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## Regulatory Theater: How Investor-Owned Utilities and Captured Oversight Agencies Perpetuate Environmental Racism

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# REGULATORY THEATER: HOW INVESTOR-OWNED UTILITIES AND CAPTURED OVERSIGHT AGENCIES PERPETUATE ENVIRONMENTAL RACISM

*Ruhan Nagra, Jeanne Bergman, & Jasmine Graham*

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## INTRODUCTION

This Article contends that the structure and processes of energy utility regulation in the United States perpetuate environmental injustice. The inequitable distribution of the benefits and harms of fossil fuel energy generation and infrastructure is widely recognized.<sup>1</sup> However, the only mechanisms currently available to redress environmental injustices

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<sup>1</sup> See, e.g., Kathiann M. Kowalski, *How Energy Issues and Civil Rights Issues Intersect*, ENERGY NEWS NETWORK (June 30, 2020), <https://perma.cc/2CC8-CBEA>; Kendra Pierre-Louise, *The Fossil Fuel Industry’s Legacy of White Supremacy*, SIERRA CLUB (Apr. 2, 2021), <https://perma.cc/ETV5-PKFW>.

in the utility sector are arcane, invisible, and inaccessible to the Black, Brown, and low-income communities who are most affected.<sup>2</sup> Regulatory institutions—which make highly consequential decisions about how gas and electricity are produced and distributed and who bears the costs—claim to be guided in their decision-making by ostensibly neutral principles such as prudence, safety, reasonableness, and reliability.<sup>3</sup> But, as this Article will demonstrate, these bland and purportedly neutral guiding principles conceal a system that is designed to protect and benefit the very industry subject to regulation. By playing this role, the regulatory system works hand-in-glove with the utility sector and the fossil fuel industry to produce outcomes that disproportionately harm communities of color.

This Article explores the role of a key administrative proceeding—the utility “rate case”—in facilitating the siting of fossil fuel infrastructure in Black, Brown, and low-income communities. The Article uses as a case study the efforts of investor-owned utility National Grid to build a massive gas pipeline and associated Liquefied Natural Gas (“LNG”) infrastructure in Brooklyn, New York.<sup>4</sup> For two years, frontline communities have used a range of tactics to prevent completion of the pipeline and LNG infrastructure,<sup>5</sup> including participation in the utility regulation process.<sup>6</sup> Although community groups have successfully delayed—and may entirely block—construction of some of the infrastructure as a result of their creative, multi-pronged advocacy and organizing strategy,<sup>7</sup> the serious limitations of the regulatory process in advancing their

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<sup>2</sup> See *infra* Part III.

<sup>3</sup> See, e.g., *Mission Statement*, N.Y. STATE DEP’T OF PUB. SERV., <https://perma.cc/936P-UNFK> (last updated Aug. 31, 2018); see also Jonas J. Monast & Sarah K. Adair, *A Triple Bottom Line for Electric Utility Regulation: Aligning State-Level Energy, Environmental, and Consumer Protection Goals*, 38 COLUM. J. ENV’T L. 1, 3 (2013); see also Susan D. Fendell, *Public Ownership of Public Utilities: Have Stockholders Outlived Their Useful Economic Lives?*, 43 OHIO STATE L.J. 821, 827 (1982).

<sup>4</sup> See Kim Fraczek & Karen Edelstein, *New Yorkers Mount Resistance Against North Brooklyn Pipeline*, FRACTRACKER ALL (May 18, 2020), <https://perma.cc/AV9H-MHPQ>.

<sup>5</sup> See *Stop the North Brooklyn Pipeline*, NO N. BROOKLYN PIPELINE, [perma.cc/XE62-DMUN](https://perma.cc/XE62-DMUN) (last visited Mar. 24, 2022).

<sup>6</sup> See generally *Ruling on Party Status, In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 19-G-0309, Sr. No. 896 (N.Y. State Dep’t of Pub. Serv. June 5, 2019), <https://perma.cc/B7U2-9WHB>; *Ruling on Party Status, In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 19-G-0309, Sr. No. 866 (N.Y. State Dep’t of Pub. Serv. July 10, 2019), <https://perma.cc/G3EY-FFX8>; *Ruling on Party Status, In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 19-G-0310 (N.Y. State Dep’t of Pub. Serv. Oct. 18, 2019), <https://perma.cc/GU96-AZ73>.

<sup>7</sup> See Samantha Maldonado, *Judge Temporarily Freezes Plan to Truck Frigid Liquid Natural Gas to Brooklyn*, CITY (Aug. 5, 2021), <https://perma.cc/U2SQ-5UV5>; see also NO N. BROOKLYN PIPELINE, *supra* note 5.

struggle for environmental justice are patent. The Article draws on the National Grid case study to expose the procedural injustice of the utility regulation system in the United States. This procedural injustice facilitates the inequitable distribution of environmental burdens resulting from utility companies' activities. Ultimately, the Article advances the position that the private, profit-driven utility model is fundamentally incompatible with environmental and energy justice and must be replaced with an alternative, publicly owned energy system.

#### I - THE "PERVERSE INCENTIVE" AND ENVIRONMENTAL RACISM

Since 2016, investor-owned utility National Grid has sought to significantly expand its gas infrastructure in New York City and recover the costs of this expansion from customers through administrative proceedings called "rate cases."<sup>8</sup> This Section begins with a brief explanation of investor-owned utilities and how they operate, followed by a description of National Grid's planned infrastructure expansion and two most recent rate cases. The Section goes on to argue that National Grid and other investor-owned utilities have a "perverse incentive" to build expensive physical infrastructure, even when customers' needs can be met with cheaper, energy-efficient, clean, and renewable alternatives. The Section concludes by describing the adverse environmental, climate, and energy impacts of this "perverse incentive" on communities affected by fossil fuel infrastructure, who are disproportionately Black, Brown, and low-income.

##### A. National Grid's Fossil Fuel Infrastructure Expansion

In 1898, Samuel Insull, founder of the Chicago-based Commonwealth Edison electric company, first proposed the idea of the "regulatory compact."<sup>9</sup> Insull realized that (1) the utility industry is a type of "natural monopoly" because competition between for-profit utility companies results in duplication of expensive infrastructure and higher costs for customers;<sup>10</sup> and (2) the "logical and necessary corollary" of the natural monopoly principle is "the principle of public control"<sup>11</sup>—that is,

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<sup>8</sup> See *Investing in the Future of Energy in NYC and LI*, NAT'L GRID, <https://perma.cc/46PX-6GVZ> (last visited Feb. 27, 2022); NAT'L GRID, *THE FUTURE OF ENERGY IN NEW YORK CITY AND LONG ISLAND* (2016), <https://perma.cc/CU74-KPQK>; see generally *Major Rate Case Process Overview*, N.Y. STATE DEP'T OF PUB. SERV., <https://perma.cc/57DY-B3SN> (last updated Sept. 23, 2011).

<sup>9</sup> Forrest McDonald, *Samuel Insull and the Movement for State Utility Regulatory Commissions*, 32 BUS. HIST. REV. 241, 241-42 (1958).

<sup>10</sup> See *id.* at 243.

<sup>11</sup> See *id.*

regulation. Since utility companies have monopolies to provide essential services in specific geographic locations, the company's customers are captive (unable to take their business elsewhere) and vulnerable to price gouging, poor service, and other forms of corporate abuse in the absence of regulation.<sup>12</sup> By 1916, 33 states had established public utility commissions to regulate monopoly utilities, and the regulatory compact was widely accepted.<sup>13</sup> The dual principles of the regulatory compact—monopoly in exchange for regulation—remain the bedrock of the utility regulation system today.<sup>14</sup>

There are three types of gas and electric distribution companies: investor-owned utilities (“IOUs”), publicly-owned utilities, and—in the case of electric utilities only—rural electric cooperatives.<sup>15</sup> Publicly-owned utilities are not-for-profit, locally controlled, and governed by elected or appointed boards that are accountable to the public.<sup>16</sup> IOUs are for-profit enterprises governed by private boards and owned by shareholders who “generally are not customers of the utility or members of the community.”<sup>17</sup> The main objective of an IOU, then, is to increase shareholder value.<sup>18</sup> Meanwhile, the IOU's customers or “ratepayers”—all the residents and businesses in the serviced area—“have no voice in the operation of the utility.”<sup>19</sup>

Investor-owned utilities are regulated by state public utility commissions, while publicly-owned utilities generally either are exempt from regulation by public utility commissions or are subject to limited regulation.<sup>20</sup> Public utility commissions are charged with ensuring that investor-owned utilities “provide reasonable, adequate and efficient service to customers at just and reasonable prices.”<sup>21</sup> Simultaneously, “regulators must provide utilities with a reasonable opportunity to recover the costs incurred [in] providing service, including a fair return to inves-

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<sup>12</sup> Fendell, *supra* note 3, at 821-22.

<sup>13</sup> McDonald, *supra* note 9, at 251.

<sup>14</sup> See generally Kenneth Rose, *Electric Power: Traditional Monopoly Franchise Regulation and Rate Making*, in *ENCYCLOPEDIA OF ENERGY* 289 (Cutler J. Cleveland ed., 2004).

<sup>15</sup> Anodyne Lindstrom & Sara Hoff, *Investor-owned Utilities Served 72% of U.S. Electricity Customers in 2017*, U.S. ENERGY INFO. ADMIN: TODAY IN ENERGY (Aug. 15, 2019), <https://perma.cc/RD2E-2S6G>.

<sup>16</sup> AM. PUB. POWER ASS'N, *PUBLIC POWER FOR YOUR COMMUNITY* 7-11 (2016), <https://perma.cc/P8R2-QV59>.

<sup>17</sup> *Id.*

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

<sup>19</sup> *Id.*

<sup>20</sup> U.S. ENV'T PROT. AGENCY, *STATE CLIMATE AND ENERGY TECHNICAL FORUM BACKGROUND DOCUMENT: AN OVERVIEW OF PUC S FOR STATE ENVIRONMENT AND ENERGY OFFICIALS* 1 (2010), <https://perma.cc/R9JN-RFPH>.

<sup>21</sup> *Id.*

tors.”<sup>22</sup> Although the primary responsibility of public utility commissions is “economic in nature,”<sup>23</sup> the scope of this responsibility extends far beyond setting utility delivery rates: public utility commissions also oversee utility companies’ processes for resource planning, procurement, and management; determine clean energy targets, budgets, and sources of funding; and develop utility incentives for energy efficiency.<sup>24</sup>

The Brooklyn Union Gas Company, doing business as “National Grid,”<sup>25</sup> is an investor-owned utility<sup>26</sup> that distributes and sells gas to approximately 1.3 million customers in New York City.<sup>27</sup> Since 2016, National Grid has sought to significantly expand its gas infrastructure in New York City by constructing an approximately 40,000-foot-long (7.5-mile), 30-inch-wide, high-pressure (350 psi) gas transmission pipeline—euphemistically named the “Metropolitan Reliability Infrastructure Project”<sup>28</sup> but widely known as the North Brooklyn Pipeline—along with two new LNG vaporizers<sup>29</sup> and an LNG Trucking Station<sup>30</sup> at the company’s LNG facility in Greenpoint, Brooklyn. All of this fossil fuel infrastructure would be located in and near communities of color and low-income communities.<sup>31</sup>

In addition to applying for permits and approvals to proceed with construction of the infrastructure,<sup>32</sup> National Grid has sought to recover

<sup>22</sup> *Id.* at 2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 2-4.

<sup>25</sup> *Brooklyn Union Gas Co/The*, BLOOMBERG, <https://perma.cc/99FB-VV79> (last visited Mar. 27, 2022).

<sup>26</sup> *Our Company*, NAT’L GRID, <https://perma.cc/9LK2-GCA7> (last visited Mar. 27, 2022).

<sup>27</sup> NAT’L GRID, THE BROOKLYN UNION GAS COMPANY: CONSOLIDATED FINANCIAL STATEMENTS FOR THE YEARS ENDED MARCH 31, 2020, 2019, AND 2018 10 (2020), <https://perma.cc/JE6D-WDKR>.

<sup>28</sup> KEDNY-KEDLI Book 4-NY at 1, 82, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 16-G-0059 (N.Y. State Dep’t of Pub. Serv. Jan. 29, 2016), <https://perma.cc/6QY6-FSQS>; Request for Information No. DPS-556 at 2, 77, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case no. 19-G-0309 (N.Y. State Dep’t of Pub. Serv. June 24, 2019) (on file with authors), <https://perma.cc/R73G-WHGV>.

<sup>29</sup> GIOP SS Filing Package at 13, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a National Grid NY for Gas Serv.*, Case No. 19-G-0309, Sr. No. 696 (N.Y. State Dep’t of Pub. Serv. Dec. 13, 2019) [hereinafter GIOP Filing Package], <https://perma.cc/8ZTN-665F>.

<sup>30</sup> *Id.* at 13-14.

<sup>31</sup> *See infra* Figures 1 and 2.

<sup>32</sup> *See SANE-16 Response, Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep’t of Pub. Serv. Dec. 1, 2020) (on file with authors), <https://perma.cc/B2B8-VLU5>; NONBKPIPELINE-1

the costs of these investments—plus a profit—from ratepayers.<sup>33</sup> In New York, the state public utility commission charged with regulating IOUs is the New York Public Service Commission (“PSC”).<sup>34</sup> The administrative proceeding through which IOUs seek the PSC’s permission to increase their customer rates is known as a “rate case.”<sup>35</sup> In January 2016, National Grid filed a rate case with the PSC.<sup>36</sup> In its filings, the company described plans to significantly increase its investments in gas infrastructure—including by building the North Brooklyn Pipeline—and asked to recover the costs of these investments from ratepayers over the next three years.<sup>37</sup> In December 2016, the PSC approved National Grid’s request to recover \$165,232,000 from ratepayers in 2017, 2018, and 2019 for the North Brooklyn Pipeline.<sup>38</sup> The pipeline, which was divided into five “phases,” would begin in Brownsville and end at the company’s LNG facility in Greenpoint.<sup>39</sup>

By the time National Grid filed its next rate case in April 2019, the first two of the pipeline’s five phases were “nearing completion with

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Response, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep’t of Pub. Serv. Sept. 11, 2020) (on file with authors), <https://perma.cc/EF6Q-Y68Y>; Attachment 1 to NONBKPIPELINE-1 Response, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep’t of Pub. Serv. Aug. 24, 2020) (on file with authors), <https://perma.cc/B85E-TVUK>.

<sup>33</sup> 2016 KEDNY Major Rate Case Filing at 1-2, Rates, *In re Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 16-G-0059 (N.Y. State Dep’t of Pub. Serv. Jan. 29, 2016) [hereinafter 2016 KEDNY Major Rate Case Filing], <https://perma.cc/K9DL-W7C2>; 2019 KEDNY Major Rate Case Filing, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep’t of Pub. Serv. Apr. 30, 2019) [hereinafter 2019 KEDNY Major Rate Case Filing], <https://perma.cc/L9CU-GMCT>.

<sup>34</sup> See N.Y. Pub. Serv. Law Ch. 48 Art. 1 § 5 (2021).

<sup>35</sup> N.Y. STATE DEP’T OF PUB. SERV., *supra* note 8.

<sup>36</sup> 2016 KEDNY Major Rate Case Filing, *supra* note 33, at 1-2.

<sup>37</sup> KEDNY-KEDLI Book 1 at 4, 20-21, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 16-G-0059 (N.Y. State Dep’t of Pub. Serv. Jan. 29, 2016) [hereinafter KEDNY-KEDLI Book 1], <https://perma.cc/8Z4R-FPUM> (requesting permission for \$245 million in rate increase over three-year period to offset gas infrastructure investments).

<sup>38</sup> Order Adopting Terms of Joint Proposal and Establishing Gas Rate Plans at 140, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Service*, Case No. 16-G-0059 (N.Y. State Dep’t of Pub. Serv. Dec. 16, 2016), <https://perma.cc/3VUK-5N29>; Joint Proposal and Accompanying Summary at 199, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 16-G-0059 (N.Y. State Dep’t of Pub. Serv. Sept. 7, 2016), <https://perma.cc/QS7D-H4FW>.

