> *Id.* at 153 (quoting *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 224-27 (2013)).

<sup>129</sup> *Id.* To receive state-action immunity, the challenged conduct must be both “clearly articulated and affirmatively expressed as state policy” and “actively supervised by the State.” *Phoebe Putney Health Sys., Inc.*, 568 U.S. at 225 (quoting *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)).

C. *The Potential for Successful Section 2 Claims*

“[A]ntitrust laws have played a small role in the evolution of the energy industry”; however, the deregulation of the energy market has resulted in greater antitrust law importance in the industry.<sup>130</sup> Ongoing deregulation of the energy market has resulted in the industry no longer consisting solely of vertically integrated utilities, and “[t]here are now multiple entities . . . performing many functions that were previously performed solely by the vertically integrated utilities.”<sup>131</sup> Unfortunately, as competition is introduced, the new entities are forced to compete with the entrenched, traditional vertically integrated utilities.<sup>132</sup>

The structure of the energy industry has changed significantly, but regardless, the industry is by no means “unregulated.”<sup>133</sup> Similar to all other competitive markets, the “newly” competitive aspects of the energy industry should be regulated by antitrust laws.<sup>134</sup> Antitrust laws will only continue to increase in importance as the industry continues to deregulate.

Given the reality of the energy industry, claims under the Sherman Antitrust Act Section 2 may have the best chance of success if brought by a renewable energy producer. Section 2 prohibits monopolization, attempts to monopolize, and conspiracies to monopolize.<sup>135</sup> It is hardly disputed that the utility industry is, and traditionally has been, a natural monopoly;<sup>136</sup> however, Section 2 of the Sherman Antitrust Act makes clear that monopolists may

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<sup>130</sup> Bolze et al., *supra* note 118, at 79.

<sup>131</sup> *Id.* at 80.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 87. Deregulation of an industry has previously shown that “when regulation is removed to allow competitive market forces,” there is an increase in “mergers, acquisitions, and other types of arrangements among competitors.” *Id.* at 80-81 (citing Hon. Richard D. Cudahy, *The FERC’s Policy on Electric Mergers: A Bit of Perspective*, 18 ENERGY L.J. 113, 113-14, 119-21 (1997)).

<sup>135</sup> See 15 U.S.C. § 2.

<sup>136</sup> See *Natural Monopoly: Definition, How It Works, Types, and Examples*, INVESTOPEDIA [hereinafter *Natural Monopoly*], [https://www.investopedia.com/terms/n/natural\\_monopoly.asp](https://www.investopedia.com/terms/n/natural_monopoly.asp) [https://perma.cc/DM5Z-RN5M] (Mar. 20, 2022). “A natural monopoly is a type of monopoly that [can exist] due to the high start-up costs or powerful economies of scale [in an industry,] which can result in significant barriers to entry for potential competitors.” *Id.* Natural monopolies typically “arise in industries that require unique raw materials, technology, or similar factors to operate.” *Id.*

not monopolize: “*Every person* who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .”<sup>137</sup>

Although natural monopolies are allowed in the utility industry,<sup>138</sup> firms enjoying such monopoly power still should not be allowed to impermissibly wield their monopoly power to exclude potential, viable competition. This is especially true in the utility industry given the impending market transition to renewable energy.

This Comment does not discuss in detail potential Section 2 claims; however, the current issues facing the energy industry seem primed for successful claims. The entry barriers renewable energy entities face,<sup>139</sup> as well as some utility conduct, may lead to a successful Section 2 claim.<sup>140</sup> Additionally, there is reason to believe

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<sup>137</sup> 15 U.S.C. § 2 (emphasis added).

<sup>138</sup> *Natural Monopoly*, *supra* note 136.

<sup>139</sup> Proof of a large market share is likely insufficient on its own to establish monopoly power. See *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 623 (6th Cir. 1999); *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 98 (2d Cir. 1998). A defendant must “possess the type of *durable* monopoly power necessary for a Section 2 case,” which can be inferred from “significant” entry barriers that operate as an insulator for the defendant and as a deterrent for potential competitors. WILSON C. FREEMAN & JAY B. SYKES, CONG. RSCH. SERV., R45910, ANTITRUST AND “BIG TECH” 9 (2019) (citing *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 188-89 (3d Cir. 2005); *United States v. Microsoft Corp.*, 253 F.3d 34, 82 (D.C. Cir. 2001); *AD/SAT, a Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999); *W. Parcel Express v. United Parcel Serv. of Am., Inc.*, 190 F.3d 974, 975 (9th Cir. 1999); *Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am.*, 885 F.2d 683, 695-96 (10th Cir. 1989)). Specifically, entry barriers in the renewable energy sector could include electric distribution and transmission. See discussion *supra* Section III.C.

<sup>140</sup> See Danielle Nicole Paschal, Note, *Market Realities Do Not Embody Necessary Economic Theory: Why Defendants Deserve a Safe Harbor Under Section 2 of the Sherman Act for Exclusive Dealing*, 46 GA. L. REV. 249, 259 (2011). A plaintiff alleging attempted monopolization must establish three elements: “(1) the defendant’s *specific intent* to monopolize the defined market, (2) the defendant’s *anticompetitive or predatory actions*, and (3) ‘*a dangerous probability of success.*’” *Id.* (emphasis added). The decades-long assault the fossil fuel industry has waged against climate change and renewable energy sources could be construed as a specific intent to monopolize the renewable energy sector or as an anticompetitive or predatory action. See *Barriers to Renewable Energy Technologies*, *supra* note 84; Jim Marston, *The Oil and Gas Industry’s Assault on Renewable Energy*, ENV’T DEF. FUND (Apr. 26, 2013), <https://www.edf.org/blog/2013/04/26/oil-and-gas-industrys-assault-renewable-energy> [https://perma.cc/JL9H-DMGW].

that a renewable energy entity could mount a successful claim under the essential facilities doctrine, which places a duty upon a monopolist to deal with rivals.<sup>141</sup> The issues currently facing the renewable energy sector and the energy industry as a whole should be further analyzed in the context of a successful Sherman Antitrust Act Section 2 claim.

#### V. POSSIBLE SOLUTIONS FOR PROTECTING AND ENSURING AN EFFECTIVELY COMPETITIVE ENERGY MARKET AND RENEWABLE ENERGY SECTOR

Given the energy industry's long history of being a governmentally protected monopoly, the spur of deregulation and renewable energy sources and technology poses a difficult question: where do we go from here?