<sup>39</sup> KEDNY-KEDLI Book 4-NY, *supra* note 28, at 86; Samantha Maldonado, *Polls Call on Hochul to Revisit Rate Hike Tied to Controversial Brooklyn Pipeline*, CITY (last updated Sep. 18, 2021, 9:39 PM), <https://perma.cc/JS77-4TUU>.

approximately 20,000 feet of main installed.”<sup>40</sup> In the 2019 rate case, National Grid sought an additional \$184,670,417 over the next three years (2020, 2021, and 2022) for the North Brooklyn Pipeline,<sup>41</sup> along with a total of \$51,230,000 for an LNG Trucking Station<sup>42</sup> and two new LNG vaporizers at the company’s Greenpoint facility.<sup>43</sup>

According to National Grid, the North Brooklyn Pipeline, LNG vaporizers, and LNG Trucking Station are all interconnected and interdependent: the vaporizers would “regasify” LNG, converting it from liquid to gas that would then exit the Greenpoint facility via the North Brooklyn Pipeline and other pipelines.<sup>44</sup> LNG transported by truck to the Greenpoint facility and unloaded at the LNG Trucking Station would then be used to refill the vaporizers.<sup>45</sup>

The PSC voted unanimously in August 2021 to allow customer rates to be increased so that National Grid could recover costs for the first four phases of the North Brooklyn Pipeline, which were already constructed by that time.<sup>46</sup> As of this writing, community groups continue to engage in efforts to halt construction of the fifth and final phase of the pipeline, the LNG vaporizers, and the LNG Trucking Station,<sup>47</sup> for which rate recovery has not yet been approved but may be approved in the future.<sup>48</sup>

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<sup>40</sup> GIOP KEDNY Filing Package at 51, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep’t of Pub. Serv. Apr. 30 2019), <https://perma.cc/84AP-RSLM>.

<sup>41</sup> GIOP KEDNY C&U Filing Package at 73, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep’t of Pub. Serv. July 3, 2019), <https://perma.cc/7HTA-3W3B> (seeking \$88,940,732 for project phases 1-4 in 2020, \$35,425,601 for phases 1-4 and \$39,574,399 for phase 5 in 2021, and \$20,729,685 for phase 5 in 2022).

<sup>42</sup> *Id.* (budgeting \$1,865,000 in 2020, \$2,100,000 in 2021, and \$12,265,000 in 2022 for the LNG Trucking Station).

<sup>43</sup> GIOP SS Filing Package, *supra* note 29 at 14 (budgeting \$1,000,000 in 2020, \$13,000,000 in 2021, and \$20,000,000 in 2022 for Vaporizers 13 and 14).

<sup>44</sup> See NAT’L GRID, NATURAL GAS LONG-TERM CAPACITY SUPPLEMENTAL REPORT FOR BROOKLYN, QUEENS, STATEN ISLAND AND LONG ISLAND (“DOWNSTATE NY”) 48-50 (May 2020), <https://perma.cc/2H7K-WBPZ>.

<sup>45</sup> *Id.* at 52.

<sup>46</sup> See Liz Donovan, *National Grid Secures Gas Rate Hike Attached to Controversial Brooklyn Pipeline*, CITY LIMITS (Aug. 13, 2021), <https://perma.cc/WP2C-L8DD>.

<sup>47</sup> See Erin Conlon, *No North Brooklyn Pipeline Coalition Looks Ahead After Gas Bill Hike Approval*, GREENPOINTERS (Aug. 16, 2021), <https://perma.cc/6794-XDM3>; Anna Conkling, *The Fight Against the North Brooklyn Pipeline Continues with a Decision on Feb. 7*, BUSHWICK DAILY (Jan. 13, 2022), <https://perma.cc/3ZWT-DPH6>.

<sup>48</sup> *Id.*; see PSC Dramatically Slashes National Grid Rate Hike Request, N.Y. STATE PUB. SERV. COMM’N (Aug. 12, 2021), <https://perma.cc/AH7X-W27V>.



*B. The “Perverse Incentive” of Investor-Owned Utilities*

After the landmark Supreme Court case *Munn v. Illinois*—which held that private industries can be regulated when they are “affected with a public interest”—the Court set out a test to determine whether an industry is so affected.<sup>49</sup> In *Wolff Packing Co. v. Court of Industrial Relations*, the Court considered “the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation” to ascertain whether that industry was affected with a public interest, justifying regulation.<sup>50</sup> It is these two characteristics of IOUs—the essential nature of the services that IOUs provide and their “natural monopoly” status, which would lead to “exorbitant charges and arbitrary control” in the absence of regulation—that make them subject to regulation by public utility commissions.<sup>51</sup> Thus, “the state perceives the problem with monopoly utilities to be lack of competition,” and “[t]he regulatory process attempts to produce the same economic results as would occur naturally in a competitively structured industry.”<sup>52</sup> As this Article argues, the state misdiagnoses the problem with IOUs. The regulatory process does not and cannot prevent the harmful financial, environmental justice, and climate impacts of IOUs on the public. The incentive structure built into the regulatory process lies at the heart of this fundamental inability of IOUs to serve the public interest.

IOUs, like all businesses, have two types of expenses: operating expenses and capital expenses.<sup>53</sup> Operating expenses are expenses incurred through everyday business operations, such as employees’ salaries and rent for offices.<sup>54</sup> Capital expenses are major, long-term expenses on physical assets such as pipelines and other gas infrastructure.<sup>55</sup> Under the current model of utility regulation, IOUs can shift their operating expenses onto ratepayers, but they do not recover anything beyond what they spent; in other words, IOUs cannot make a profit from their operating expenses.<sup>56</sup> With capital expenses, however, IOUs can recover not only their investment in the infrastructure but also

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<sup>49</sup> *Munn v. Illinois*, 94 U.S. 113, 126 (1876).

<sup>50</sup> *Charles Wolff Packing Co. v. Ct. of Indus. Relations of State of Kan.*, 262 U.S. 522, 538 (1923).

<sup>51</sup> Fendell, *supra* note 3, at 821.

<sup>52</sup> *Id.* at 822.

<sup>53</sup> See Christina Majaski, *Operating Expense vs. Capital Expense: What’s the Difference?*, INVESTOPEDIA (Jan. 28, 2022), <https://perma.cc/ZAK9-HJ23>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> David Roberts, *The Simple Reason Most Power Utilities Suck*, VOX (Sept. 4, 2017, 1:00 PM), <https://www.vox.com/2016/6/29/12038074/power-utilities-suck>.

a return on equity (“ROE”)—the profit or net income expressed as a percentage of the investment.<sup>57</sup>

Herein lies the “perverse incentive.”<sup>58</sup> An IOU may be able to meet customers’ energy needs with minimal capital expenditure (for example, by implementing energy efficiency measures that would reduce demand for gas or electricity) or with no capital expenditure at all (for example, by implementing a demand-side management program in which customers who use less gas or electricity during periods of high demand are rewarded).<sup>59</sup> But because of the potential for ROE recovery, IOUs are incentivized to build expensive infrastructure: the more that IOUs invest in infrastructure, the higher their profits.<sup>60</sup> As the U.S. Environmental Protection Agency has acknowledged, “[u]nder traditional [public utility commission] regulation, a utility’s throughput incentive (i.e., the incentive to maximize sales in order to increase profit), is in conflict with an aggressive pursuit of energy efficiency.”<sup>61</sup>

Indeed, it has long been noted that “utilities may perform unnecessary capital work on which they earn a return rather than cheaper, simpler operations and maintenance work on which they don’t.”<sup>62</sup> Capital spending by U.S. gas and electric IOUs has skyrocketed from \$69 billion in 2008 to about \$115 billion in 2016.<sup>63</sup>

As others have pointed out, two additional aspects of the utility regulation system compound the “perverse incentive.”<sup>64</sup> First, once a public utility commission approves a customer rate hike so that an IOU can recover its capital expenses plus ROE, the IOU recovers the ap-

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<sup>57</sup> See Heather Payne, *Private (Utility) Regulators*, 50 ENV’T L. 999, 1019-1025 (2020); see also LISA FONTANELLA, RRA REGULATORY FOCUS MAJOR RATE CASE DECISIONS: JANUARY - DECEMBER 2020 1 (Feb. 2, 2021) <https://perma.cc/Z6Y6-W36C> (noting that nationwide, the average ROE authorized for gas utilities in rate cases decided in 2020 was 9.46%).

<sup>58</sup> Roberts, *supra* note 56; see also MELISSA WHITED ET AL., SYNAPSE ENERGY ECON., INC., UTILITY PERFORMANCE INCENTIVE MECHANISMS: A HANDBOOK FOR REGULATORS 46 (Mar. 9, 2015), <https://perma.cc/9P6L-RGE9>.

<sup>59</sup> J.C. Kibbey, *Utility Accountability 101: How Do Utilities Make Money?*, NAT’L. RES. DEF. COUNCIL (Jan. 20, 2021), <https://perma.cc/M2FV-BZZG>.

<sup>60</sup> See Rebecca Smith, *Utilities’ Profit Recipe: Spend More*, WALL ST. J. (Apr. 20, 2015, 6:04 PM), <https://perma.cc/PYM8-2689>; see also Mark Paul, *Can Public Ownership of Utilities Be Part of the Climate Solution?*, FORBES (Sept. 13, 2019, 1:36 PM), <https://perma.cc/76XT-73X2>; see also *id.*

<sup>61</sup> U.S. ENV’T PROT. AGENCY, *supra* note 20, at 4.

<sup>62</sup> Katharine M. Mapes et al., *Retooling Ratemaking: Addressing Perverse Incentives in Wholesale Transmission Rates*, 42 ENERGY L.J. 339, 345 (2021).

<sup>63</sup> DELOITTE CTR. FOR ENERGY SOLUTIONS, FROM GROWTH TO MODERNIZATION: THE CHANGING CAPITAL FOCUS OF THE US UTILITY SECTOR (2016), <https://perma.cc/SQR2-H2GE>.

<sup>64</sup> See Mapes et al., *supra* note 62.

proved rate even if its capital expenses are ultimately lower than forecasted.<sup>65</sup> Second, public utility commissions do not earmark the approved rate funds: although “component costs are used to support a rate determination” in rate cases,<sup>66</sup> IOUs need not spend the entirety of the capital expenses advanced in a rate case on capital projects.<sup>67</sup> Instead, “the actual revenue collected from rates may be spent on any legitimate business purpose, retained, or even distributed as dividends to investors.”<sup>68</sup> Thus, IOUs are incentivized to artificially inflate capital expenses—at ratepayers’ expense—because excess profits can be retained or given to investors.

National Grid claims that its massive infrastructure expansion is necessary to meet future demand for gas,<sup>69</sup> but recent analyses have found that the company overestimates demand for gas.<sup>70</sup> One of these analyses concluded that “[i]n fact, National Grid is expected to have a substantial *surplus* of supply capacity by 2034/35” (emphasis added).<sup>71</sup> With energy demand slowing, National Grid is likely expanding its gas infrastructure to increase profits, not to meet customers’ needs—a predictable outcome of the utility regulation system, which gives National Grid a “perverse incentive” to build expensive physical infrastructure.

Later sections of this Article will show that the “perverse incentive” is a symptom of a deeper problem: an energy system driven by private, profit-driven IOUs that are unaccountable to the people directly affected by their operations. As others have noted, such a system is fundamentally at odds with the emerging concept of “energy sovereignty,” which prioritizes “the rights of communities and individuals to make their own

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<sup>65</sup> *Id.*

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

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

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

<sup>69</sup> See KEDNY-KEDLI Book 1, *supra*, note 37, at 36-38.

<sup>70</sup> See KENJI TAKAHASHI ET AL., SYNAPSE ENERGY ECON., INC., ASSESSMENT OF NATIONAL GRID’S LONG-TERM CAPACITY REPORT: NATURAL GAS CAPACITY NEEDS AND ALTERNATIVES 1-2 (Apr. 15, 2020), <https://perma.cc/JKW3-DVEZ>; see also SUZANNE MATTEI, 350.ORG & 350 BROOKLYN, FALSE DEMAND: THE CASE AGAINST THE WILLIAMS FRACKED GAS PIPELINE 3 (Mar. 2019), <https://perma.cc/9R6T-MAMJ>; SUZANNE MATTEI ET AL., INST. FOR ENERGY ECON. & FIN. ANALYSIS, PROPOSED NESE GAS PIPELINE IN NEW YORK: A BAD BARGAIN FOR RATEPAYERS AND TAXPAYERS (Apr. 2020), <https://perma.cc/KWY2-TX4Z>.

<sup>71</sup> Mattei, *supra* note 70, at 3. A ban on gas hookups for new construction in New York City was signed into law in December 2021, suggesting that demand will continue to decline in the future. See Deepa Shivaram, *The Largest City in the U.S. Bans Natural Gas in New Buildings*, WBUR (Dec. 15, 2021), <https://perma.cc/43H5-6698>.

choices regarding the forms, scales, and sources of energy as well as the patterning and organization of energy usage.”<sup>72</sup>

### C. Environmental Justice and Climate Impacts

The consequences of the “perverse incentive” are devastating for communities affected by gas infrastructure as well as for the climate. It is well-documented that fossil fuel infrastructure disproportionately burdens Black, Brown, and low-income communities.<sup>73</sup> A recent study found that gas pipelines, in particular, are concentrated in areas with more socially vulnerable populations, raising environmental justice “concerns associated with the inequitable distribution of hazards resulting from energy infrastructure.”<sup>74</sup> Virtually the entire route of National Grid’s North Brooklyn Pipeline is within state-designated “disadvantaged communities,” along with the company’s proposed LNG vaporizers and LNG Trucking Station.<sup>75</sup> Forty-four and three tenths percent of the population in the evacuation zone of the infrastructure is Black.<sup>76</sup> In the neighborhood of Brownsville, where the North Brooklyn Pipeline begins, 68.4% of residents identify as Black and 25.6% of residents identify as Hispanic.<sup>77</sup>

A significant proportion of the gas distributed through gas infrastructure is extracted using high volume hydraulic fracturing (“frack-

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<sup>72</sup> Chelsea Schelly et al., *Energy Policy for Energy Sovereignty: Can Policy Tools Enhance Energy Sovereignty?*, 205 SOLAR ENERGY 109, 109-12 (2020).

<sup>73</sup> See, e.g., Maninder P.S. Thind et al., *Fine Particulate Air Pollution from Electricity Generation in the US: Health Impacts by Race, Income, and Geography*, 53 ENV’T SCI. & TECH. 14010 (2019) (showing that across income levels, Black Americans have the highest mortality rate from particulate matter air pollution caused by electricity generation); LESLEY FLEISCHMAN & MARCUS FRANKLIN, CLEAN AIR TASK FORCE & NAACP, FUMES ACROSS THE FENCE-LINE (2017), [perma.cc/V67F-DNAN](https://perma.cc/V67F-DNAN); Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480 (2018); Paul Mohai et al., *Racial and Socioeconomic Disparities in Residential Proximity to Polluting Industrial Facilities: Evidence From the Americans’ Changing Lives Study*, 99 AM. J. PUB. HEALTH S649 (2009); Jill Johnston & Lara Cushing, *Chemical Exposures, Health and Environmental Justice in Communities Living on the Fenceline of Industry*, 7 CURRENT ENV’T HEALTH REC. 48 (2020); TIM DONAGHY & CHARLIE JIANG, GREENPEACE, FOSSIL FUEL RACISM (Charlie Jiang ed., 2021), [perma.cc/ZU5U-7C6R](https://perma.cc/ZU5U-7C6R).

<sup>74</sup> Ryan E. Emanuel et al., *Natural Gas Gathering and Transmission Pipelines and Social Vulnerability in the United States*, 5 GEOHEALTH 1, 3 (2021).

<sup>75</sup> See *infra* Figure 1.

<sup>76</sup> See *infra* Figure 2.

<sup>77</sup> *New York Neighborhood Data Profiles*, N.Y. UNIV. FURMAN CTR., <https://perma.cc/MK6S-LV7F> (click on “BK16: Brownsville” in “Browse Neighborhood” search bar) (last visited Apr. 26, 2021); U.S. ENERGY INFO. ADMIN., HYDRAULIC FRACTURING ACCOUNTS FOR ABOUT HALF OF CURRENT U.S. CRUDE OIL PRODUCTION (2016), [perma.cc/5YVF-7ZMY](https://perma.cc/5YVF-7ZMY); U.S. ENERGY INFO. ADMIN., U.S. CRUDE OIL AND NATURAL GAS PROVED RESERVES, YEAR-END 2020 (2022), [perma.cc/NG82-VVN4](https://perma.cc/NG82-VVN4).

ing”),<sup>78</sup> which has even more severe health, environmental, and climate impacts than conventional gas production.<sup>79</sup> According to the U.S. Department of Energy, up to 95% of new wells drilled are hydraulically fractured,<sup>80</sup> and the U.S. Energy Information Administration has estimated that fracked gas accounts for two-thirds of U.S. gas production.<sup>81</sup> The National Grid subsidiaries that service downstate New York purchase over half their winter gas supply from the Marcellus Shale region of Pennsylvania,<sup>82</sup> where fracking is used to extract shale gas.<sup>83</sup> A significant proportion of the gas in National Grid’s North Brooklyn Pipeline and LNG infrastructure is therefore fracked gas from the Marcellus Shale.

Gas pipelines can freeze, corrode, break, leak, catch on fire, and explode, posing serious health and safety risks to the communities in which they are sited.<sup>84</sup> Pipelines leak large volumes of methane.<sup>85</sup> One study found that these leaks, or fugitive emissions, “contribute to the risk of explosions in urban environments”—with 15% of the surveyed leaks categorized as “potentially explosive”—and concluded that “[a]ll leaks must be addressed, as even small leaks cannot be disregarded as ‘safely leaking.’”<sup>86</sup> An analysis of nearly 9,000 significant pipeline-related incidents in the U.S. from 1986 to 2016 found that these spills,

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<sup>78</sup> U.S. DEP’T OF ENERGY, ENERGY SECRETARY ERNEST MONIZ’S STATEMENT TO THE SENATE COMMITTEE ON APPROPRIATIONS ON DRIVING INNOVATION THROUGH FEDERAL INVESTMENTS (2014), [perma.cc/FC69-TJKD](https://perma.cc/FC69-TJKD); U.S. ENERGY INFO. ADMIN., HYDRAULICALLY FRACTURED WELLS PROVIDE TWO-THIRDS OF U.S. NATURAL GAS PRODUCTION (2016), [perma.cc/PGP2-WJM5](https://perma.cc/PGP2-WJM5).

<sup>79</sup> See generally CONCERNED HEALTH PROS. OF N.Y. & PHYSICIANS FOR SOC. RESP., COMPENDIUM OF SCIENTIFIC, MEDICAL, AND MEDIA FINDINGS DEMONSTRATING RISKS AND HARMS OF FRACKING (UNCONVENTIONAL GAS AND OIL EXTRACTION) (7th ed. 2020), <https://perma.cc/LBD5-W2HR> (providing a comprehensive and fully referenced compilation of evidence detailing risks and harms of fracking).

<sup>80</sup> U.S. DEP’T OF ENERGY, *supra* note 78.

<sup>81</sup> U.S. ENERGY INFO. ADMIN., *supra* note 78.

<sup>82</sup> See Request for Information No. SANE-17, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case Nos. 19-G-0309 & 19-G-0310 (N.Y. State Dep’t of Pub. Serv. Apr. 17, 2020) [hereinafter SANE-17 Response] (on file with authors).

<sup>83</sup> Peter Eavis, *Fracking Once Lifted Pennsylvania. Now It Could Be a Drag.*, N.Y. TIMES (Mar. 31, 2020), [perma.cc/DEZ3-FFYY](https://perma.cc/DEZ3-FFYY).

<sup>84</sup> CONCERNED HEALTH PROS. OF N.Y. & PHYSICIANS FOR SOC. RESP., *supra* note 79, at 42.

<sup>85</sup> Zachary D. Weller et al., *A National Estimate of Methane Leakage from Pipeline Mains in Natural Gas Local Distribution Systems*, 54 ENV’T SCI. & TECH. 8958, 8958 (2020); Margaret F. Hendrick et al., *Fugitive Methane Emissions from Leak-Prone Natural Gas Distribution Infrastructure in Urban Environments*, 213 ENV’T POLLUTION 710, 710 (2016).

<sup>86</sup> Hendrick et al., *supra* note 85, at 710, 714.

fires, explosions, and other accidents resulted in 548 deaths, more than 2,500 injuries, and over \$8.5 billion in damages.<sup>87</sup> In 2019 alone, there were 652 reported pipeline incidents.<sup>88</sup> Indeed, data suggest that new pipelines are failing at about the same rate as gas transmission lines installed before the 1940s.<sup>89</sup> Nearly 153,000 people live in the evacuation zone of the North Brooklyn Pipeline, raising concerns about how a safe evacuation would be undertaken in the event of a pipeline accident.<sup>90</sup> The pipeline's evacuation zone includes 81 daycare facilities, 63 schools, 13 healthcare facilities, and three nursing homes.<sup>91</sup>

In addition to fugitive emissions, methane and volatile organic compounds ("VOCs") are often intentionally leaked during routine pipeline maintenance and cleaning. Before devices called "pigs" are inserted into the pipeline to remove debris, the pipeline is depressurized, venting VOCs and methane.<sup>92</sup> VOCs can produce serious health effects, including respiratory difficulty and organ damage.<sup>93</sup> In environmental justice communities, such as those along the route of the North Brooklyn Pipeline, health effects from additional fracked gas infrastructure threaten to exacerbate pre-existing disparities in health.<sup>94</sup> In Brownsville, for example, the 14% of adults who suffer from asthma (the highest rate in New York City)<sup>95</sup> are especially vulnerable to air quality impacts from the North Brooklyn Pipeline's emissions. In addition to air emissions, communities along the pipeline route face health risks from radioactive materials,<sup>96</sup> which are unearthed during the gas drilling process and

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<sup>87</sup> Richard Stover, *America's Dangerous Pipelines*, CTR. FOR BIO. DIVERSITY, <https://perma.cc/RXG3-BSM9> (last visited May 11, 2021); George Joseph, *30 Years of Oil and Gas Pipeline Accidents, Mapped*, BLOOMBERG (Nov. 30, 2016), <https://perma.cc/7E7P-BMWN>.

<sup>88</sup> Matt Kelso, *2021 Pipeline Incidents Update: Safety Record Not Improving*, FRACTRACKER ALL. (Apr. 14, 2021), <https://perma.cc/LBJ7-Y5UL>.

<sup>89</sup> Sara Smith, *As US Rushes to Build Gas Lines, Failure Rate of New Pipes Has Spiked*, S&P GLOB. MKT. INTEL. (Sept. 9, 2015), [perma.cc/9STV-9FWU](https://perma.cc/9STV-9FWU).

<sup>90</sup> Fraczek & Edelstein, *supra* note 4.

<sup>91</sup> *Id.*

<sup>92</sup> See Brittany Patterson, *MarkWest Agrees to Pay Millions in Federal Settlement Over 'Pig' Emissions*, W. VA. PUB. BROAD. (Apr. 26, 2018), [perma.cc/B7ZL-NUSF](https://perma.cc/B7ZL-NUSF).

<sup>93</sup> See *Volatile Organic Compounds*, AM. LUNG ASS'N (Feb. 12, 2020), [perma.cc/UKP4-2DGQ](https://perma.cc/UKP4-2DGQ).

<sup>94</sup> See CONCERNED HEALTH PROS. OF N.Y. & PHYSICIANS FOR SOC. RESP., *supra* note 79, at 42.

<sup>95</sup> See Andrea Leonhardt, *Report Finds the City's Highest Adult Asthma Rates in Brownsville*, BKREADER (Jan. 24, 2019), [perma.cc/EU37-KFW9/](https://perma.cc/EU37-KFW9/).

<sup>96</sup> See Justin Nobel, *America's Radioactive Secret*, ROLLING STONE (Jan. 21, 2020), [perma.cc/28Y8-SNR4](https://perma.cc/28Y8-SNR4).

build up in pipelines.<sup>97</sup> Of all the geological formations from which gas is extracted in the U.S., the Marcellus Shale—a major source of National Grid’s gas supply<sup>98</sup>—has tested the highest for radioactivity.<sup>99</sup>

The LNG infrastructure that National Grid seeks to install at its Greenpoint facility also threatens the health and safety of surrounding communities. The Greenpoint facility, which has stored and processed LNG since 1968,<sup>100</sup> is highly controversial.<sup>101</sup> After an explosion of an LNG storage tank on Staten Island killed 43 workers in 1973,<sup>102</sup> New York State instituted a moratorium on new LNG facilities.<sup>103</sup> Pre-existing facilities like National Grid’s, however, were unaffected.<sup>104</sup> Today, while the moratorium on new LNG facilities remains in place in New York City,<sup>105</sup> National Grid plans to *expand* its facility by increasing the number of LNG vaporizers from six to eight<sup>106</sup> and installing an LNG Trucking Station.<sup>107</sup> The company also seeks to transport LNG to the Greenpoint facility by truck, which is prohibited in New York City<sup>108</sup> and requires a Fire Code variance from the New York City Fire Department.<sup>109</sup>

As the Staten Island explosion made all too clear, LNG infrastructure and LNG transport pose catastrophic risks to public health and safety. LNG is a highly volatile, explosive fossil fuel that can flash-freeze human flesh, cause second-degree burns on human skin within a one-

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<sup>97</sup> See Andrew W. Nelson et al., *Understanding the Radioactive Ingrowth and Decay of Naturally Occurring Radioactive Materials in the Environment: An Analysis of Produced Fluids from the Marcellus Shale*, 123 ENV’T HEALTH PERSPS. 689, 689 (Jul. 1, 2015).

<sup>98</sup> See SANE-17 Response, *supra* note 82.

<sup>99</sup> Nobel, *supra* note 96.

<sup>100</sup> See NAT’L GRID, DRAFT UPLAND SITE SUMMARY 6 (2012), <https://perma.cc/7QRX-M5TE>.

<sup>101</sup> See, e.g., Press Release, Frack Outta Brooklyn & No N. Brooklyn Pipeline Coal., Caravan Action: “FDNY Shut Down the Head of the North BK Pipeline!” (Mar. 3, 2021), [perma.cc/7MF6-SDRE](https://perma.cc/7MF6-SDRE); see also e.g., Edward Cowans, *Hazards Cited in Ship Delivery of Gas*, N.Y. TIMES, Dec. 25, 1972, at 26, <https://perma.cc/CM2V-3LCW>.

<sup>102</sup> Robert D. McFadden, *43 Workers Buried in Huge Gas Tank Explosion and Fire on Staten Island*, N.Y. TIMES, Feb. 11, 1973, at 1, <https://perma.cc/YD8D-WUQD>.

<sup>103</sup> Jon Campbell, *State Poised to Lift Liquefied Natural Gas Storage Moratorium*, POUGHKEEPSIE J. (Jan. 27, 2015, 8:25 PM), <https://perma.cc/98T9-8QY9>.

<sup>104</sup> N.Y. COMP. CODES R. & REGS. tit. 6 § 570 (2015).

<sup>105</sup> Rachel Shapiro, *State Ban on Liquefied Natural Gas Storage Remains in Effect for New York City*, SILIVE (Jan. 30, 2015), <https://perma.cc/4K6N-T5NC>.

<sup>106</sup> *Id.*; Rosemary Misdary, *Greenpoint Residents, Local Leaders Call on Gov. Hochul to Reject Natural Gas Permit*, GOTHAMIST (Jan. 27, 2022), <https://perma.cc/J9U3-5FKD>; see also *Greenpoint Energy Center*, NAT’L GRID, <https://perma.cc/2CRV-6P34> (last visited Mar. 27, 2022).

<sup>107</sup> GIOP SS Filing Package, *supra* note 29, at 72.

<sup>108</sup> See N.Y.C. Fire Code §§ 2707.10.1, 3205.4.4 (2014).

<sup>109</sup> See N.Y.C. Fire Code § 104.8 (2014).

mile radius, and displace oxygen, resulting in asphyxiation.<sup>110</sup> Created by turning methane gas into a liquid through a cryogenic process, LNG requires evaporative cooling to keep chilled.<sup>111</sup> LNG tanks are therefore intentionally leaky: gas is vented from the tanks to maintain the super-chilled temperature of the LNG.<sup>112</sup> National Grid seeks to install two new LNG vaporizers,<sup>113</sup> which rely on periodic flaring to control pressure during the regasification process.<sup>114</sup> As a result of the need for venting and flaring—both of which release significant quantities of methane into the air—the greenhouse gas emissions of LNG are 30% higher than those of conventional gas.<sup>115</sup>

National Grid's Greenpoint facility is located in and near state-designated "disadvantaged communities"<sup>116</sup> who have lived with toxic industrial air pollution for decades<sup>117</sup> and experienced some of New York City's slowest rates of improvement in air quality in recent years.<sup>118</sup> Moreover, the facility abuts Newtown Creek, which is a Superfund site, a dumping site for hazardous waste, and one of the most polluted waterways in the U.S.<sup>119</sup> As a result of its previous (that is, pre-LNG) operations at the Greenpoint facility, National Grid has contributed to the contamination of Newton Creek,<sup>120</sup> and sediments off the shore of National Grid's facility contain some of the site's highest levels of cancer-causing chemicals.<sup>121</sup> Thus, the health and safety impacts of ad-

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<sup>110</sup> CONCERNED HEALTH PROS. OF N.Y. & PHYSICIANS FOR SOC. RESP, *supra* note 79, at 393.

<sup>111</sup> *Id.* at 43.

<sup>112</sup> *Id.* at 392-93.

<sup>113</sup> GIOP Filing Package, *supra* note 29, at 14 [hereinafter GIOP Filing Package].

<sup>114</sup> CONCERNED HEALTH PROS. OF N.Y. & PHYSICIANS FOR SOC. RESP, *supra* note 79, at 393.

<sup>115</sup> *Id.* at 43.

<sup>116</sup> *See infra* Figure 1.

<sup>117</sup> *See Welcome to ELL: Environmental Legacy and Improvements*, N. BROOKLYN NEIGHBORS, <https://northbrooklynneighbors.org/eli> (last visited Apr. 3, 2022); *see also* KATHERINE SCHWARZ ET. AL, CMTY. ENV'T HEALTH CTR., *RIGHT TO BREATHE/RIGHT TO KNOW: INDUSTRIAL AIR POLLUTION IN GREENPOINT-WILLIAMSBURG*, at vi (1992).

<sup>118</sup> *See id.*; *see also* N.Y. CITY DEP'T OF HEALTH & MENTAL HYGIENE, *NEW YORK CITY COMMUNITY AIR SURVEY: NEIGHBORHOOD AIR QUALITY 2008-2016* app. 3 at 29-40 (2018), <https://perma.cc/X2ZB-S5M7>.

<sup>119</sup> *Newtown Creek: Public Health Assessment*, N.Y. STATE DEP'T OF HEALTH, <https://perma.cc/YBJ2-G3VT> (last visited May 11, 2021).

<sup>120</sup> *See generally Cleanup Activities, Superfund Site: Newton Creek Brooklyn, Queens, NY*, U.S. ENV'T PROT. AGENCY, <https://perma.cc/P6XA-WEHT> (last visited Apr. 21, 2022); *Enforcement, Case Summary: Settlement Reached at Newton Creek Superfund Site*, U.S. ENV'T PROT. AGENCY, <https://perma.cc/MG4A-84QV> (last visited Apr. 21, 2022).

<sup>121</sup> *See* U.S. Env't Prot. Agency, *Presentation at the Technical CAG Meeting: Newton Creek Superfund Site*, at 8 (Feb. 20, 2018), <https://perma.cc/6W64-WD2A>; Hussein I. Abdel-Shafy & Mona S.M. Mansour, *A Review on Polycyclic Aromatic Hydrocarbons: Source,*



ditional LNG infrastructure at the Greenpoint facility would compound the pre-existing risks that surrounding environmental justice communities have long faced.

In addition to its disproportionate health, safety, and environmental impacts on Black, Brown, and low-income communities, expansion of gas infrastructure is fundamentally incompatible with achieving the greenhouse gas emissions reductions that are necessary to avoid the most cataclysmic impacts of climate change.<sup>122</sup> Gas has the highest near-term greenhouse gas emissions impact of all heating fuels, including coal.<sup>123</sup> This is due primarily to the leakage and venting of methane, a highly potent greenhouse gas with a global warming potential 86 times higher than that of carbon dioxide for its first 20 years in the atmosphere.<sup>124</sup>

In 2019, New York State recognized the dire reality of the climate crisis when it enacted the landmark Climate Leadership and Community Protection Act (“CLCPA”), which mandates a 40% reduction in greenhouse gas emissions (from 1990 levels) by 2030 and an 85% reduction by 2050.<sup>125</sup> National Grid’s additional gas infrastructure—which would increase greenhouse gas emissions, prolong reliance on gas as an energy source, and delay the transition to clean energy<sup>126</sup>—is inconsistent with the requirements of the CLCPA<sup>127</sup> and with growing calls for a rapid phase-out of fossil fuels.<sup>128</sup>

Moreover, project applicants often try to “segment” large fossil fuel projects into their constituent parts for purposes of obtaining needed permits and approvals—a tactic to either minimize the appearance of a project’s adverse environmental and climate impacts or evade environ-

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*Environmental Impact, Effect on Human Health and Remediation*, 25 EGYPTIAN J. PETROLEUM 107, 114, 116 (2016).