An effectively competitive energy market is important for both new market players and consumers.<sup>142</sup> However, in industries that have been "historically dominated by government-protected monopolies," an effectively competitive industry is only possible if incumbents' market power and unearned advantages are removed.<sup>143</sup> On the other hand, completely dismantling incumbent utility companies' hard-earned might seems to go against fundamental antitrust principles that prohibit punishment for merely possessing monopoly power.<sup>144</sup>

How can competition and fairness be guarded in an everchanging energy industry? There are two possible sources that protection may stem from: regulators or the courts enforcing antitrust law.

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<sup>141</sup> See *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 409-10 (1912). The Terminal Railroad Association of St. Louis controlled the facilities required to carry traffic across the Mississippi River, and the Supreme Court held that the refusal to grant access to competitors was in violation of Sections 1 and 2 of the Sherman Antitrust Act. *Id.* In the renewable energy sector, a potential claim could arise from the rejection of access to distribution facilities and transmission infrastructure. See discussion *supra* Section III.C.

<sup>142</sup> HEMPLING, *supra* note 19, at 147.

<sup>143</sup> *Id.*

<sup>144</sup> See Bolze et al., *supra* note 118, at 92.



*A. Regulators*

Regulators are permitted to authorize competition in a traditionally monopolistic market, should they so wish, as seen through the extensive transformation the energy industry has undergone over the past fifty years.<sup>145</sup> Policymakers introduce competition into historically monopolistic markets by changing the laws and regulations that established the prior monopolies.<sup>146</sup>

However, merely authorizing competition within a traditionally monopolistic market does not automatically achieve “effective competition.”<sup>147</sup> Effective competition will only be achieved when it results in a market structure that rewards merit, not mere market power.<sup>148</sup> Professor Hempling asserts that “[f]or industries historically dominated by government-protected monopolies, effective competition is possible only if policymakers remove the incumbents’ market power and their unearned advantages.”<sup>149</sup>

State regulators’ recent behaviors cast doubt on whether this is a viable option to protect and ensure competition within the energy market and renewable energy sector.<sup>150</sup> The numerous natural disasters, the monopolies’ dedication to profit, and regulators inability to protect consumers begs the question: who is

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<sup>145</sup> See discussion *supra* Section II.A.

<sup>146</sup> HEMPLING, *supra* note 19, at 147.

<sup>147</sup> *Id.* at 142. There are two steps necessary to create effective competition: (1) regulators must reduce the incumbent’s control of monopoly facilities by requiring the incumbent both to “unbundle” its competitive services from its monopoly services and to allow new market entrants nondiscriminatory access to its monopoly services; and (2) regulators must identify and lower entry barriers and eliminate each incumbents’ unearned advantage. *Id.* at 147-48. Authorized competition will become effective competition only if both steps are taken. *Id.*

<sup>148</sup> *Id.* at 147 (“An effectively competitive market structure produces procompetitive conduct, which in turn produces proconsumer performance. Consumers shop based on merits, sellers strive to succeed on the merits, costs decline, quality improves, breakthroughs happen. Structure forces conduct; conduct produces performance. Those are the elements of effective competition.”).

<sup>149</sup> *Id.* Professor Hempling identifies several examples of unearned advantages, including: (1) entrenched customer preferences; (2) long-term contracts; and (3) incumbent’s name recognition. *Id.* at 202-03, 209.

<sup>150</sup> See, e.g., *In re* The Application of Plains and Eastern Clean Line LLC for a Certificate of Public Convenience and Necessity to Construct, Own and Operate as an Electric Transmission Public Utility in the State of Arkansas, No. 10-041-U, 2011 Ark. PUC LEXIS 9 (Ark. Pub. Serv. Comm’n Jan. 11, 2011).

to protect consumers? The answer could be the courts and the antitrust laws.

Undoubtedly, many complicated utility matters are best left to regulators, not courts, due to the technical expertise needed to make such decisions.<sup>151</sup> However, some situations rise to such a dire level that antitrust intervention becomes appropriate, particularly when the regulatory agency is not the effective decision maker and the conduct threatens the competitive vigor of a vertically or collaterally related relevant market.<sup>152</sup>

### *B. Court Enforcement of Antitrust Laws and the Revival of the Monopoly Leveraging Doctrine*

#### 1. History of the Evolution and Regression of the Monopoly Leveraging Doctrine

“[Leveraging]—the use of power in one market to influence . . . another market—does not fit clearly under either the monopolization or the attempt to monopolization label.”<sup>153</sup> The Supreme Court initially embraced the concept of monopoly leveraging but subsequently repudiated the doctrine. In 1948, the *Griffith* Court first acknowledged that a monopolist in one market may violate Section 2 by acting in a way that gained a competitive advantage in a second market, even if no monopoly in the second market was threatened.<sup>154</sup> In 1979, the Second Circuit adopted the *Griffith* Court’s proposition in its *Berkey Photo, Inc. v. Eastman Kodak Co.* decision and held that “[i]t is the use of economic power that creates the liability.”<sup>155</sup> Thirteen years later, the Supreme

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<sup>151</sup> See, e.g., *AT&T Corp. v. FCC*, 220 F.3d 607, 620 (D.C. Cir. 2000) (finding that the regulatory agency was a better tribunal than the court for making the determination of whether copper or optical fiber was a better material for certain transmission lines).

<sup>152</sup> See 3B AREEDA & HOVENKAMP, *supra* note 39, ¶ 787b, at 378-84. Compare *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973) (holding that appellant’s conduct violated Section 2), with *Verizon Commc’ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 415-16 (2004) (finding no Section 2 violation).

<sup>153</sup> E. THOMAS SULLIVAN & JEFFREY L. HARRISON, *UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS* § 6.06[D], at 304 (7th ed. 2019).

<sup>154</sup> *United States v. Griffith*, 334 U.S. 100, 107 (1948), *abrogated by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).

<sup>155</sup> 603 F.2d 263, 276 (2d Cir. 1979).

Court appeared to revive a version of the monopoly leveraging theory in a footnote in its *Kodak* opinion:

The Court has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if “a seller exploits his dominant position in one market to expand his empire into the next.”<sup>156</sup>

Notably, the Court did not include the phrase, “even if there has not been an attempt to monopolize the second market,” that the Second Circuit used in *Berkey*.<sup>157</sup>

Regardless, the Court’s decision in *Spectrum Sports* seemed to do away with non-monopolistic leveraging claims under Section 2 altogether,<sup>158</sup> but the Court provided an even more definite conclusion in *Verizon v. Trinko*.<sup>159</sup> In *Trinko*, the Court held that its *Spectrum Sports* decision prescribed that no Section 2 action may be maintained unless a “dangerous probability of success” in monopolization of the second market exists.<sup>160</sup> This decision has led the commentators and lower courts alike to conclude that a monopoly leveraging claim can only exist where the requirements of attempted monopolization or actual monopolization in the leveraged market are met, and thus, a freestanding monopoly leveraging claim no longer exists.<sup>161</sup>

The complete disposal of an independent monopoly leveraging claim under Section 2 may amount to a dangerous indifference in particular circumstances when the environment is primed for monopolists to exploit such a sweeping oversight. Even the doctrine’s staunch critics acknowledge there should be some possible qualifications and suggest:

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<sup>156</sup> *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 480 n.29 (1992) (quoting *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 611 (1953)).

<sup>157</sup> *Berkey Photo, Inc.*, 603 F.2d at 276.

<sup>158</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (“[Section] 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so.”).

<sup>159</sup> *Verizon Comm’ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 415-16 (2004).

<sup>160</sup> *Id.* at 415 n.4 (citing *Spectrum Sports, Inc.*, 506 U.S. at 459).

<sup>161</sup> *See* 3 AREEDA & HOVENKAMP, *supra* note 39, ¶ 652b1-2, at 138 & n.15.

[A]ny monopoly leveraging claim must be limited to circumstances where (1) the “target,” B market, is properly defined; and (2) the alleged conduct threatens the B market with the higher prices or reduced output or quality associated with the kind of monopoly that is ordinarily accompanied by large market share.<sup>162</sup>

Although such critics would likely disagree with the implementation of a subjective balancing test, such as the one put forth in this Comment, it is likely they might agree with the general concept that there may be certain situations where monopoly leveraging claims should at least be considered.

Claims of a monopolist potentially using “vertical integration or [other means] to monopolize a second market, [and thus] doubling or at least increasing monopoly profits,” have been discredited by influential commentators.<sup>163</sup> However, those same commentators recognize that this may not be the case when considering “price-regulated monopolists, who may be prevented . . . from charging its profit-maximizing price in its *primary* market.”<sup>164</sup> Those commentators point to subtle ways that problems may arise; for example, some regulatory agencies “lack the resources to verify costs [to] ensure that firms are not transferring excessive costs from unregulated production into the regulated base.”<sup>165</sup>

## 2. The Necessity of an Independent Monopoly Leveraging Claim Under Section 2 in a Transitioning Energy Market

Monopoly leveraging claims center around the premise that a firm “used [its] monopoly power in one market to cause injury in a *second* market.”<sup>166</sup> These claims fall into three categories: (1) “the defendant has used or is using its monopoly power in one market to create a monopoly in a second market”;<sup>167</sup> (2) “the defendant uses monopoly power in [market] A to place rivals in [market] B at a competitive disadvantage,” resulting in a price increase or quality

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<sup>162</sup> *Id.* ¶ 652c, at 145.

<sup>163</sup> 3B *id.* ¶ 787b, at 378.

<sup>164</sup> *Id.* (emphasis added).

<sup>165</sup> *Id.* ¶ 787b, at 378-79.

<sup>166</sup> 3 *id.* ¶ 652c, at 143 (emphasis added).

<sup>167</sup> *Id.*

decline in market B;<sup>168</sup> and (3) a “monopolist . . . uses its power in [market] A to obtain an ‘unfair’ advantage over rivals in [market] B,” which may result in “enlarging its own market share at their expense, but with no [evidence of a] price increase or quality decrease in the B market.”<sup>169</sup>

The type of monopoly claims that would result from a utility monopolist in the renewable energy context would fall within the second category because it threatens “things commonly identified as economic monopoly,” specifically, “higher prices or reduced output or quality.”<sup>170</sup> This falls directly in line with what antitrust laws protect against—“higher prices or lower quality or output,” not protection from merely a large market share.<sup>171</sup>

Some critics argue that a distinctive leveraging claim is unnecessary in the case where alleged conduct threatens a separate market with the kind of higher prices or reduced output or quality typically associated with a monopoly because it would fall within the “monopolization” or “attempt to monopolize” language of Section 2.<sup>172</sup> Although that argument has significant merit, it is not necessarily applicable in the energy industry context. The industry has undergone, and continues to undergo, rapid transformation, which has included the deregulation of many industry aspects.<sup>173</sup> Although deregulation typically leads to increased antitrust scrutiny,<sup>174</sup> it appears that there is still a hesitancy to scrutinize a monopoly’s power.

For example, in 2010, Entergy Corporation was investigated by the Justice Department’s Antitrust Division due to allegations that Entergy was using its control of its transmission lines to keep competitors from selling power that had been produced at more efficient, cheaper power plants.<sup>175</sup> By 2012, Entergy was no longer

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.* ¶ 652c, at 144.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* ¶ 652c, at 145.

<sup>173</sup> *See supra* Parts II, III.

<sup>174</sup> *See Bolze et al.*, *supra* note 118, at 93-94.

<sup>175</sup> Schuppe, *supra* note 4; *Entergy Corporation Cooperating with the U.S. Department of Justice on Civil Investigation*, ENERGY NEWSROOM (Oct. 12, 2010), <https://www.energynewsroom.com/news/entergy-corporation-cooperating-with-u-s-department-justice-on-civil-investigation/> [https://perma.cc/4MK5-R4ND].

under investigation but had promised to transfer its transmission lines to an independent company.<sup>176</sup> However, Entergy never transferred the lines after the Mississippi Public Service Commission rejected the plan due to the belief that it would be in the best interest of the customers and stakeholders to not approve the transaction.<sup>177</sup> Since then, Entergy has held on to its transmission lines, and there has been no further action by the Justice Department.<sup>178</sup> Unfortunately, this is just one of numerous examples of a monopoly exploiting its power to persuade regulators and to harm consumers in pursuit of maintaining its regional dominance.