<sup>122</sup> Letter from U.S. Scientists on the Fossil Fuel Era to President Joseph R. Biden (Oct. 7, 2021) [hereinafter Letter from U.S. Scientists], <https://perma.cc/QDU5-EADA>.

<sup>123</sup> PACE Agree Direct Testimony EG at 19, *In re Rates Charges, Rules and Regulations of Niagara Mohawk Power Corp. d/b/a National Grid for Electric Serv.*, Case Nos. 20-E-0380 & 20-G-0381, Sr. No. 313 (N.Y. State Pub. Serv. Comm’n Nov. 30, 2020) [hereinafter PACE Agree Direct Testimony EG], <https://perma.cc/3TMW-NSFE>.

<sup>124</sup> Gunnar Myhre et al., *Anthropogenic and Natural Radiative Forcing*, in CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS WORKING GROUP I CONTRIBUTION TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 659, 714 (Thomas F. Stocker et al. eds., 2014).

<sup>125</sup> See S.B. 6599, S. Assemb., Reg. Sess. § 75-0107(1) (N.Y. 2019).

<sup>126</sup> See generally PACE Agree Direct Testimony EG, *supra* note 123.

<sup>127</sup> See S.B. 6599, S. Assemb., Reg. Sess. §§ (1), (2)(a), (4) (N.Y. 2019).

<sup>128</sup> See, e.g., PACE Agree Direct Testimony EG, *supra* note 123, at 2-3; Letter from U.S. Scientists, *supra* note 122.

mental review altogether.<sup>129</sup> Even though National Grid has repeatedly described the North Brooklyn Pipeline, LNG vaporizers, and LNG Trucking Station as interconnected and interdependent,<sup>130</sup> the company has segmented this single, massive fracked gas expansion project into its constituent parts, separately seeking permits and approvals for each of the three pieces of infrastructure.<sup>131</sup> Segmentation—defined as “the division of the environmental review of an action such that various activities or stages” are treated “as though they were independent, unrelated activities”<sup>132</sup>—is prohibited by the New York State Environmental Quality Review Act (“SEQRA”).<sup>133</sup> New York agencies, in the authors’ view, have failed to enforce SEQRA and prevent National Grid’s unlawful segmentation of its expansion project.<sup>134</sup> As a result, the project as a whole has never undergone environmental review and two of the project’s three constituent parts—the North Brooklyn Pipeline and the LNG Trucking Station—have each evaded environmental review.<sup>135</sup>

Finally, in addition to its environmental justice and climate impacts, National Grid’s expansion of fracked gas infrastructure would increase ratepayers’ “energy burdens”—the percentage of household income spent on energy bills<sup>136</sup>—since National Grid would raise customer rates to recover the costs of the infrastructure (plus a percentage of those costs as profit for the company’s investors). Black, Brown, and low-income households in the U.S. face disproportionately high energy burdens: according to a recent analysis, energy burden is 43% higher for Black households and 20% higher for Hispanic households than for non-Hispanic white households, and low-income households spend three times more of their income on energy bills than non-low-income households.<sup>137</sup> Generally, the lower a household’s income, the

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<sup>129</sup> See Michael Burger & Jessica Wentz, *Evaluating the Effects of Fossil Fuel Supply Projects on Greenhouse Gas Emissions and Climate Change Under NEPA*, 44 WM. & MARY ENV’T L. & POL’Y REV. 423, 428, 440 (2020).

<sup>130</sup> See NAT’L GRID, *supra* note 44.

<sup>131</sup> See sources cited *supra* note 32; see generally Complaint at 18-22, *Sane Energy Project v. N.Y. State Dep’t of Env’t Conservation*, No. 706273/2021 (N.Y. Sup. Ct. Queens Cty., Mar. 18, 2021) [hereinafter Complaint].

<sup>132</sup> N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(ah) (2019).

<sup>133</sup> See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(g)(1) (2019).

<sup>134</sup> See Complaint, *supra* note 131.

<sup>135</sup> See generally *id.*

<sup>136</sup> Off. of Energy Efficiency and Renewable Energy, *Low-Income Community Energy Solutions*, STATE & LOC. SOL. CTR., <https://perma.cc/TGM7-H8LH> (last visited Mar. 22, 2022).

<sup>137</sup> ARIEL DREHOBL ET AL., AM. COUNCIL FOR AN ENERGY-EFFICIENT ECON., HOW HIGH ARE HOUSEHOLD ENERGY BURDENS? AN ASSESSMENT OF NATIONAL AND METROPOLITAN ENERGY BURDEN ACROSS THE UNITED STATES, at iii (2020), <https://perma.cc/M7TU-ZQFR>.

less energy the household uses,<sup>138</sup> however, in addition to charges based on energy usage, monthly energy bills include fixed charges regardless of how much energy a household uses.<sup>139</sup> These fixed charges disproportionately impact low-to-moderate-income households with higher energy burdens.<sup>140</sup>

Utility rate hikes also exacerbate “energy insecurity,” or the “inability to adequately meet basic household energy needs.”<sup>141</sup> Black households face the highest nationwide levels of energy insecurity at any income bracket.<sup>142</sup> In Detroit, African American households were found to be several times more likely than non-African American households to experience utility arrearage or shut-offs.<sup>143</sup> Indigenous, African American, and multiracial households nationwide have the highest rates of home heating and cooling service losses, most frequently receive disconnection notices, and most often sacrifice other necessities to pay for energy services.<sup>144</sup>

As renowned law and energy scholar Shalanda Baker has written, when disproportionate energy burdens and energy insecurity are considered together with disproportionate harms from fossil fuel infrastructure, the implications are devastating: “Communities of color are disproportionately subsidizing an energy system that is killing them.”<sup>145</sup>

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<sup>138</sup> Table CE1.1 Summary Annual Household Site Consumption and Expenditures in the U.S.—Totals and Intensities, 2015, in 2015 RESIDENTIAL ENERGY CONSUMPTION SURVEY: ENERGY CONSUMPTION AND EXPENDITURES TABLES, U.S. ENERGY INFO. ADMIN. (2018), <https://perma.cc/TZQ5-AVSY>.

<sup>139</sup> MELISSA WHITED ET AL., SYNAPSE ENERGY ECON INC., CAUGHT IN A FIX: THE PROBLEM WITH FIXED CHARGES FOR ELECTRICITY 1 (2016), <https://perma.cc/9VRB-JPH4>.

<sup>140</sup> *Id.* at 2, 15-16.

<sup>141</sup> Diana Hernández, *Understanding ‘Energy Insecurity’ and Why It Matters to Health*, SOC. SCI. & MED., Aug. 2016, at 1, 2, <https://perma.cc/B9JN-JSAP>.

<sup>142</sup> Sonal Jessel et al., *Energy, Poverty, and Health in Climate Change: A Comprehensive Review of an Emerging Literature*, FRONTIERS IN PUB. HEALTH, Dec. 2019, at 1, 7, <https://perma.cc/FX84-PMMW>.

<sup>143</sup> Dominic J. Bednar et al., *The Intersection of Energy and Justice: Modeling the Spatial, Racial/Ethnic and Socioeconomic Patterns of Urban Residential Heating Consumption and Efficiency in Detroit, Michigan*, 143 ENERGY & BUILDINGS 25, 27 (2017).

<sup>144</sup> See CHANDRA FARLEY ET AL., GRID MODERNIZATION LAB’Y CONSORTIUM, ADVANCING EQUITY IN UTILITY REGULATION: FUTURE ELECTRIC UTILITY REGULATION REPORT NO. 12 at 21-26 (2021), <https://perma.cc/ZH9J-KB8U>.

<sup>145</sup> Shalanda H. Baker, *How to Create Anti-Racist Energy Policies*, WBUR (Sept. 23, 2020), <https://perma.cc/M43J-GRN2>.

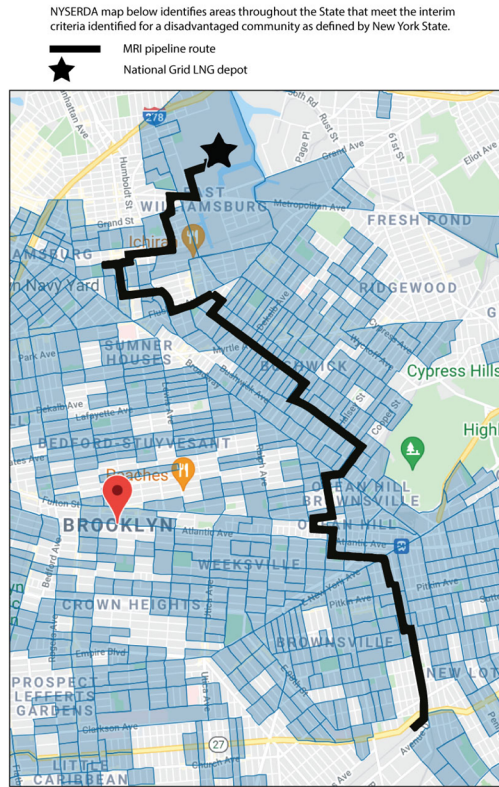


Figure 1: National Grid’s North Brooklyn Pipeline and Greenpoint LNG facility are located in state-designated “disadvantaged communities.” The shaded areas meet the criteria for “disadvantaged communities” as defined by New York State.<sup>146</sup> Source: Sane Energy Project.

<sup>146</sup> See *Disadvantaged Communities*, N.Y. STATE ENERGY & DEV., <https://perma.cc/EF3S-VYV8> (last visited May 12, 2022).

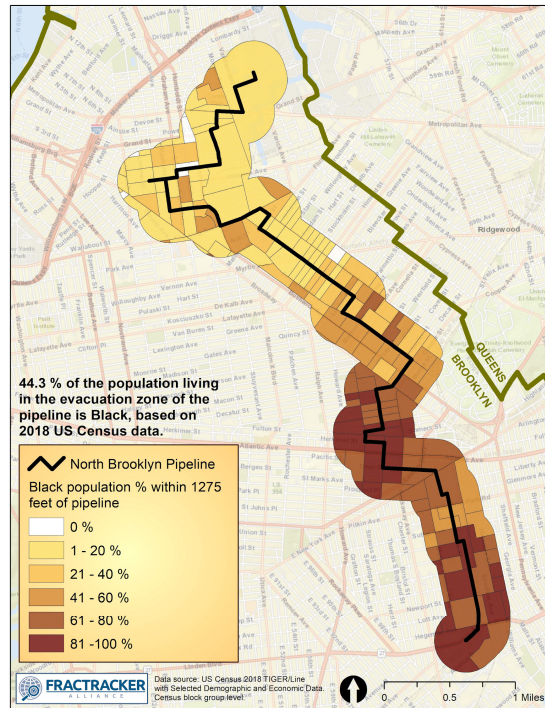


Figure 2: The North Brooklyn Pipeline transmits fracked gas through predominantly Black communities at a pressure of 350 pound-force per square inch (psi). A gas pipeline with a pressure of 350 psi has an evacuation radius—also known as an evacuation zone or impact zone—of about 1,275 feet.<sup>147</sup> Source: Fractracker Alliance.

## II - UTILITY RATE CASES IN NEW YORK

In theory, the utility rate case process provides an administrative forum for oversight of proposed changes in utility fees and investments. However, in an energy system centered on investor-owned monopoly utilities, the utility rate case process is the mechanism by which these companies ensure their continued ability to secure profits at the expense of a captive market. This Section begins with an overview of utility rate cases in New York, briefly describing both the process and the players involved. The Section then discusses the legal standard for utility rate-making and the principles that have been developed to guide ratemaking policy.

<sup>147</sup> See Kim Fraczek, *New Yorkers Mount Resistance Against North Brooklyn Pipeline*, FRACTRACKER ALL. (May 18, 2020), <https://perma.cc/FBM9-XXP4>.

*A. Utility Rate Cases 101: The Process*

In New York State, a rate case begins when an investor-owned utility submits a filing to the Department of Public Service (“DPS”), the “staff arm” of the Public Service Commission,<sup>148</sup> requesting an increase to its “rate base” (and, consequently, customers’ delivery rates) and presenting its justification for the proposed rate increase.<sup>149</sup> The filing includes estimates of the IOU’s capital expenses, operating expenses, depreciation costs, taxes, and rate of profit.<sup>150</sup>

The “rate base” is the net value of the IOU’s assets, on which the IOU makes a profit.<sup>151</sup> The rate base includes capital expenses but not operating expenses;<sup>152</sup> in other words, the amount of the IOU’s proposed rate base increase is predicated solely on capital expenses—planned additions and improvements to the IOU’s energy production, transmission, and distribution system. Thus, as discussed above, although the IOU recovers both its capital expenses and its operating expenses from ratepayers, capital expenses drive the IOU’s profitability.<sup>153</sup>

After an IOU initiates a rate case, the IOU is legally required to inform residents of the affected service areas about the proposed rate increase by publishing a notice once a week, for four consecutive weeks, “in a newspaper having general circulation in each county containing territory affected by the proposed change.”<sup>154</sup> The newspaper notice must “plainly state” the proposed changes “in a form and manner designed to be seen and understood” by affected ratepayers.<sup>155</sup> No further public notice requirements for proposed rate hikes are imposed on IOUs.<sup>156</sup> Moreover, the newspaper notice need not contain any information about the capital projects that the IOU seeks to undertake<sup>157</sup>—that is, the gas or electricity infrastructure projects that would be driving the increase in customers’ energy bills. The notice need not mention the ongoing rate case in which the proposed rate increase is under delibera-

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<sup>148</sup> *Meet the Commissioners*, N.Y. STATE DEP’T OF PUB. SERV., <https://perma.cc/9YCL-G8ZH> (last visited Apr. 26, 2022).

<sup>149</sup> N.Y. STATE DEP’T OF PUB. SERV., *supra* note 8.

<sup>150</sup> *Id.*

<sup>151</sup> Russell Ernst, *Rate Base: Understanding a Frequently Misunderstood Concept*, S&P GLOB. MKT. INTEL. (Mar. 3, 2017, 10:15 AM), <https://perma.cc/73KB-S72X>.

<sup>152</sup> *See* Kibbey, *supra* note 59.

<sup>153</sup> *See supra* Part I-B.

<sup>154</sup> N.Y. COMP. CODES R. & REGS. tit. 16, § 720-8.1(a) (1999); *see also* N.Y. PUB. SERV. L. § 66(12)(b) (2021).

<sup>155</sup> N.Y. COMP. CODES R. & REGS. tit. 16, § 720-8.1(a) (1999).

<sup>156</sup> *See id.*

<sup>157</sup> *See id.*

tion or inform concerned ratepayers about how they can get involved in the rate case.<sup>158</sup>

Rate cases in New York must be decided within 11 months of the filing date.<sup>159</sup> During the first four months of a rate case (months 1-4), DPS assembles a team “charged with the responsibility to analyze the utility rate filing and represent the public interest.”<sup>160</sup> The team consists of attorneys, economists, accountants, financial analysts, engineers, and consumer service specialists “who audit and investigate the company’s proposals” and usually develop a counter-proposal to the rate filing.<sup>161</sup> Other stakeholders (“intervenor”), including individual members of the public as well as organizations and groups, can also become parties to the rate case and develop their own testimony challenging the IOU’s proposals.<sup>162</sup> The discovery process, in which any party can serve any other party with interrogatories and requests for documents (“Information Requests”), begins after a rate case is filed and generally continues throughout the case.<sup>163</sup> An Administrative Law Judge (“ALJ”) is assigned to preside over the case and hear the evidence.<sup>164</sup>

Over the course of the next three months (months 5-7), the DPS team and other stakeholders file their testimony, the IOU files rebuttal testimony, and evidentiary hearings (including cross-examination of expert witnesses) are conducted.<sup>165</sup> All written evidence and testimony submitted by the IOU, DPS team, and other stakeholders, along with transcripts of evidentiary hearings, are filed on the publicly accessible DPS docket for the rate case,<sup>166</sup> unless particular evidence is restricted from public view as a result of a successful request for confidentiality by the IOU.<sup>167</sup>

At any point during the rate case, the IOU can notify the parties that it wishes to negotiate a settlement and then either (1) develop a draft of a confidential “Joint Proposal,” confidentially negotiate this draft Joint Proposal with the parties, arrive at a revised Joint Proposal through the negotiation process, and publicly issue this agreed-upon Joint Proposal; or (2) confidentially negotiate the original rate filing with the parties, ar-

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<sup>158</sup> *See id.*

<sup>159</sup> N.Y. STATE DEP’T PUB. SERV., *supra* note 8.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> N.Y. COMP. CODES R. & REGS. tit. 16, §§ 5.3(a), 5.4(a) (2011).

<sup>164</sup> N.Y. STATE DEP’T OF PUB. SERV., *supra* note 8.

<sup>165</sup> *Id.*

<sup>166</sup> *See, e.g., Search/Commission Files*, N.Y. STATE DEP’T OF PUB. SERV., <https://www3.dps.ny.gov/W/PSCWeb.nsf/All/FCFC9542CC5BE76085257FE300543D5E?OpenDocument> (enter “19-G-0309” in “Search by Case Number” field) (last visited Apr. 24, 2022).

<sup>167</sup> *See* N.Y. COMP. CODES R. & REGS. tit. 16, § 6-1.3(b)(2) (2021).

rive at a Joint Proposal through the negotiation process, and publicly issue this agreed-upon Joint Proposal.<sup>168</sup> Settlement negotiations are completely confidential and generally consist of a back-and-forth between the IOU and DPS about the terms of the Joint Proposal.<sup>169</sup> The Joint Proposal that emerges from these negotiations need not have been agreed upon by all parties or even most parties negotiating.<sup>170</sup> Generally, the IOU and DPS are in agreement about the Joint Proposal and seek “to convince some of the intervening parties to support” the proposal.<sup>171</sup> However, there is no requirement that the IOU and DPS succeed in securing intervenor support, and ultimately, the Public Service Commission can approve a Joint Proposal that a significant number of intervenors oppose.<sup>172</sup>

In the final stage of the rate case (months 7-11), the parties file initial briefs and reply briefs in support of or in opposition to the Joint Proposal.<sup>173</sup> Public hearings are held in the utility’s affected service areas.<sup>174</sup> Notably, these public hearings generally occur *after* the Joint Proposal has been agreed upon by parties in confidential negotiations, so there is often no opportunity for the public to directly participate in the development of the Joint Proposal.<sup>175</sup> The ALJ issues a “recommended decision,” that is, a recommendation that the Public Service Commission adopt, adopt with modifications, or reject the Joint Proposal.<sup>176</sup> Finally, the Public Service Commission issues a written decision regarding the Joint Proposal.<sup>177</sup>

### *B. Utility Rate Cases 101: The Players*

Energy rate cases in New York are dominated by two parties: the gas and/or electric IOU seeking the rate hike and the regulators charged with representing the public interest.<sup>178</sup> These regulators are officials with the Department of Public Service, the “staff arm” of the state public utility commission (New York Public Service Commission) that ul-

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<sup>168</sup> Richard Berkley & Laurie Wheelock, Presentation on Participating in a NYS Public Service Commission Rate Case at the 2019 LIFE Regional Meetings (May 14, 2019) at 8, <https://perma.cc/A6MZ-EC5N>.

<sup>169</sup> *Id.* at 9.

<sup>170</sup> *See id.* at 9; N.Y. STATE DEP’T OF PUB. SERV., *supra* note 8.

<sup>171</sup> Berkley & Wheelock, *supra* note 168, at 9.

<sup>172</sup> *See id.*; N.Y. STATE DEP’T OF PUB. SERV., *supra* note 8.

<sup>173</sup> *See* Berkley & Wheelock, *supra* note 168, at 7, 9; N.Y. STATE DEP’T OF PUB. SERV., *supra* note 8.

<sup>174</sup> N.Y. STATE DEP’T OF PUB. SERV., *supra* note 8.

<sup>175</sup> *See* Berkley & Wheelock, *supra* note 168, at 9.

<sup>176</sup> *See* N.Y. STATE DEP’T OF PUB. SERV., *supra* note 8.

<sup>177</sup> *See id.*

<sup>178</sup> *See* Berkley & Wheelock, *supra* note 168, at 5-10.



timately decides the case.<sup>179</sup> The seven members of the PSC are appointed by the governor.<sup>180</sup>

The interests of consumers are purportedly represented by another state agency, the Utility Intervention Unit (“UIU”), which is housed in the Department of State’s Division of Consumer Protection.<sup>181</sup> The UIU claims to “actively represent[] the interests of residential and small commercial consumers before the PSC during utility rate cases,” asserting that its intervention in rate cases “help[s] ensure that customers can access just and reasonable rates, that relevant consumer protections are followed, and that providers maintain quality service.”<sup>182</sup> However, as others have noted, the UIU suffers from several serious limitations when it comes to protecting consumer interests in rate cases. First, the UIU is not an independent agency; the UIU’s operation under the authority of the governor—who appoints the members of the PSC<sup>183</sup>—constrains its advocacy on behalf of ratepayers.<sup>184</sup> Second, the UIU is charged with representing the interests of both residents and businesses—interests that are not aligned and, in fact, are “frequently at odds.”<sup>185</sup> Since costs are allocated across different categories of customers in a rate case, the UIU’s representation of both residential and business interests means the agency is ill-equipped to advocate for residential customers when they are saddled with an unjust share of costs as compared to businesses.<sup>186</sup>

In addition to the utility company and state agencies, parties to rate cases might include representatives of cities and smaller municipalities, nonprofit consumer and business advocates, real estate developers, other energy interests, environmental groups, and members of the public.<sup>187</sup> These prospective parties can apply to intervene in a rate case by submitting a Party Status Request Form.<sup>188</sup> There is no funding available to community intervenors in utility rate cases to defray expenses incurred

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<sup>179</sup> See N.Y. STATE DEP’T OF PUB. SERV., *supra* note 148.

<sup>180</sup> *Id.*

<sup>181</sup> *Utility Intervention Unit*, N.Y. STATE DEP’T OF STATE., <https://perma.cc/6FC9-MLK7> (last visited May 11, 2022).

<sup>182</sup> *Id.*

<sup>183</sup> N.Y. STATE DEP’T OF PUB. SERV., *supra* note 148.

<sup>184</sup> See N.Y. STATE DEP’T OF PUB. SERV., *supra* note 148. Indeed, New York is one of only seven states without an independent state consumer advocate’s office, and legislation to create such an office was vetoed by Governor Kathy Hochul in December 2021. Julia Rock, *Hochul Vetoes Bill to Create Utility Consumer Advocate*, N.Y. FOCUS (Dec. 8, 2021), <https://perma.cc/85YV-DDLD>.

<sup>185</sup> Rock, *supra* note 184.

<sup>186</sup> See *id.*

<sup>187</sup> See N.Y. STATE DEP’T OF PUB. SERV., *supra* note 8.

<sup>188</sup> See *Service List and Party Status Request Forms*, N.Y. STATE DEP’T OF STATE, <https://perma.cc/RJ3T-8HHS> (last visited May 11, 2022).

in the rate case process;<sup>189</sup> by contrast, in other administrative proceedings, New York State offers intervenors funds “to pay for expert witnesses, consultants, administrative costs (such as document preparation and duplication) and legal fees.”<sup>190</sup>

### C. *The Legal Standard and Guiding Principles for Utility Ratemaking*

When determining utility rates, the New York PSC—like all state public utility commissions—is constrained by a highly “investor-oriented” legal standard.<sup>191</sup> According to the conventional understanding of two landmark Supreme Court cases that set out the test for state regulation of utility rates, a rate that does not yield a “just and reasonable” profit for a utility company is an unconstitutional taking of property without due process in violation of the Fifth Amendment (applicable to states through the Fourteenth Amendment).<sup>192</sup>

In *Bluefield Water Works & Improvement Co. v. Public Service Commission*, the Court first reaffirmed the “well-settled” doctrine that “[r]ates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.”<sup>193</sup> The Court then held:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding, risks and uncertainties . . . .<sup>194</sup>

Two decades later, the Court expanded on this standard in *Federal Power Commission v. Hope Natural Gas Co.*, holding that a utility company’s return on equity “should be sufficient to assure confidence in the

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<sup>189</sup> The authors have found no information indicating the availability of funding for utility rate case intervenors in New York State.

<sup>190</sup> See *The Fund for Municipal and Local Parties: A Guide to Intervenor Funding Pursuant to Article 10 of the Public Service Law*, N.Y. STATE DEP’T OF PUB. SERV., <https://perma.cc/MVM7-KPND> (last visited MAY 11, 2022) (providing information about the availability of intervenor funding for municipalities and “eligible local parties”—for example, individuals who are directly affected by a proposed power plant—in Article 10 major energy generation facility cases).

<sup>191</sup> Fendell, *supra* note 3, at 821, 823.

<sup>192</sup> See *id.* at 821-22.

<sup>193</sup> *Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 690 (1923).

<sup>194</sup> *Id.* at 692.

financial integrity of the enterprise, so as to maintain its credit and to attract capital.”<sup>195</sup> Thus, “not only does the Supreme Court recognize the cost of attracting private capital as a cost of providing utility service, the Court makes the attraction of private capital, and thus the investor, the focus and criterion by which the fairness of rates is determined.”<sup>196</sup>

Certainly, there are legal arguments to be made that utility rates are *not* just “bounded on the low end by the concept of a ‘reasonable return’” but, in fact, “bounded on both sides to form a ‘zone of reasonableness.’”<sup>197</sup> Law and economics scholar John N. Drobak has argued that the “prevailing interpretation of utility ratemaking law,” which contends that “the Constitution requires rates to be set at levels high enough to generate moderate profits for investors,” fails to account for the Supreme Court’s recognition of “a countervailing aspect [of the ratemaking standard]: the protection of the public interest.”<sup>198</sup> According to Drobak, significant financial harm to utility investors is permissible under the Constitution when justified by the public interest.<sup>199</sup>

Nevertheless, the fact that the predominant interpretation of utility ratemaking doctrine may be wrong as a matter of law offers cold comfort to ratepayers and marginalized communities facing increasing energy burdens and energy insecurity. The legal system has not simply failed to protect Black, Brown, and low-income communities suffering disproportionate financial and environmental harms as a result of the utility ratemaking process;<sup>200</sup> the legal system has, in fact, *driven* this inequity by “regard[ing] dividends on stock as a cost” that captive ratepayers must shoulder to receive essential services from monopoly utilities.<sup>201</sup>

The “investor-oriented” legal standard for utility ratemaking may contribute, moreover, to what some experts believe are exorbitant ROEs authorized by regulators for utility companies.<sup>202</sup> According to a 2019 analysis of nearly 1,600 rate cases over a 38-year period, ROEs approved by public utility commissions “have exhibited a large and growing premium over the riskless rate of return.”<sup>203</sup> The study’s authors

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<sup>195</sup> Federal Power Comm’n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944).

<sup>196</sup> Fendell, *supra* note 3, at 821, 823.

<sup>197</sup> Mapes et. al., *supra* note 62, at 343.

<sup>198</sup> John N. Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 B.U. L. REV. 65, 65-67 (1985).

<sup>199</sup> *Id.* at 67.

<sup>200</sup> *See supra* Part I.

<sup>201</sup> *See* Fendell, *supra* note 3, at 825, 830-31.

<sup>202</sup> *See, e.g.*, David C. Rode et al., *Regulated Equity Returns: A Puzzle*, 133 ENERGY POL’Y 1, 1-17 (2019) (discussing the return on equity authorized by regulators resulting in tangible profits for utility firms).

<sup>203</sup> *Id.* at 1 (reasoning that utility investments are relatively low-risk, which would generally indicate lower returns).

found that the growing premium cannot be explained by traditional economic models and concluded that regulators are likely approving excessive ROEs that yield unreasonably high profits for utility companies.<sup>204</sup>

Beyond the legal standard, various thinkers—chief among them the renowned finance scholar and utility expert James C. Bonbright—have identified (non-legally binding) goals and principles of utility ratemaking that parties to rate cases continue to cite in support of their positions.<sup>205</sup> In his seminal 1961 book, *Principles of Public Utility Rates*, Bonbright articulated three “primary objectives” of ratemaking policy: the “fair-return standard,” that is, the ability of private utility companies to secure a profit; the “fair-cost-apportionment objective,” that is, the fair distribution of costs among customers; and the “optimum-use or consumer-rationing objective,” that is, optimal efficiency in energy use.<sup>206</sup> The “Bonbright Principles,” as they are known, also include several secondary attributes of a sound rate structure: rates should be simple, understandable, acceptable to the public, feasible in their application, non-controversial in their interpretation, stable, and non-discriminatory.<sup>207</sup>

As Bonbright himself acknowledged, however, these principles are ambiguous: “how, for example, does one define ‘undue discrimination’?” he asked.<sup>208</sup> Indeed, the highly subjective nature of concepts like fairness, simplicity, stability, and non-discrimination is precisely the reason these principles form the contested terrain of rate cases. As the next Section will show, ambiguity favors utility companies—not rate-payers—because regulators yield the definitions of these subjective principles to the utilities that set the rate case agenda.

### III - PROCEDURAL INJUSTICE IN UTILITY RATE CASES

Mirroring the meaning of “environmental justice,”<sup>209</sup> “energy justice” encompasses both distributive justice (equitable dissemination of “the benefits and costs of energy services”) and procedural justice (“how [energy] decisions are made . . . or who is involved and has influence in

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<sup>204</sup> *Id.*

<sup>205</sup> See NAT’L ASS’N OF REGUL. UTIL. COMMISSIONERS, NARUC MANUAL ON DISTRIBUTED ENERGY RESOURCES RATE DESIGN AND COMPENSATION 20 (2016), <https://perma.cc/89QJ-KC49>.

<sup>206</sup> JAMES C. BONBRIGHT, *PRINCIPLES OF PUBLIC UTILITY RATES* 292 (1961).

<sup>207</sup> *Id.* at 291.

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

<sup>209</sup> See generally Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV’T L. REP. 10681 (2000).

decision-making”).<sup>210</sup> Leading energy scholars Benjamin Sovacool and Michael Dworkin have described procedural justice as consisting of “four important elements: (1) access to information; (2) access to and meaningful participation in decision-making; (3) lack of bias on the part of decision-makers; and (4) access to legal processes for achieving redress.”<sup>211</sup>

Using the National Grid proceeding as an example, this Section argues that utility rate cases in New York are characterized by procedural injustice, failing to ensure the full and informed involvement of communities in the energy decisions that will affect them. The Section describes some of the mechanisms that deprive affected communities of meaningful participation in the rate case process, including insufficient public notice requirements, the power of utility companies to set the rate case agenda, steep information asymmetry between the parties, communities’ lack of resources and technical expertise, and the phenomenon of “regulatory capture.”

This Article posits that, due in part to this lack of procedural justice, rate cases in New York fail to protect marginalized communities from the adverse environmental and economic impacts of highly consequential energy decisions. Indeed, by procedural design, these tightly-controlled administrative proceedings prioritize the financial viability of investor-owned utilities over the rights and needs of ratepayers. Ultimately—and as the National Grid rate case demonstrates—utility regulators work hand-in-glove with investor-owned utilities to render rate case decisions that inequitably harm Black, Brown, and low-income communities.

#### *A. Insufficient Public Notice Requirements*

As noted above, after initiating a rate case in New York, an IOU need only publish notice of the proposed rate increase in local newspapers once a week for four consecutive weeks at some point before the effective date of the increase.<sup>212</sup> The newspaper publication need not contain any information about the proposed infrastructure projects that would be driving the rate increase, the ongoing rate case, or how concerned ratepayers can intervene in the rate case.<sup>213</sup> Thus, only if a ratepayer happens to read their county newspaper on one of the four days of

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<sup>210</sup> Benjamin K. Sovacool & Michael H. Dworkin, *Energy Justice: Conceptual Insights and Practical Applications*, 142 APPLIED ENERGY 435, 436-37 (2015).

<sup>211</sup> *Id.* at 437.

<sup>212</sup> See N.Y. COMP. CODES R. & REGS. tit. 16, § 720-8.1 (2021); see also N.Y. PUB. SERV. L. § 66(12)(b) (2019).

<sup>213</sup> See sources cited *supra* note 212.

publication would the ratepayer encounter the notice. In the event that a ratepayer actually encounters the notice, the form and content of the notice—which are typically dense and inaccessible to a layperson—discourage engagement.<sup>214</sup> The inaccessibility of the notice prevents an average ratepayer from clearly understanding what the notice is, in theory, intended to convey—that the ratepayer will likely see an increase in their monthly energy bills.<sup>215</sup> Even if the ratepayer walks away with this minimal understanding, they are left in the dark as to what proposed capital projects are driving the increase in their energy bills or how to get involved in the decision-making process.