A leveraging claim does not fit neatly within Section 2's "monopolize" or "attempt to monopolize" statutory language;<sup>179</sup> however, the inability to precisely place a monopoly leveraging claim within Section 2's statutory language should not result in the foreclosure of an independent monopoly leveraging claim. The reality of the modern world calls for an independent monopoly leveraging claim under Section 2 for four reasons: (1) a clear preference for opening the energy market up to competition exists;<sup>180</sup> (2) recent incidents indicate regulators place incumbent, traditional utilities' needs above the needs of consumers;<sup>181</sup> (3) forcing the transitioning energy market to satisfy the ever-complex market definition requirement would damage competition, cause consumer harm, and potentially sabotage the public welfare;<sup>182</sup> and

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<sup>176</sup> Schuppe, *supra* note 4.

<sup>177</sup> *Entergy, ITC Call Off Grid Sale, Citing States' Opposition*, REUTERS (Dec. 13, 2013, 11:30 AM), <https://www.reuters.com/article/utilities-entergy-itc/entergy-itc-call-off-grid-sale-citing-states-opposition-idUSL2N0JS0PQ20131213> [<https://perma.cc/J29D-6FMQ>]; Schuppe, *supra* note 4.

<sup>178</sup> Schuppe, *supra* note 4.

<sup>179</sup> 15 U.S.C. § 2; SULLIVAN & HARRISON, *supra* note 153, § 6.06[D], at 304.

<sup>180</sup> See discussion *infra* Section V.B.2.a.

<sup>181</sup> See Schuppe, *supra* note 4; Kasakove, *supra* note 4; Bisaha, *supra* note 4.

<sup>182</sup> "It is generally agreed that the primary goal of United States antitrust enforcement is to maximize wealth and increase consumer welfare by assuring that markets remain open to entry and output can expand." Bolze et al., *supra* note 118, at 81 (citing ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 1 (4th ed. 1994)).

(4) the courts were expressly delegated the broad authority to interpret the Sherman Antitrust Act.<sup>183</sup>

*a. A Clear Preference for a Competitive Energy Market*

Antitrust law protects competition, not competitors. Free and open markets serve as the foundation of the American economy.<sup>184</sup> In *Brown Shoe Co. v. United States*, the Supreme Court wrote that Congress' "concern [in passing the Sherman Antitrust Act was] with the protection of *competition*, not *competitors*, and its desire [was] to restrain [conduct] only to the extent that [it] may tend to lessen competition."<sup>185</sup> However, no antitrust remedy is available "where the only *injury* claimed is to a competitor, and [the *injury*] will not have an effect on price or output."<sup>186</sup>

As noted, throughout the years, the energy industry has undergone transformations due to administrative regulations and Congressional action.<sup>187</sup> The deeply held value of fair and free competitive markets and the evident slow, steady march towards a more competitive energy market seem to plainly indicate a general consensus favoring actions taken to increase competition within markets.

*b. Preservation of Competition for the Public Interest*

"[A]ntitrust is designed to protect consumers from producers, not to protect producers from each other or to ensure that one firm gets more of the business."<sup>188</sup> Similarly, a commonly agreed upon purpose of antitrust law is to safeguard competition for the benefit of the public interest, not to protect "others" from competition.<sup>189</sup>

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<sup>183</sup> SULLIVAN & HARRISON, *supra* note 153, § 1.03, at 7. "[I]t is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case." 21 CONG. REC. 2460 (1890).

<sup>184</sup> *Guide to Antitrust Laws*, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws> [<https://perma.cc/3K3W-W9L7>] (last visited Feb. 8, 2023).

<sup>185</sup> 370 U.S. 294, 320 (1962).

<sup>186</sup> SAGERS, *supra* note 109, at 54 (emphasis added).

<sup>187</sup> See discussion *supra* Section II.A.

<sup>188</sup> *Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 90 F.3d 238, 240 (7th Cir. 1996); see also *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

<sup>189</sup> See *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 994 (11th Cir. 1993). "[C]ustomers are the intended beneficiaries of competition . . ." *Glen Holly Ent., Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1014 (9th Cir. 2003). The purpose of antitrust law is to

The Department of Justice and the Federal Trade Commission bear the responsibility for enforcing federal antitrust law, but *Gulf States Utilities Co. v. Federal Power Commission* confirmed that antitrust law “principles apply to federal utility regulators too.”<sup>190</sup> “[W]hen regulatory statutes reference the ‘public interest,’”<sup>191</sup> “*Gulf States* established that a regulator’s ‘public interest’ duties include applying the principles and furthering the policies of other statutes,” including the antitrust laws.<sup>192</sup> Regulatory commission decisions before, during, and after natural disasters, such as the February 2021 winter storm<sup>193</sup> and Hurricane Ida,<sup>194</sup> raise both general public interest concerns and concerns about a regulator’s public interest duties.<sup>195</sup>

*c. The Energy Market’s Definition Difficulties*

The question of “market power” is vital in a case involving Section 1 or Section 2 of the Sherman Antitrust Act.<sup>196</sup> The purpose of market definition is to assess anticompetitive effects.<sup>197</sup> Under Section 2, a plaintiff is generally required “to show that a single firm either is a monopolist or that there is a dangerous probability that the firm will become a monopolist.”<sup>198</sup>

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maximize consumer benefit, *Reiter*, 442 U.S. at 343, by promoting low prices, high quality, varied products and services, innovation, access, and efficiency in production and distribution. *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308 (3rd Cir. 2007).

<sup>190</sup> 411 U.S. 747 (1973); HEMPLING, *supra* note 19, at 171.

<sup>191</sup> HEMPLING, *supra* note 19, at 151. Although the Sherman Antitrust Act does not explicitly mention the public interest, the Supreme Court has expressed the importance of antitrust law by calling it “the Magna Carta of free enterprise,” and stating that antitrust laws “are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.” Christopher R. Leslie, *Antitrust Law as Public Interest Law*, 2 U.C. IRVINE L. REV. 885, 885 n.1 (2012) (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)).

<sup>192</sup> HEMPLING, *supra* note 19, at 172 (“[T]he Commission’s broad authority to consider anticompetitive and other conduct touching the ‘public interest’ under the other sections of the [Federal Power] Act emphasizes the breadth of its authority under the public interest standard generally and as embodied in § 204.”) (alteration in original) (quoting *Gulf States*, 411 U.S. at 751, 753, 756-59); *see also* Leslie, *supra* note 191, at 885-86.

<sup>193</sup> *See* Schuppe, *supra* note 4.

<sup>194</sup> Daly, *supra* note 5.