In February 2016, shortly after filing its first of two rate cases seeking cost recovery for the North Brooklyn Pipeline,<sup>216</sup> National Grid published notices of the proposed rate hike in county newspapers, as legally required.<sup>217</sup> After informing ratepayers that National Grid “is proposing an increase in delivery revenue of approximately \$245 million for Calendar Year 2017 to address its revenue deficiency,” the notice listed current and proposed rates in various categories that a layperson would likely not understand, such as “S.C. No. 1B-DG Residential Distributed Generation Service” and “Service Classification No. 4A-High Load Factor Service.”<sup>218</sup> The reasons provided for the rate hike were “substantially higher capital investment requirements”—that is, investments in the North Brooklyn Pipeline and other unnamed infrastructure projects—and “increases in operating costs that are not reflected in current rates.”<sup>219</sup> Even ratepayers who reviewed the notice carefully would not have understood either how the proposed \$245 million rate increase would affect them or what specific investments and costs were being used to justify the increase.<sup>220</sup>

In April 2019, National Grid filed its next rate case, seeking additional cost recovery for the North Brooklyn Pipeline as well as recovery for the LNG Trucking Station and two new LNG vaporizers.<sup>221</sup> Accord-

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<sup>214</sup> See *infra* Figures 3 and 4.

<sup>215</sup> See N.Y. COMP. CODES R. & REGS. tit. 16, § 720-8.1 (2021); *infra* Figures 3 and 4.

<sup>216</sup> See sources cited *supra* note 33.

<sup>217</sup> KEDNY Proof of Publication, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat'l Grid NY for Gas Serv.*, Case No. 16-G-0059 (N.Y. State Dep't of Pub. Serv. Oct. 4, 2016), <https://perma.cc/2M22-NEJG>; see 2016 KEDNY Major Rate Case Filing, *supra* note 33, at 1-2; *infra* Figure 3.

<sup>218</sup> See *infra* Figure 3.

<sup>219</sup> See *infra* Figure 3.

<sup>220</sup> See *infra* Figure 3.

<sup>221</sup> Affidavits and Proofs of Publication, *In re Rates, Charges, Rules and Regulations of Brooklyn Union Gas Co. d/b/a Nat'l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep't of Pub. Serv. June 17, 2019), <https://perma.cc/U7G8-W7CV>; 3B. GIOP KEDNY C&U Filing Package at 1-2, Rates, Charges, Rules and Regulations of The Brooklyn Union

ing to local newspaper notices published the following month, the Company sought “to increase delivery revenues by \$236.8 million to modernize its infrastructure, support energy policy goals, and deliver safe and reliable service in a rising cost environment.”<sup>222</sup> The notice contained no information about the precise meaning of these objectives: what infrastructure would be “modernize[d]” and how? What were National Grid’s “energy policy goals” and how would the proposed rate increase enable the company to meet them? Why was the rate increase necessary to ensure “safe and reliable service”? Like the 2016 notice, the 2019 notice entirely omitted mention of the capital infrastructure projects driving the proposed rate hike—the North Brooklyn Pipeline, LNG Trucking Station, and LNG vaporizers—and included an indecipherable table of current and proposed rates.<sup>223</sup> In one respect, however, the 2019 notice provided greater transparency than the prior notice—by stating clearly that “a typical residential heating customer [would] see a \$16.66 monthly increase (11.99%) in their total bill.”<sup>224</sup>

According to Lee Ziesche of the community group Sane Energy Project (“Sane Energy”), affected communities did not learn of National Grid’s fracked gas infrastructure projects and rate increases until 2019, well after the first of the two proposed rate hikes had been approved.<sup>225</sup> Sane Energy became a party to the 2019 rate case after attending a training session about the rate case hosted by an allied nonprofit.<sup>226</sup> As one of Sane Energy’s representatives in the rate case, Ziesche prepared testimony, submitted discovery requests, cross-examined National Grid employees and regulators at evidentiary hearings, and participated in confidential settlement negotiations.<sup>227</sup> Ziesche was interviewed for this Article about her “insider” experience and insights as a party representative in the rate case.

During the first few months of the rate case, Sane Energy noticed that National Grid was seeking cost recovery for an expensive project called the “Metropolitan Reliability Infrastructure Project.”<sup>228</sup> Recognizing that the project was, in fact, a massive fracked gas transmission pipeline for which a significant amount of cost recovery had already

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Gas Company d/b/a National Grid NY for Gas Service, 19-G-0309 (N.Y. State Dep’t of Pub. Serv. July 3, 2019), <https://perma.cc/4E7J-K2ZP>; *see infra* Figure 4.

<sup>222</sup> *See infra* Figure 4.

<sup>223</sup> *See infra* Figure 4.

<sup>224</sup> *See infra* Figure 4.

<sup>225</sup> Telephone Interview with Lee Ziesche, Deputy Director of Communications and Media, Sane Energy Project (Jan. 23, 2022).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*; *see generally* GIOP KEDNY Filing Package, *supra* note 40, at 50-52.

been approved in the prior rate case, Sane Energy sought more information about the pipeline through discovery requests.<sup>229</sup> After consulting maps of the pipeline route obtained in discovery, Sane Energy members realized that the pipeline was being built through their neighborhoods.<sup>230</sup> Sane Energy began to build a coalition of community groups, the No North Brooklyn Pipeline Coalition, to oppose the continued construction of the pipeline.<sup>231</sup> By October 2019, the first three of the pipeline's five phases were complete, and the fourth phase was under construction.<sup>232</sup>

Thus, directly affected Black, Brown, and low-income communities had no idea about National Grid's plans to raise their utility bills and build fracked gas infrastructure in their neighborhoods until one of two rate increases had already been approved and much of the infrastructure had been built. The public notice requirements imposed on IOUs in New York are so woefully insufficient that an IOU can secure a massive rate increase to undertake large-scale fossil fuel infrastructure projects in marginalized communities without the slightest knowledge of those communities. Ultimately, frontline communities learned about National Grid's plans not through newspaper notices but through their own initiative and organizing savvy.

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<sup>229</sup> Ziesche, *supra* note 225; GIOP KEDNY Filing Package, *supra* note 228, at 50-53; SANE-4 Response, *In re* Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat'l Grid NY for Gas Service, Case No. 19-G-0309 (N.Y. State Dep't of Pub. Serv. Oct. 28, 2019) (on file with authors), <https://perma.cc/ZSQ3-E2C4>.

<sup>230</sup> Ziesche, *supra* note 225; Request for Information No. DPS-556, *supra* note 28, at 77.

<sup>231</sup> Ziesche, *supra* note 225; *About*, NO NORTH BROOKLYN PIPELINE, <https://perma.cc/2JAC-LY5G> (last visited Apr. 23, 2022).

<sup>232</sup> SANE-4 Response, *supra* note 229.





perceive and process information about one interpretation and possess little or incommensurable data about alternatives.”<sup>237</sup> In the news media context, writes Entman, “the frame . . . is really the imprint of power—it registers the identity of actors or interests that competed to dominate the text.”<sup>238</sup> News texts therefore “[r]eflect the play of power and boundaries of discourse over an issue,” and ideas that transcend these “boundaries of discourse” are “unlikely to influence policy.”<sup>239</sup>

The power of framing and agenda-setting is apparent in rate case proceedings. When National Grid filed its 2016 rate case, the company justified its proposed rate hike and associated capital infrastructure projects by repeatedly invoking objectives like safety, reliability, modernization, and expansion of gas infrastructure.<sup>240</sup> These were the features that National Grid selected and made salient in its framing of the rate proposal. Emphasizing that its proposal would “deliver[] economic and environmental benefits from gas expansion,”<sup>241</sup> the company hailed “the economic benefits of natural gas”<sup>242</sup> and claimed that “[g]as growth” and continued conversions of customers from oil to gas would “create[] significant environmental benefits from lower emissions.”<sup>243</sup> The assumption on which National Grid’s framing relied—that expansion of gas infrastructure is economically and environmentally advantageous—has been debunked by scientific literature.<sup>244</sup> Studies have made clear that oil-to-gas conversion will increase, rather than decrease, greenhouse gas emissions due to methane leakage<sup>245</sup> and that fossil fuel investments will soon become stranded assets (that is, economically worthless) as climate laws and policies are implemented.<sup>246</sup> National Grid’s power to frame its rate proposal meant that these faulty underlying assumptions would be accepted unless challenged by regulators or intervenors. But the Department of Public Service failed to evaluate the scientific soundness of National Grid’s justifications for the rate increase, and in fact, the terms “methane,” “climate change,” and “greenhouse gas emissions”

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<sup>237</sup> *Id.* at 54.

<sup>238</sup> *Id.* at 55.

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

<sup>240</sup> See KEDNY-KEDLI Book 1, *supra* note 37, at 3-4.

<sup>241</sup> See *id.* at 4.

<sup>242</sup> See *id.* at 4-5.

<sup>243</sup> See *id.* at 14.

<sup>244</sup> See generally Robert W. Howarth et al., *Methane and the Greenhouse-gas Footprint of Natural Gas From Shale Formations*, 106 CLIMATIC CHANGE 679 (2011); Robert W. Howarth, *Ideas and Perspectives: Is Shale Gas a Major Driver of Recent Increase in Global Atmospheric Methane?*, 16 BIOGEOSCIENCES 3033 (2019); J.-F. Mercure et al., *Reframing Incentives for Climate Policy Action*, 6 NATURE ENERGY, 1133 (2021).

<sup>245</sup> See generally Howarth, *supra* note 244; Howarth et al., *supra* note 244.

<sup>246</sup> See generally Mercure et al., *supra* note 244.

do not appear a single time in DPS’s testimony regarding the rate proposal.<sup>247</sup> Meanwhile, community groups—who did not learn of National Grid’s 2016 rate case until it was over—were not intervenors in the case and therefore could not challenge the company’s claims.<sup>248</sup> This demonstrates the power of framing and agenda-setting: the incorrect assumptions underlying National Grid’s rate proposal were simply accepted as true.

National Grid also cited “increased customer demand for natural gas”<sup>249</sup> and touted the “Metropolitan Reliability Infrastructure (MRI) project”—or North Brooklyn Pipeline—for its provision of an additional 850,000 dekatherms of gas capacity per day.<sup>250</sup> Analyses have found, however, that National Grid overestimates energy demand and wrongly conflates it with gas demand: the rate of increase in energy demand has slowed, and demand can be met through non-gas alternatives.<sup>251</sup> In promoting a particular “problem definition”<sup>252</sup> (how to meet “increased customer demand for natural gas”) and “treatment recommendation”<sup>253</sup> (construction of the North Brooklyn Pipeline), National Grid omitted alternative “problem definitions” and thereby limited the frame of the debate: the “problem” that the company defined and placed on the agenda would be the subject of the conversation, rather than any number of other priorities that might guide the ratemaking process—for example, how to meet energy demand with exclusively non-gas alternatives.

Thus, the frame of National Grid’s rate filing was “the imprint of power,” reflecting the “boundaries of discourse” about the proposed rate hike.<sup>254</sup> When community groups intervened in the company’s subsequent rate case in 2019 and raised concerns about the environmental justice and climate change implications of National Grid’s proposal, those concerns were largely ignored by the company and DPS<sup>255</sup> because they

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<sup>247</sup> See Staff Gas Infrastructure and Operations Panel Testimony, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 16-G-0059 (N.Y. State Dep’t of Pub. Serv. May 20, 2016), <https://perma.cc/4AB4-ZHE3>.

<sup>248</sup> See *Matter Master: 16-00252/16-G-0059*, N.Y. STATE DEP’T OF PUB. SERV., <https://perma.cc/N4T7-ST9D> (last visited July 31, 2022) (listing 32 parties to the action under the “Party List” tab, none of whom are community groups).

<sup>249</sup> See KEDNY-KEDLI Book 1, *supra* note 37, at 7.

<sup>250</sup> *Id.* at 38.

<sup>251</sup> See TAKAHASHI ET AL., *supra* note 70, at 1-2, 13, 30; MATTEI, *supra* note 70, at 3-6, 20-21; INST. FOR ENERGY ECON. & FIN. ANALYSIS, *supra* note 70, at 1-3, 20.

<sup>252</sup> Entman, *supra* note 235, at 52.

<sup>253</sup> See *id.*

<sup>254</sup> See *id.* at 55.

<sup>255</sup> Order Approving Joint Proposal at 71-72, Rates, *In re Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep’t of Pub. Serv. Aug. 12, 2021) [hereinafter Order Approving Joint Proposal], <https://perma.cc/BL9J-HC5M>; Transcript of Evidentiary Hearing at 75-80, *In re Rates,*

“breached the bounds” of what National Grid had determined to be “acceptable discourse” about the rate proposal.<sup>256</sup> In other words, environmental justice and climate change were not on the agenda that National Grid had set. As Ziesche said, “[t]he foundation was all negotiating off National Grid’s proposal. They got to put forth something that was insane and it was all negotiated from there.”<sup>257</sup>

Finally, another aspect of the rate case process exacerbates the problem of agenda-setting by the IOU: the IOU’s prior rates are used as the baseline for proposed increases.<sup>258</sup> Rather than assessing rates anew, the IOU and regulators assume prior rates as the starting point for an increase.<sup>259</sup> The lack of any opportunity to challenge these base rates is another function of the IOU’s agenda-setting power. Leading energy scholar Heather Payne has advocated for the use of a budgeting method called zero-based planning in utility rate cases.<sup>260</sup> With zero-based planning, rate increases would not be connected to prior rates.<sup>261</sup> Instead, the ratemaking process would “start[] from zero,” all assumptions would be explicitly acknowledged and vetted, and “automatic, incremental increases” would be “specifically disallow[ed].”<sup>262</sup> According to Payne, since “[t]he use of [zero-based planning] requires the justification of every dollar spent,” this budgeting method would “further[] the goal of complete transparency and invit[e] a conversation around what the future state of our [utility] system should be.”<sup>263</sup>

### C. Information Asymmetry and Lack of Transparency

The principle of “good governance”—that is, “democratic and transparent decision-making processes” in which “all people . . . have access to high-quality information about energy and the environment”—is central to energy justice.<sup>264</sup> Utility rate cases, however, are characterized by steep “information asymmetry” and a lack of transparency.<sup>265</sup> Indeed, Payne has attributed the failure of the regulatory compact to information asymmetry between rate case parties, arguing that utility regu-

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Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv., Case No. 19-G-0309 (N.Y. State Dep’t of Pub. Serv. July 13, 2021), <https://perma.cc/WR2K-WALM>.

<sup>256</sup> See Entman, *supra* note 235, at 55.

<sup>257</sup> Ziesche, *supra* note 225.

<sup>258</sup> Payne, *supra* note 57, at 1050.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 1039-43.

<sup>261</sup> *Id.* at 1039.

<sup>262</sup> *Id.* at 1008.

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

<sup>264</sup> Sovacool & Dworkin, *supra* note 210, at 436, 439.

<sup>265</sup> Payne, *supra* note 57, at 1034.

lation “fails to deliver on the public benefits of the regulatory compact”<sup>266</sup> because “monopolistic cost-of-service utilities are not providing enough information to enable meaningful regulation and oversight.”<sup>267</sup>

As described above, IOUs have a “perverse incentive” to invest in capital infrastructure on which they can earn a profit.<sup>268</sup> Information asymmetry compounds this problem during rate case proceedings because “the regulated monopoly utility is in complete control of the information that would indicate when a solution other than spending utility capital and adding that amount to the rate base would be beneficial to consumers.”<sup>269</sup> That is, since IOUs have a financial incentive to invest in capital infrastructure and are often in exclusive possession of information about alternatives to capital investment that would better serve the interests of ratepayers, these alternatives may not even make it onto the table of rate case proceedings. When it comes to utility ratemaking and the range of potential options for meeting customers’ needs, regulators and intervenors necessarily operate at a severe information disadvantage because they “don’t know what they don’t know.”

During National Grid’s 2016 rate case, regulators failed to question or challenge the need for the North Brooklyn Pipeline, and community groups—unaware of the company’s plans at this stage—were not there to force the issue.<sup>270</sup> After community groups became parties to National Grid’s subsequent rate case in 2019<sup>271</sup> and expressed vocal opposition to the pipeline and other capital investments throughout the first year of the proceeding,<sup>272</sup> the Department of Public Service served National Grid with a discovery request about the need for the remaining portions of the

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<sup>266</sup> *Id.* at 1000, 1007.