<sup>195</sup> *See* discussion *supra* Section III.D.

<sup>196</sup> SULLIVAN & HARRISON, *supra* note 153, § 2.06, at 25.

<sup>197</sup> *See id.*

<sup>198</sup> *Id.* § 2.06[A][5], at 31.



The analysis of market power typically revolves around three questions: (1) What is the relevant market? (2) What is the defendant's market share within the relevant market? (3) What does that relevant market share indicate about market power when considered in light of all relevant factors?<sup>199</sup>

Essentially, all Sherman Antitrust Act causes of action require proof of market power, which can be demonstrated with direct or indirect evidence.<sup>200</sup> Given the unlikelihood of direct proof of anticompetitive harm, the courts have derived a test to estimate market power for a defendant's market share.<sup>201</sup> This derived test places the burden upon the plaintiff to meet three requirements: (1) define the product market; (2) define the geographic market; and (3) demonstrate that the defendant's market share threatens competition.<sup>202</sup>

*FTC v. Staples, Inc.* made clear that in some circumstances, market power is not adequately addressed by solely focusing on products.<sup>203</sup> Submarkets can exist within broader economic markets and can have a bearing on antitrust analysis.<sup>204</sup> In *Staples*, the merger of two retailers of office supplies was challenged by the Federal Trade Commission, but a problem arose due to office supply retailers selling products that almost always have substitutes.<sup>205</sup> In *Brown Shoe Co. v. United States*, the Supreme Court recognized that within a broad market, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."<sup>206</sup>

A Section 2-specific market power issue arises when attempting to match the market with the alleged anticompetitive

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<sup>199</sup> *Id.* § 2.06[B], at 31.

<sup>200</sup> SAGERS, *supra* note 109, at 66-68.

<sup>201</sup> *See* *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

<sup>202</sup> *Id.*

<sup>203</sup> 970 F. Supp. 1066, 1075-76 (D.D.C. 1997); SULLIVAN & HARRISON, *supra* note 153, § 2.06[B][6], at 39.

<sup>204</sup> SULLIVAN & HARRISON, *supra* note 153, § 2.06[B][7], at 40; *see also* *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 768 (9th Cir. 2001); *Staples*, 970 F. Supp. at 1075.

<sup>205</sup> *Staples*, 970 F. Supp. at 1074. The general rule when determining a relevant product market is that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use [by consumers] or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co.*, 370 U.S. at 325.

<sup>206</sup> 370 U.S. at 325.

conduct. An instructional case on this issue is *Aquatherm Industries, Inc. v. Florida Power & Light Co.*,<sup>207</sup> in which Aquatherm, a manufacturer of solar-power heating systems for swimming pools, alleged Section 2 violations against Florida Power & Light for falsely advertising that electric heating was the most cost-efficient.<sup>208</sup> Aquatherm identified two “affected” markets: the market for pool-heating equipment and the market for electric power.<sup>209</sup> Aquatherm was unsuccessful in its claims because Florida Power & Light did not compete in the pool-heating equipment market and thus could not be said to be monopolizing or attempting to monopolize the pool-heating equipment market.<sup>210</sup> Additionally, Florida Power & Light already possessed a 100% market share in the sale of electricity, thus making it impossible to increase its dominance.<sup>211</sup>

The difficulty in defining market power for antitrust purposes is not a recent development; however, the particular circumstances facing the transitioning energy market give rise to additional questions of how to properly define market power in a way to protect competition without punishing successful utilities.

*d. Congress Granted the Courts Authority*

The Sherman Antitrust Act’s broad, vague language has led to the thought that the statutes effectively grant “common law lawmaking authority under which the federal courts have been tasked with the creation of a federal policy of free competition.”<sup>212</sup> This has led to the courts being the source of much of the controversy that surrounds antitrust law.<sup>213</sup> The legislative history<sup>214</sup> and ample prior case law should instill confidence in the courts to implement a balancing test that stresses objectivity and reasonableness.

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<sup>207</sup> 145 F.3d 1258 (11th Cir. 1998).

<sup>208</sup> *Id.* at 1260.

<sup>209</sup> *Id.* at 1261.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> SAGERS, *supra* note 109, at 7.

<sup>213</sup> *Id.*

<sup>214</sup> *See generally* 21 CONG. REC. 2455-74 (1980).

### 3. The Courts Should Implement a Balancing Test to Protect Consumers Due to Regulatory Commissions' Failure to Provide Adequate Protection

The determinative factor in *Trinko* and *Otter Tail* centered around whether the governing regulatory agency was properly acting as an effective decision-maker.<sup>215</sup> Increasingly, it appears that regulatory commissions are failing to protect consumers from utility monopolies that use their power to hinder, even halt, the transition into renewable energy and at the expense of the utility consumer.<sup>216</sup> The consumer suffers harm because of a less reliable grid,<sup>217</sup> the contribution to climate change,<sup>218</sup> and increased costs to ratepayers due to failed, costly, and untimely projects.<sup>219</sup> The courts must now take up the responsibility of utility consumers' protection and uphold and enforce the stated goal of the Sherman Antitrust Act.<sup>220</sup> The most apt way for the courts to begin taking up this responsibility is the implementation of a balancing test when considering an independent monopoly leveraging claim under Section 2.

The purpose of Section 2 is to prohibit anticompetitive conduct that results in or is in the pursuit of monopolization,<sup>221</sup> and it seems counterintuitive to fail to acknowledge some unique and specific circumstances in which a monopoly leveraging claim would properly further the Section's primary purpose. The best way for a court to uphold the Section's purpose and protect consumers would be the implementation and utilization of a balancing test that considers the totality of the specific circumstances and refrains from insinuating a broad generalization that all utility monopolies

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<sup>215</sup> See *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 411-15 (2004); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-77 (1973).

<sup>216</sup> See discussion *supra* Section III.D.

<sup>217</sup> See Schuppe, *supra* note 4.

<sup>218</sup> See Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, 109 CALIF. L. REV. 209, 237-52 (2021).

<sup>219</sup> See Jonas J. Monast, *Electricity Competition and the Public Good: Rethinking Markets and Monopolies*, 90 U. COLO. L. REV. 667, 694 (2019).

<sup>220</sup> "It is generally agreed that the primary goal of United States antitrust enforcement is to maximize wealth and increase consumer welfare by assuring that markets remain open to entry and output can expand." Bolze et al., *supra* note 118, at 81 (citing GELLHORN & KOVACIC, *supra* note 182, at 1).