<sup>267</sup> *Id.* at 1007.

<sup>268</sup> *See supra* Part II.

<sup>269</sup> Payne, *supra* note 57, at 1036.

<sup>270</sup> *See generally Matter Master: 16-00252/16-G-0059*, N.Y. STATE DEP’T OF PUB. SERV., <https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=16-g-0059>.

<sup>271</sup> *See sources cited supra* note 6.

<sup>272</sup> *See, e.g.,* Sane Energy Project Supplemental Testimony, *In re* Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv., Case No. 19-G-0309 (N.Y. State Dep’t of Pub. Serv. Jan. 30, 2020), [perma.cc/39ZE-447Z](https://perma.cc/39ZE-447Z); Ruling On Party Status, *In re* Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv., Case No. 19-G-0309 (N.Y. State Dep’t of Pub. Serv. June 5, 2019), <https://perma.cc/ZHY6-V3RW>; Ruling on Party Status, *In re* Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv., Case No. 19-G-0309, Sr. No. 866 (N.Y. State Dep’t of Pub. Serv. July 10, 2019), <https://perma.cc/JZU7-DC8H>; Ruling on Party Status, *In re* Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv., Case No. 19-G-0309, Sr. No. 679 (N.Y. State Dep’t of Pub. Serv. Oct. 18, 2019), <https://perma.cc/CR4F-9ZVR>.

pipeline.<sup>273</sup> Although this was a positive step by regulators (no doubt a result of the pressure exerted by community intervenors), National Grid's response to the discovery request<sup>274</sup> illustrates how powerfully IOUs can use information asymmetry to their advantage. DPS asked National Grid to describe and quantify the benefits of the pipeline under three scenarios: if no further work were completed, if only four of the pipeline's five phases were completed, and if all five phases were completed (as proposed).<sup>275</sup> DPS also asked the company to "explain and quantify the alternatives to completing Phase 5," which would terminate at National Grid's LNG facility in Greenpoint.<sup>276</sup>

National Grid's responses indicated that the North Brooklyn Pipeline needed to be constructed in its entirety and that there were no viable long-term alternatives to completion of Phase 5.<sup>277</sup> The company also emphasized the need for additional LNG and Compressed Natural Gas ("CNG") supplies at the Greenpoint facility by winter 2021-22.<sup>278</sup> Increased LNG and CNG supplies, the company argued, would make the need for Phase 5 of the pipeline even more urgent because the takeaway capability of the existing system was insufficient to handle the transmission of additional gas from the Greenpoint facility.<sup>279</sup> In short, according to National Grid, capital spending on gas infrastructure was the only path forward.

Subsequent events, however, cast serious doubt on the company's claims. After insisting that CNG was needed at the Greenpoint facility, National Grid withdrew its bid to build two new CNG injection heaters (in the hopes that abandoning plans for CNG would help clear the path for approval of two new LNG vaporizers).<sup>280</sup> In the face of massive public opposition, the company's application for new LNG vaporizers has still not been approved, over two years after its submission.<sup>281</sup> Winter 2021-22 has come and gone without any additional CNG or LNG at the Greenpoint facility, and Phase 5 of the North Brooklyn Pipeline has been paused, with the Public Service Commission declining (for now) to

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<sup>273</sup> See Exhibit 735 (Response to IR DPS-1091), *supra* note 98, at 1-3.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 2-3.

<sup>276</sup> *Id.* at 3.

<sup>277</sup> See *id.* at 11.

<sup>278</sup> See *id.*

<sup>279</sup> See *id.* at 10-11.

<sup>280</sup> Exhibit 845-Monitor's 8th Q Report at 4, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat'l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep't of Pub. June 22, 2021) [hereinafter Exhibit 845-Monitor's 8th Q Report], [perma.cc/VG9P-6J89](https://perma.cc/VG9P-6J89).

<sup>281</sup> Tom DiChristopher, *National Grid Running Out of NY Gas Supply Options Amid Permit Delays – Utility*, S&P GLOB. MKT. INTEL. (Jan. 7, 2022), [perma.cc/H8XY-QMVU](https://perma.cc/H8XY-QMVU).

approve rate recovery for the final phase.<sup>282</sup> Thus, none of the infrastructure that National Grid claimed was absolutely necessary has materialized. Indeed, an independent monitor appointed by New York State has noted National Grid's pattern of "mov[ing] the goalposts" on proposed infrastructure projects—that is, repeatedly claiming that a project must be in service by a certain date, failing to meet that deadline, and then setting a new target date.<sup>283</sup> According to the monitor, the company continually "miss[es] key milestones on a project while nevertheless maintaining that all is well because, according to National Grid, the project will be completed by the ultimate time it is truly 'needed.'"<sup>284</sup> Importantly, the company "moved the goalposts" not only on the timelines of proposed projects, but also on what projects are "needed" at all: CNG infrastructure was initially presented as essential (and used as part of the justification for the North Brooklyn Pipeline) and later abandoned.<sup>285</sup>

The problem of information asymmetry in rate cases is compounded by IOUs' regular invocation of confidentiality to avoid sharing information.<sup>286</sup> Under New York regulations, an IOU may request "trade secret" or "confidential commercial" status for information submitted to the Department of Public Service if the information "would be likely to cause substantial injury to the competitive position" of the IOU.<sup>287</sup> Factors to be considered in making this determination include "the extent to which the disclosure would cause unfair economic or competitive damage" and "the worth or value of the information to the [IOU] and the [IOU's] competitors."<sup>288</sup> As Payne has written, however, "[t]hese are regulated monopoly businesses. Simply by definition, they are not in competition with anyone—a regulated monopoly utility is a non-competitive business. Therefore, any claim that a regulated monopoly utility needs to have business information kept confidential for competitive reasons is absurd. There is no competition."<sup>289</sup>

Nevertheless, National Grid successfully invoked trade secret protection or business confidentiality at least five different times during the 2016 rate case, arguing, for example, that a report about the company's

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<sup>282</sup> Order Approving Joint Proposal, *supra* note 255, at 84-85.

<sup>283</sup> See Exhibit 842-Monitor 5th Q Report 9-18-20 at 3, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat'l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep't of Pub. Serv. June 22, 2021), <https://perma.cc/2EBQ-35XE>.

<sup>284</sup> See Exhibit 844-Monitor 7th Q Report 12-18-20 at 3, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat'l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep't of Pub. Serv. June 22, 2021), <https://perma.cc/3QS6-Y6R6>.

<sup>285</sup> See Exhibit 845-Monitor's 8th Q Report, *supra* note 280, at 4.

<sup>286</sup> See Payne, *supra* note 57, at 1045-46.

<sup>287</sup> N.Y. COMP. CODES. R. & REGS. tit. 16, § 6-1.3(b)(2) (2021).

<sup>288</sup> *Id.*

<sup>289</sup> Payne, *supra* note 57, at 1044.

“operation and maintenance of natural gas distribution facilities” was “commercially sensitive” and “would unfairly benefit outside parties and place [the company] at a competitive disadvantage” if publicly disclosed.<sup>290</sup> National Grid also sought to prevent public disclosure of its employees’ financial information.<sup>291</sup> As Payne has argued, “[g]iven that captive ratepayers are paying [IOU employees’] salaries, [salary] information should be available to regulators, public staff, intervenors, and the general public.”<sup>292</sup>

The rate case discovery process—in which any party can serve any other party with Information Requests—is presumably intended to rectify the steep information asymmetry between parties to the proceeding and, more broadly, facilitate transparency and public oversight of IOUs.<sup>293</sup> Discovery rules require rate case parties in New York to “fully disclose to each other, upon request, all information (including data, records, objects, and documents) relevant and material to [the] proceeding . . . and any information likely to lead to such information.”<sup>294</sup> A party receiving an Information Request must provide responses and produce requested documents within ten days.<sup>295</sup> Parties can also request that the Public Service Commission “authorize other forms of discovery, including oral depositions and inspection of sites, facilities, or original documents.”<sup>296</sup> Thus, the discovery process enables parties to access information that would otherwise be unobtainable and is critical for informed evaluation of IOUs’ proposed rate increases.

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<sup>290</sup> See Request for Exception from Disclosure, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 16-G-0059 (N.Y. State Dep’t of Pub. Serv. May 9, 2017), <https://perma.cc/P4M9-TCHV>; see also Request for Exception from Disclosure, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 16-G-0059 (N.Y. State Dep’t of Pub. Serv. Apr. 11, 2016) [hereinafter *Request for Exception from Disclosure* (Apr. 11, 2016)], <https://perma.cc/FUM4-78ES>; Request for Exception from Disclosure, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 16-G-0059 (N.Y. State Dep’t of Pub. Serv. April 3, 2017), <https://perma.cc/2N4K-NKD4>; Request for Exception from Disclosure, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 16-G-0059 (N.Y. State Dep’t of Pub. Serv. Apr. 26, 2017), <https://perma.cc/SJ5R-UNHN>; Request for Exception from Disclosure, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat’l Grid NY for Gas Serv.*, Case No. 16-G-0059 (N.Y. State Dep’t of Pub. Serv. Mar. 30, 2018), <https://perma.cc/8JE9-SZ3S>.

<sup>291</sup> See Request for Exception from Disclosure (Apr. 11, 2016), *supra* note 290.

<sup>292</sup> Payne, *supra* note 57, at 1046.

<sup>293</sup> See N.Y. COMP. CODES. R. & REGS. tit. 16, § 5.1(a) (2021).

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at §§ 5.3, 5.4, 5.5.

<sup>296</sup> *Id.* at § 5.6.



In practice, however, the discovery process is limited and fails to ensure full transparency, public oversight, and accountability. When Sane Energy submitted discovery requests to National Grid and the City of New York in the 2019 rate case, asking for information about the status of environmental approval for the company's LNG Trucking Station (one of the capital projects for which National Grid sought rate recovery), both the company and the City objected to the requests on the ground that they were not "relevant and material"<sup>297</sup> to the proposed distribution rates at issue in the proceeding.<sup>298</sup> Sane Energy challenged this narrow interpretation of the "relevant and material" standard, arguing that access to basic information about environmental approval for capital projects is essential to assessing the validity of cost recovery for those projects.<sup>299</sup> If, for example, National Grid were proceeding with a capital project for which it has not obtained required environmental approval, then the company should not be permitted to recover the costs of that project from ratepayers. Ultimately, National Grid and the City provided Sane Energy with limited information that failed to fully address the concerns raised.<sup>300</sup>

In addition to evading production of relevant materials by citing limitations on the scope of discovery, National Grid also *concealed* at least one key document during discovery, according to Sane Energy.<sup>301</sup> The document was directly responsive to three different Information Requests submitted by Sane Energy, but consistently omitted from National Grid's responses to these Information Requests.<sup>302</sup> Sane Energy

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<sup>297</sup> See *id.* at § 5.1(a).

<sup>298</sup> See Request No. SANE-35, *In re Rates, Charges, Rules and Reguls. of the Brooklyn Union Gas Company d/b/a Nat'l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep't of Pub. Serv. July 2, 2021) [hereinafter Request No. SANE-35], <https://perma.cc/A2PU-5GHY>; see also Request No. SANE-30, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat'l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep't of Pub. Serv. Mar. 22, 2021) [hereinafter Request No. SANE-30], <https://perma.cc/HLW9-VYQB>.

<sup>299</sup> See E-mail from Kim Fraczek & Lee Zieche, Sane Energy Project, to Philip A. Decicco, Vice President & Deputy Gen. Couns. to Nat'l Grid, (Apr. 9, 2021, 12:12 EST) (on file with authors).

<sup>300</sup> See Request No. SANE-35, *supra* note 298; see also Request No. SANE-30, *supra* note 298; Request No. SANE-30 Supplemental 2, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat'l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep't of Pub. Serv. Apr. 28, 2021) (on file with authors).

<sup>301</sup> Petitioners'/Plaintiffs' Statement of Material Facts at ¶¶ 34-43; *Sane Energy Project v. City of New York*, No. 518354/2021 (Sup. Ct. Kings Ct. Feb. 14, 2021).

<sup>302</sup> *Id.*; see Request No. SANE-26, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat'l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep't of Pub. Serv. Jan. 29, 2021) (on file with authors), <https://perma.cc/W9AK-YC3A>; Request No. SANE-28, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat'l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep't of Pub. Serv. Mar. 3, 2021)

happened to discover the existence of the document through a subsequent lawsuit filed against National Grid.<sup>303</sup> It is highly plausible that such concealment or omission by IOUs is par for the course but rarely discovered by regulators or intervenors since IOUs are generally in exclusive possession of information requested in discovery and there is no enforcement mechanism for disclosure. Moreover, as Sane Energy suspects, IOUs may be emboldened to conceal or omit key responsive documents when the requesting party is not represented by an attorney;<sup>304</sup> as described further below, resource constraints often preclude community groups like Sane Energy from having legal representation in rate cases.<sup>305</sup>

Finally, one of the clearest manifestations of non-transparency in utility rate cases is the confidential settlement negotiation process. As described above, at any point during a rate case in New York, an IOU can notify the parties that it wishes to negotiate a settlement—that is, arrive at an agreed-upon Joint Proposal.<sup>306</sup> All settlement negotiations between the parties are strictly confidential:<sup>307</sup> community members affected by the outcome of the rate case have no seat at the table unless they are registered parties, which the vast majority of community members are not (in large part due to the time-and-resource-intensive nature of the rate case process, as described below). Thus, community groups cannot relay the contents of settlement talks to the community members they represent and solicit input or feedback without violating the confidentiality rules of the negotiations. Community members therefore remain in the dark not only about the IOU's plans and intentions, but also about regulators' positions and the extent to which regulators challenge—or fail to challenge—the IOU. As Ziesche explained:

We couldn't consult with the community about the result of the rate hike and whether it would actually benefit them. [The confidentiality requirement] limits who can be involved. The amount of time needed to participate as a party to the rate case means that working class people can't be involved . . . . We couldn't talk [publicly] about how good of a job the state did

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(on file with authors), <https://perma.cc/C53N-HHZR>; Request No. SANE-36, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat'l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep't of Pub. Serv. July 2, 2021) (on file with authors), <https://perma.cc/SX9H-N5RS>; Exhibit J, *Sane Energy Project v. City of New York*, No. 518354/2021 (N.Y. Sup. Ct. Kings Cty. Aug. 4, 2021).

<sup>303</sup> *Id.*

<sup>304</sup> Ziesche, *supra* note 225.

<sup>305</sup> *See infra* Part III-D.

<sup>306</sup> Berkley & Wheelock, *supra* note 168.

<sup>307</sup> *Id.* at 9.

fighting for us. If we learned something that might be harmful to the community or that the community might want to know, we couldn't tell them.<sup>308</sup>

Generally, public hearings in the affected service areas are held only *after* negotiations are over and an agreed-upon Joint Proposal has been issued<sup>309</sup>—when it is too late to meaningfully participate in the process.

#### *D. Communities' Lack of Resources and Technical Expertise*

In an open acknowledgment of the generally limited or nonexistent role of the public in utility rate cases, the vice chairman of the Montana Public Service Commission noted in 2017, “[a] regulator should not be mistaken: the parties appearing before him are not the public, and the interests of stakeholders together do not constitute the public interest.”<sup>310</sup> In theory, community members affected by the outcome of a rate case can weigh in on proposed distribution rates and capital infrastructure projects by becoming parties to the proceeding, submitting testimony, gathering information through the discovery process, cross-examining the IOU and regulators during evidentiary hearings, and participating in settlement negotiations.<sup>311</sup> In reality, however, the typical energy consumer lacks the time, resources, and technical expertise needed to meaningfully participate in a utility rate case.<sup>312</sup>

The rate case process is “difficult for the average citizen to understand,”<sup>313</sup> and mounting an effective challenge to an IOU’s rate filing requires a “high degree of specialized knowledge”<sup>314</sup> about engineering, accounting, economics, law, environmental science, and the utility industry.<sup>315</sup> Well-resourced rate case parties can hire experts and attorneys, but community groups and members of the public rarely have sufficient resources for expert consultants or legal representation.<sup>316</sup> Unlike

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<sup>308</sup> Ziesche, *supra* note 225.

<sup>309</sup> See Berkley & Wheelock, *supra* note 168, at 9.