<sup>221</sup> See 15 U.S.C. § 2.

display impermissible monopoly leveraging conduct solely by entering the renewable energy marketplace.

Courts should apply this balancing test when a smaller, newer renewable energy developer brings an antitrust claim against a utility monopoly. A balancing test is best suited for an independent monopoly leveraging claim because it falls in line with the Supreme Court's recent increase in moving away from "overly mechanical" analyses.<sup>222</sup> As seen in and developed by the *American Needle* and *North Carolina State Board of Dental Examiners* decisions, there is an increasing willingness to move towards examining economic realities of markets rather than strictly utilizing doctrinal tests.<sup>223</sup>

The courts should look to the following factors, in addition to the totality of the circumstances, to evaluate: (1) whether the monopoly has impermissibly used its monopoly power in the nonrenewable energy sector to place the renewable energy generator at a competitive disadvantage;<sup>224</sup> (2) whether there has been a competitive disadvantage resulting in quality decline;<sup>225</sup> (3) whether the relevant product and geographic markets have been defined;<sup>226</sup> (4) whether regulation would create a chilling effect on fair competition within the market;<sup>227</sup> (5) whether the monopoly is attempting to protect its monopoly power;<sup>228</sup> and (6) whether there is actual, or a dangerous threat of, monopolization in the renewable energy market.<sup>229</sup>

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<sup>222</sup> Jarod Bona, *What Are the Elements for a Monopolization Claim Under the Federal Antitrust Laws?*, ANTITRUST ATT'Y BLOG (Apr. 3, 2021), <https://www.theantitrustattorney.com/elements-monopolization-claim-federal-antitrust-laws/> [<https://perma.cc/X57S-NX6G>].

<sup>223</sup> *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 191 (2010); *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 510 (2015).

<sup>224</sup> See 3B AREEDA & HOVENKAMP, *supra* note 39, ¶ 787b, at 378-84.

<sup>225</sup> See Kiesling, *supra* note 32, at 1625.

<sup>226</sup> See *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

<sup>227</sup> See *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1353 (Fed. Cir. 1999).

<sup>228</sup> See *United States v. Microsoft Corp.*, 253 F.3d 34, 50 (D.C. Cir. 2001).

<sup>229</sup> See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 454-59 (1993).

*α. Impermissible Use of Monopoly Power in the Nonrenewable Energy Sector Which Placed the Renewable Energy Generator at a Competitive Disadvantage*

The “[e]nergy market[ is] vulnerable to market power abuses,” yet judicial oversight of traditional utilities has been feeble.<sup>230</sup> Additionally, despite Congress’ repeated actions to “encourage [electricity] generators to participate in competitive markets, . . . many utilities that own both transmission and generation assets have managed to circumvent competitive markets.”<sup>231</sup> Further, vertically integrated utilities have managed to continue operating uncompetitive coal generators “[b]y selling electricity at a loss and recovering [those] losses in state rate recovery proceedings.”<sup>232</sup>

Although much of the nation has embraced competitive energy markets, courts and regulators still preserve and utilize “legal rules that emerged to protect consumers in the [long-gone] era of utility rate regulation.”<sup>233</sup> Professor Macey argues that “zombie energy laws” “prevent clean energy companies from competing with incumbent fossil fuel generators.”<sup>234</sup>

For example, “[i]n restructured markets, . . . a bidding process . . . determines which generators will provide electricity to meet demand in a given period time.”<sup>235</sup> The “grid operator” overseeing this process “determines how much electricity is needed . . . and [then] identifies which generators are able to provide power to the region at the lowest cost.”<sup>236</sup> It is possible for generators to “have legitimate reasons to [submit bids and] operate even when it is unprofitable . . . to do so”; however, Professor Macey points out that “coal-fired power plants owned by vertically integrated utilities [appear] to be recouping losses they incur in energy markets from their captive ratepayers.”<sup>237</sup> Alarming, state regulators are

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<sup>230</sup> Macey, *supra* note 99, at 1079.

<sup>231</sup> *Id.* (citing 16 U.S.C. § 824a-3(a)-(b)).

<sup>232</sup> *Id.* at 1079-80 (citing Catherine Morehouse, *Inefficient Coal Plant Scheduling Cost Ratepayers \$3.5B from 2015 to 2017, Report Says*, UTIL. DIVE (Oct. 23, 2019), <https://www.utilitydive.com/news/inefficient-coal-plant-scheduling-cost-ratepayers-35b-from-2015-to-2017/565648/> [<https://perma.cc/A5GY-DQHQ>]).

<sup>233</sup> *Id.* at 1081.

<sup>234</sup> *Id.* at 1082.

<sup>235</sup> *Id.* at 1106.

<sup>236</sup> *Id.* at 1107.

<sup>237</sup> *Id.* at 1109.

continuing to allow this practice even when those vertically integrated utilities are participants in restructured energy markets.<sup>238</sup> This continued practice permits “generation facilities owned by vertically integrated utilities to manipulate competitive energy markets, which seriously distorts energy market prices and reduces revenues enjoyed by generators that could offer electricity more competitively, including solar and wind generators.”<sup>239</sup>

This type of conduct taken by nonrenewable energy generators should serve as an example of the type of impermissible monopoly power in the nonrenewable energy sector that places a renewable energy generator at a competitive disadvantage.<sup>240</sup>

*b. Whether There Has Been a Competitive Disadvantage Resulting in Quality Decline*

Similar to the first consideration concerning an impermissible use of monopoly power in the nonrenewable energy sector which resulted in the renewable energy generator being placed at a competitive disadvantage, courts must first look at the conduct of the incumbent utilities to determine if renewable energy was placed at a competitive disadvantage, and then at the industry as a whole to determine whether the quality of energy generated from renewable sources declined. A court considering this portion of the balancing test should first determine whether renewable energy generators are completely foreclosed from a market<sup>241</sup>—or significantly hindered in meaningful market participation<sup>242</sup>—due to the actions of an incumbent utility, and then whether there appears to be a resulting decline in quality.

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> See Monast, *supra* note 219, at 694. Overinvestment and poor risk management are common quality declines that can result from an incumbent firm exploiting its dominance. See *id.* For example, “South Carolina is grappling with a financial fallout after the recent cancellation of the VC Summer nuclear project in the state. The two lead utilities had invested approximately \$9 billion in the project by the time of cancellation.” *Id.*

<sup>241</sup> See, e.g., *In re The Application of Plains and Eastern Clean Line LLC for a Certificate of Public Convenience and Necessity to Construct, Own and Operate as an Electric Transmission Public Utility in the State of Arkansas*, No. 10-041-U, 2011 Ark. PUC LEXIS 9 (Ark. Pub. Serv. Comm’n Jan. 11, 2011).

<sup>242</sup> See Konidena, *supra* note 91.

*c. Relevant Product and Geographic Markets*

“Defining the relevant market is an indispensable element” to consider.<sup>243</sup> Here, it will be the market in which the utility monopoly and the renewable energy generators compete based on products that are in competition with each other. The courts must determine the relevant product market and the relevant geographic market.<sup>244</sup> The relevant product market will identify the products or services that compete with one another,<sup>245</sup> which will either be generation-based or transmission-based.

The geographic market will be relevant to competition that is geographically confined,<sup>246</sup> as will likely be the case in renewable energy cases due to the limitations of utility transmission and the fact that some parts of the country are further along in its transition to renewable energy.<sup>247</sup> It is imperative that both the relevant product market and the relevant geographic market are taken into consideration because the relevant market analysis could be determinative in whether a utility monopoly achieved a competitive advantage in the specific renewable energy market.<sup>248</sup>

*d. The Chilling Effect on the Market*

The courts must then look to the impact on the relevant renewable energy market as “the *use* of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.”<sup>249</sup> The primary concern is that the utility monopoly’s presence in the renewable energy market may all but ensure that no other entity would, or

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<sup>243</sup> *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1355 (Fed. Cir. 1999).

<sup>244</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

<sup>245</sup> *See id.* at 325.

<sup>246</sup> *See id.* at 328.

<sup>247</sup> In 2019, Delaware, Ohio, and New Jersey produced the least amount of electricity from renewables whereas Vermont, Idaho, and Washington produced the most amount of electricity from renewables. Samuel Stebbins, *These States Are Producing the Most Renewable Energy. Where Does Yours Rank?*, USA TODAY, <https://www.usatoday.com/story/money/2019/07/26/renewable-energy-hydro-wind-solar-power-produced-by-each-state/39801879/> [<https://perma.cc/C5UU-9CF8>] (July 26, 2019, 12:11 PM).

<sup>248</sup> “The ‘market’ which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration.” *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956).

<sup>249</sup> *United States v. Griffith*, 334 U.S. 100, 107 (1948) (emphasis added).

could, be a market player. However, the Supreme Court has cautioned against constructions of Section 2 which might chill fair competition and has reasoned that vigorous competition is not unreasonable if it drives out inefficient players.<sup>250</sup> To effectively consider all significant impacts on the relevant renewable energy market, the methodology should follow the “post-Chicago” approach to antitrust analysis, which favors a market-specific approach, and a court should consider external factors that may affect the market being examined.<sup>251</sup>

In *Intergraph Corp.*, the Federal Circuit relied on a Supreme Court concurrence and stated that leveraging is not illegal “unless ‘a significant fraction [of] buyers or sellers are frozen out of a market.’”<sup>252</sup> However, foreclosure effects “may be assessed on an aggregate basis,”<sup>253</sup> “and a ‘pattern’ of behavior may give ‘increased plausibility to [plaintiff’s] claim.’”<sup>254</sup> Thus, it is imperative to look at each claim on an individual basis as each relevant market, as well as each utility monopoly’s conduct, will be incredibly fact-specific.

Courts should be aware of certain tactics that are typically deployed to remove competition. Exclusionary strategies, such as tying arrangements, may be implemented to protect or extend market share and entry barriers that decrease the attractiveness of entering the renewable energy market.<sup>255</sup> Federal district and appeals courts generally require strong showings of anticompetitive conduct; federal courts, in recent years, have found harmed competition in a number of cases involving a wide range of

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<sup>250</sup> See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

<sup>251</sup> See Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513, 529-31 (1995).

<sup>252</sup> *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1360 (Fed. Cir. 1999) (quoting *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O’Connor, J., concurring in the judgment)).

<sup>253</sup> William F. Adkinson, Jr., et al., *Enforcement of Section 2 of the Sherman Act: Theory and Practice* 29 (Fed. Trade Comm’n, Working Paper, 2008), [https://www.ftc.gov/system/files/documents/public\\_events/section-2-sherman-act-hearings-single-firm-conduct-related-competition/section2overview.pdf](https://www.ftc.gov/system/files/documents/public_events/section-2-sherman-act-hearings-single-firm-conduct-related-competition/section2overview.pdf) [https://perma.cc/5HEM-UGMU] (quoting 1 SECTION OF ANTITRUST L., AM. BAR ASS’N, ANTITRUST LAW DEVELOPMENTS 244 (Jonathan M. Jacobson et al. eds., 6th ed. 2007)).

<sup>254</sup> *Id.* (alteration in original) (quoting 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 310c7, at 208 (3d ed. 2007)).

<sup>255</sup> See *id.* at 2.



unilateral conduct.<sup>256</sup> The District of Columbia Circuit has provided a significant decision in this regard.<sup>257</sup> In *Microsoft Corp.*, the court upheld a finding that Microsoft had violated Section 2 by imposing improper restraints on key distributors and other improper conduct.<sup>258</sup>

*e. Defensive Leveraging Conduct*

A court must also consider whether the actions taken by the monopoly were an attempt to protect its monopoly power in violation of Section 2 of the Sherman Antitrust Act. Robin Cooper Feldman coined the Defensive Leveraging Theory, which argues that “[l]everage behavior should not be analyzed solely as an attempt to reap additional monopoly rent from a second market. Rather, it is frequently an attempt to prevent erosion of the primary monopoly.”<sup>259</sup> For example, in *Microsoft Corp.*, the D.C. Circuit found that Microsoft had leveraged its monopoly power in the market for operating systems to increase its browser market share by placing restrictions on a competitor, thus protecting its operating systems monopoly.<sup>260</sup>

A court analyzing whether a utility monopoly’s actions meet the level of anticompetitive conduct seen in *Microsoft Corp.* should look at the actions taken and consider their purpose and effect. If a utility monopoly takes an action that appears to be for the sole purpose of hindering competition, the court should carefully consider whether it was an attempt to protect its monopoly of providing electricity to consumers. For example, if a utility monopolist enters into the renewable energy market, not to gain additional profits from the new market, but rather to prevent the natural erosion of its nonrenewable energy monopoly, this would constitute “defensive” monopoly leveraging and satisfy this factor of the balancing test. However, the difficult question is how to provide satisfactory evidence of such conduct. As illustrated in *Berkey Photo*:

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<sup>256</sup> See *id.* at 19.

<sup>257</sup> See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>258</sup> *Id.* at 59-64, 67-78.

<sup>259</sup> Robin Cooper Feldman, *Defensive Leveraging in Antitrust*, 87 GEO. L.J. 2079, 2079 (1999).

<sup>260</sup> See *Microsoft Corp.*, 253 F.3d at 64.

[A] large firm does not violate [Section] 2 simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity—more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they *cannot by themselves* be considered uses of monopoly power.<sup>261</sup>

For this factor, it is imperative that courts hone in on the “*cannot by themselves*” aspect and must fully assess whether a utility monopolist took part in defensive leveraging. Courts cannot understand the full impact of the conduct without analyzing the structural changes in both the nonrenewable energy market and the renewable energy market.<sup>262</sup> This should be taken seriously as defensive leveraging can enable a monopolist to use “the power of its existing customer base [in] the new market thereby dominating the new technology and crushing challengers.”<sup>263</sup> Robin Cooper Feldman illustrates the primary concern:

In the lifecycle of a monopoly, new entrants may choose to enter the market by splintering off a portion of the monopolist’s market or jumping into the next generation of product development. A monopolist blocks these challenges through defensive leveraging: Using power in the primary market, the monopolist projects into the newly splintered or newly developed market and dominates both. This is the essence of defensive leveraging. It is not an attempt to reap additional monopoly profit from a second market. It is an effort to protect the primary monopoly from the natural forces of competition.<sup>264</sup>

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<sup>261</sup> *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979) (emphasis added).

<sup>262</sup> See Feldman, *supra* note 259, at 2093.

<sup>263</sup> *Id.* at 2094.

<sup>264</sup> *Id.* at 2095.

When determining whether a utility monopoly's conduct was purely a defensive mechanism to protect its existing monopoly, courts should look to see if a utility monopoly attempted to crush existing competitors in the renewable energy market by blocking a competitor's attempts to splinter off a portion of the renewable energy market or to jump into the next generation of product development, such as installing solar panels or providing storage for solar energy.

*f. Actual, or a Dangerous Threat of, Monopolization in the Renewable Energy Market*

Lastly, courts should determine whether the utility monopoly has *truly* achieved a competitive advantage in the renewable energy market to sufficiently show that there is actual, or a dangerous threat of, monopolization in the renewable energy market due to the monopoly's presence. This is a significant aspect of the balancing test and should be weighed most heavily due to the potentially significant risk of quashed competitive opportunities. If a utility monopolist successfully utilizes defensive leveraging in the renewable energy market, such conduct can substantially delay—or prevent altogether—monopoly erosion<sup>265</sup> and would essentially secure the transfer of the utility monopoly's permissible power within the nonrenewable energy market to the renewable energy market. Even if a utility monopolist merely delays its general energy market power erosion, it implicates antitrust policy as antitrust is concerned with market power that may be exercised for a substantial period of time in addition to indefinite market power.<sup>266</sup>

Currently, courts lack clarity as to the amount of proof of market power required for a Section 2 violation as a result of the Supreme Court's decision in *Spectrum Sports*, which led some courts to conclude that the standard had been raised.<sup>267</sup> Given the confusion, this adds justification to weighing this factor most heavily to ensure judicial consistency. Typically, monopoly power

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<sup>265</sup> *Id.* at 2093.

<sup>266</sup> *Id.*

<sup>267</sup> See WILLIAM M. HANNAY, CORPORATE COUNSEL'S ANTITRUST DESKBOOK § 4:22, Westlaw (database updated Oct. 2021).

can be “demonstrated by showing that both (1) the [utility monopoly] has [or] . . . has a dangerous probability of attaining[] a high share of a [renewable energy] market and (2) there are entry barriers,” which possibly may have been created by the utility monopoly’s conduct “that permit[s] the [utility monopoly] to exercise substantial market power for an appreciable period.”<sup>268</sup> To appropriately determine both elements, courts will need to consider the utility monopoly’s current market share of the renewable energy market and whether its conduct (as ascertained from the preceding factors) has led to the likelihood that it will acquire a dominant share.<sup>269</sup> Then, a court will need to further analyze whether the utility monopoly’s conduct has created entry barriers for new renewable energy market players and whether it is likely that such entry barriers will continue to persist.

If a court determines, in conjunction with the previous five factors, that the utility monopoly has an actual monopoly or poses a dangerous threat of extending its power and thus achieving monopolization in the renewable energy market, a court should find the utility monopoly guilty of engaging in monopoly leveraging in violation of Section 2 of the Sherman Antitrust Act.

### CONCLUSION

The protection of the energy industry and the grid are of utmost priority, and policymakers, regulators, and the courts should act accordingly. The industry’s transition in the past few decades provided ample opportunities to allow competition into the energy generation industry; however, it has become apparent that incumbent nonrenewable energy firms, rather than the public welfare, have become the primary concern of the powers that be.

Any efforts to “authorize” competition within a monopolized market will not immediately render that market effectively competitive.<sup>270</sup> Where regulators or policymakers fail to address

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<sup>268</sup> *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*: Chapter 2, U.S. DEP’T JUST.: ARCHIVES, <https://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2> [<https://perma.cc/YY2H-FABA>] (Mar. 18, 2022).

<sup>269</sup> Other approaches to identifying monopoly power include considering the anticompetitive effects, such as the reduction of output. *Id.*

<sup>270</sup> See HEMPLING, *supra* note 19, at 147.

and remove securely ingrained aspects of the historical monopoly structure, the granting of authorizing competition may be lip service at best.<sup>271</sup>

The energy generation wholesale market has seen success since the transformation began,<sup>272</sup> and in light of improved renewable energy technology, incumbent firms' active resistance to include renewable energy generators into the transmission markets, policymakers' and regulators' lack of protection, and the growing climate crisis, renewable energy hopefuls should not be foreclosed from effectively competing within the renewable energy sector and the energy industry as a whole.

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<sup>271</sup> *See id.*

<sup>272</sup> Blumsack, *supra* note 17.