<sup>310</sup> See Julia Pyper, *Why There's No Such Thing As a Free Market for Electricity*, GREEN TECH MEDIA (May 23, 2017), <https://perma.cc/R894-3QZR>.

<sup>311</sup> See *supra* Part II-A.

<sup>312</sup> See Payne, *supra* note 57, at 1031-33.

<sup>313</sup> See *id.* at 1031.

<sup>314</sup> See *id.* at 1032.

<sup>315</sup> See Ziesche *supra* note 225; see also CHARLIE HARAK ET AL., NAT'L CONSUMER L. CTR., A CONSUMER'S GUIDE TO INTERVENING IN STATE PUBLIC UTILITY PROCEEDINGS iii (2004), <https://perma.cc/Z8P6-C4YM>. (“Clearly, participation before PUCs requires time and financial resources, and a working knowledge of the legal rules and political dynamics that drive PUC decision-making.”).

<sup>316</sup> See Ziesche *supra* note 225; see also HARAK ET AL., *supra* note 315, at x-xiv.

in other administrative proceedings in New York, the state does not provide funds for community intervenors in utility rate cases to pay for experts or lawyers.<sup>317</sup>

During an evidentiary hearing in the 2019 rate case, Sane Energy asked National Grid whether the company had conducted any assessments of its proposed capital projects' greenhouse gas emissions and impact on disadvantaged communities.<sup>318</sup> National Grid confirmed that no such assessments had been undertaken.<sup>319</sup> Sane Energy lacked the resources to hire a greenhouse gas emissions expert or environmental justice expert to conduct these assessments, which could have significantly bolstered community groups' contention that National Grid's fracked gas infrastructure projects did not comply with the Climate Leadership and Community Protection Act.<sup>320</sup> Under the CLCPA, a state agency making any type of decision—in this case, the utility regulatory agency (Public Service Commission) and its staff arm (Department of Public Service)—has an affirmative obligation to ensure that the decision (1) is not “inconsistent with” or will not “interfere with the attainment of the statewide greenhouse gas emissions limits” imposed by the CLCPA; and (2) will not “disproportionately burden disadvantaged communities.”<sup>321</sup> Notwithstanding this obligation, DPS neither required National Grid to conduct climate and environmental justice impact assessments nor conducted the assessments itself.<sup>322</sup> Thus, regulators failed to carry out their responsibilities—a symptom of regulatory capture, as described below—and community groups lacked the resources to “do the state’s job,” as Ziesche put it:

We were able to put forth a good enough argument for the state to ask more questions. But the state didn't do that. DPS didn't do a CLCPA assessment . . . . We didn't have the resources to get an expert to say “these are what the actual greenhouse gas

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<sup>317</sup> See Assemb. B. A1966, Assemb. Reg. Sess. (N.Y. 2019); Erik Kriss, *NYS Legislature Backs Historic \$16M Increase for Home & Community Services*, AARP (Mar. 12, 2019, 05:27 PM), <https://perma.cc/92LA-76KG>. But see N.Y. STATE DEP'T OF PUB. SERV. *supra* note 190.

<sup>318</sup> Corrected Evidentiary Hearing Transcript Volume 9 at 393, 405, 406, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a Nat'l Grid NY for Gas Serv.*, Case No. 19-G-0309 (N.Y. State Dep't of Pub Serv. Mar. 19, 2020), <https://perma.cc/Q86F-7HQP>.

<sup>319</sup> *Id.*

<sup>320</sup> Ziesche, *supra* note 225.

<sup>321</sup> See S.B. S6599, S. Assemb. Reg. Sess. § 7(1-3) (N.Y. 2019).

<sup>322</sup> See generally 19-01092/19-G-0309, N.Y. STATE DEP'T OF PUB. SERV., <https://perma.cc/5EDZ-RGFS> (last visited Apr. 19, 2022) (finding in a review of the 887 documents filed in the 2019 rate case that neither National Grid nor the Department of Public Service completed and filed climate or environmental justice impact assessments).

emissions are” or “these are the impacts on disadvantaged communities.” If we don’t do the state’s job, they don’t do it either.<sup>323</sup>

Participation in utility rate cases is also a time-intensive endeavor.<sup>324</sup> Rate cases can span 11 months.<sup>325</sup> The 2019 National Grid rate case continued for nearly two and a half years.<sup>326</sup> A typical community member working for 40 hours or more per week simply does not have the time to review and digest rate case documents, draft Information Requests, prepare testimony, and participate in months of negotiations.<sup>327</sup> As Ziesche said, “[f]or the first year of the rate case, I was only [a] part-time [employee at Sane Energy]. I was going from rate case meetings to serving at a restaurant. There are thousands and thousands of pages of documents. You need time to go through it all, and somebody needs to train you to understand what it all means.”<sup>328</sup>

### *E. Regulatory Capture*

The phenomenon of “regulatory capture” describes “the process through which regulated monopolies end up manipulating the state agencies that [we]re [designed] to control them.”<sup>329</sup> Energy scholar Heather Payne has argued that state public utility commissions and IOUs “play a ‘game’” driven by regulatory capture.<sup>330</sup> In the utility rate case context, two mechanisms of regulatory capture are particularly salient: (1) the IOU’s ability to define and manipulate the standards that govern its own regulation; and (2) the use of negotiation to reach resolution, despite the monopoly status of IOUs and the absence of key conditions needed for successful negotiation.<sup>331</sup>

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<sup>323</sup> Ziesche, *supra* note 225.

<sup>324</sup> HARAK ET AL., *supra* note 315, at ix-x.

<sup>325</sup> N.Y. STATE DEP’T OF PUB. SERV., *supra* note 8.

<sup>326</sup> 2019 KEDNY Major Rate Case Filing, *supra* note 33, at 1; Order Approving Joint Proposal, *supra* note 255, at 1.

<sup>327</sup> See HARAK ET AL. *supra* note 315, at ix-x.

<sup>328</sup> Ziesche, *supra* note 225.

<sup>329</sup> Heather Payne, *Game Over: Regulatory Capture, Negotiation, and Utility Rate Cases in an Age of Disruption*, 52 UNIV. S.F. L. REV. 75, 79 (2017) (alteration in original).

<sup>330</sup> *Id.* at 76.

<sup>331</sup> Another mechanism of regulatory capture in rate cases is the composition of the state public utility commissions charged with regulating utility companies. First, the “revolving door” pattern of commissioners who leave government to obtain employment in the utility industry they regulated, and vice-versa, is both a product of and a contributor to regulatory capture: regulators seek to curry favor with the utility industry so as to secure employment in the industry down the road. Payne, *supra* note 329, at 83. In New York, two of the seven members of the Public Service Commission were formerly employed by a utility company and the remaining five previously held government positions; none of the commissioners

First, IOUs have defined and manipulated the seemingly neutral and public interest-oriented principles that guide public utility commissions' decisions—"safety,"<sup>332</sup> "reliability,"<sup>333</sup> and "reasonable rates"<sup>334</sup>—in a manner that prioritizes the financial viability of utility companies over the interests of ratepayers. In New York, utility companies are statutorily obligated to provide "safe, adequate, and reliable" service,<sup>335</sup> and—as is apparent in National Grid's rate filings and public notices—IOUs justify their proposed rate hikes and capital spending by invoking this very imperative,<sup>336</sup> manipulating these standards to serve their own interests.

In arguing that the North Brooklyn Pipeline and other fracked gas infrastructure is necessary for the company to provide safe, adequate, and reliable service,<sup>337</sup> National Grid has depended on a narrow interpretation of this standard that favors increases in capital spending. Across the utility sector, IOUs narrowly interpret their obligation to provide "adequate" and "reliable" service as their "ability . . . to meet demand at any given time," and regulators accept this interpretation.<sup>338</sup> An IOU considers its gas system "reliable" when the system's capacity to trans-

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have backgrounds in consumer protection or environmental justice. *See* N.Y. STATE DEP'T PUB. SERV., *supra* note 148 (click on each commissioner's name for biographical information). Second, the demographic composition of state public utility commissions exacerbates the problem of regulatory capture: predominantly white, male, and "mid to high wealth" utility commissioners often fail to act in the interest of Black, Brown, and low-income communities. *See Engaging With Public Utilities and Public Service Commissions*, NAACP, <https://perma.cc/K3GC-M7YH> (last visited Apr. 26, 2022); *see also* Stanley Dunlap, *Lawsuit Charges PSC At-Large Elections Unfair to Black Voters*, GA. REC., (July 15, 2020) <https://perma.cc/PSQ5-7TSA>. Mississippi, which is 48% African American, has never had a Black commissioner, and Georgia has had only one Black commissioner in the agency's 107-year history. *Engaging With Public Utilities and Public Service Commissions*, NAACP, <https://perma.cc/9BVR-XKXX> (last visited Apr. 26, 2022). As the NAACP has noted, the demographic composition of public utility commissions "is significant, given the disproportionate location of energy production facilities in low income communities of color" and the "disparate impact [of utility rates] on women, communities of color[,] and low income communities." *Id.*

<sup>332</sup> *See Safety*, NAT'L ASS'N OF REGUL. UTIL. COMM'RS, <https://perma.cc/UJ6S-2QJ3> (last visited Apr. 26, 2022).

<sup>333</sup> *See Reliability*, NAT'L ASS'N OF REGUL. UTIL. COMM'RS, <https://perma.cc/T5K9-W3WJ> (last visited Apr. 26, 2022).

<sup>334</sup> *See Reasonable Rates*, NAT'L ASS'N OF REGUL. UTIL. COMM'RS, <https://perma.cc/6HLQ-GGLD> (last visited Apr. 26, 2022).

<sup>335</sup> N.Y. PUB. SERV. L. § 65(14) (2021).

<sup>336</sup> *See* Affidavits and Proofs of Publication at 3, *In re Rates, Charges, Rules and Reguls. of Brooklyn Union Gas Co. d/b/a National Grid NY for Gas Serv.*, 19-G-0309 (N.Y. State Dep't of Pub. Serv. June 17, 2019), <https://perma.cc/J5F3-UR4R>; KEDNY-KEDLI Book 1, *supra* note 37, at 5.

<sup>337</sup> KEDNY-KEDLI Book 1, *supra* note 37, at 4, 36-39.

<sup>338</sup> Fendell, *supra* note 3, at 827.

mit and distribute gas exceeds demand on a day of extreme cold weather called “Design Day.”<sup>339</sup> National Grid calculates this peak demand using Design Day conditions of 0° F in Central Park for 24 hours—a scenario that last occurred in 1934.<sup>340</sup> Since additional capital infrastructure unquestionably increases National Grid’s capacity to transmit and distribute gas, the company “has tied the reliability of its service to its [profit-generating] rate base.”<sup>341</sup> To justify construction of new fracked gas infrastructure, National Grid has successfully argued that more infrastructure is needed to meet gas demand in the event of (a highly unlikely) Design Day scenario and that the adequacy and reliability of the system depend on the company’s ability to meet demand under these extreme circumstances.<sup>342</sup> Thus, National Grid uses the regulatory standard of “adequacy” and “reliability” to promote its own profit interest by equating the standard with the company’s ability to meet demand, over-forecasting this demand, and conditioning the ability to meet demand on construction of additional capital infrastructure.

“Captured” regulators, moreover, simply accepted National Grid’s interpretation of the standard, failing to use the full extent of their authority to adopt a more expansive interpretation that would protect marginalized communities and the climate. Although utility regulators in New York have statutory authority to pursue state goals of energy efficiency,<sup>343</sup> public safety,<sup>344</sup> environmental preservation,<sup>345</sup> and conservation,<sup>346</sup> the Department of Public Service did not insist on a holistic conception of “adequacy” and “reliability”<sup>347</sup> that might have considered, for example, whether new fracked gas infrastructure can possibly be considered “reliable” in an era of imminent climate catastrophe. Throughout the 2019 rate case, community groups argued that as New York phases out fossil fuel infrastructure on the timeline required by the Climate Leadership and Community Protection Act, gas infrastructure projects will soon become stranded assets that must be retired well before the end of their useful lives.<sup>348</sup> Ratepayers will be saddled with the costs of National Grid’s projects for decades after the projects are re-

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<sup>339</sup> See *id.*; *Design Day Definition*, LAW INSIDER, <https://perma.cc/3B49-3AF4> (last visited Apr. 19, 2022); see, e.g., NAT’L GRID, *supra* note 44, at 27.

<sup>340</sup> NAT’L GRID, *supra* note 44, at 27.

<sup>341</sup> Cf. Fendell, *supra* note 3, at 827.

<sup>342</sup> See generally, NAT’L GRID, *supra* note 44.

<sup>343</sup> N.Y. PUB. SERV. L. § 65 (2021).

<sup>344</sup> *Id.* at § 5(2).

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> See generally, Order Approving Joint Proposal, *supra* note 255, at 56, 62, 71, 73, 79-80, 86, 95, 117-18, 128.

<sup>348</sup> See, e.g., Sane Energy Project Supplemental Testimony, *supra* note 272, at 10-11.

tired—a factor that regulators might have weighed in their assessment of “reliability.”

Similarly, the severe safety and health consequences of National Grid’s North Brooklyn Pipeline and LNG infrastructure—including methane emissions, risks of pipeline incidents, and LNG-related explosion risks<sup>349</sup>—seemingly did not factor into regulators’ assessment of the company’s ability to provide “safe” service: DPS expressed no such concerns, and it was left to community intervenors to raise these issues on their own.<sup>350</sup> During an evidentiary hearing, Sane Energy asked DPS to describe the factors that DPS considers in its assessment of “safety.”<sup>351</sup> At one point in cross-examination, the community group asked: “[W]hat is safe and reliable? In the word safe, are you looking at all the public health impacts included with things like emissions and pollutants?”<sup>352</sup> Regulators repeatedly evaded the question, even when pressed to respond.<sup>353</sup>

As for the rates that an IOU can charge its customers, “[t]he well-known, oft-repeated mantra of the utility regulator is that rates must be ‘just and reasonable’”<sup>354</sup>—a standard echoed in New York’s utility regulation statute.<sup>355</sup> To determine “just and reasonable” utility rates, the Supreme Court has applied the “prudent-investment rule,” which bases rates on “the cost of prudently invested capital used to provide the service.”<sup>356</sup> According to the Court, the prudent-investment rule:

addressed the natural temptations on the utilities’ part to claim a return on outlays producing nothing of value to the public. It was meant . . . to discourage unnecessary investment . . . and so to protect ratepayers from supporting excessive capacity, or abandoned, destroyed, or phantom assets . . . . But the mitigation was too little, the prudent-investment rule in practice often being no match for the capacity of utilities having all the relevant in-

<sup>349</sup> See *supra* notes 84-87 and accompanying text.

<sup>350</sup> See *generally Matter Master: 16-00252/16-G-0059*, N.Y. STATE DEP’T OF PUB. SERV., <https://perma.cc/8BZ9-WWBW> (last visited July 31, 2022); see *generally Matter Master: 19-01092/19-G-0309*, N.Y. STATE DEP’T OF PUB. SERV., <https://perma.cc/5EDZ-RGFS> (last visited Apr. 19, 2022) (finding in a review of the 887 documents filed in the 2019 rate case and the 506 documents filed in the 2016 rate case found that the Department of Public Service never expressed concern about the safety and health consequences of National Grid’s North Brooklyn Pipeline and LNG infrastructure).

<sup>351</sup> Order Approving Joint Proposal, *supra* note 255, at 53.

<sup>352</sup> *Id.* at 57.

<sup>353</sup> See *id.* at 53-58.

<sup>354</sup> Mapes et al., *supra* note 62, at 342.

<sup>355</sup> N.Y. PUB. SERV. L. § 65(1) (McKinney 2022).

<sup>356</sup> *Verizon Commc’ns, Inc. v. Fed. Commc’ns Comm’n*, 535 U.S. 467, 484-85 (2002).



formation to manipulate the rate base and renegotiate the rate of return every time a rate was set.<sup>357</sup>

Thus, the prudent-investment rule is intended to disincentivize unnecessary capital spending by rewarding IOUs with cost recovery for *prudent* investments only—that is, investments that are essential for service provision and will not yield stranded assets.<sup>358</sup> However, as the Court recognized, the prudent-investment rule falls short in practice because IOUs can easily manipulate it.<sup>359</sup> As Payne has noted, “[m]any investments can be deemed sufficient, prudent, and acceptable. When everything between 0% and 100% . . . of what the utilities ask for can be granted, with essentially no judicial oversight of the decision, the regulatory system becomes the very definition of arbitrary and capricious.”<sup>360</sup> Since IOUs set the rate case agenda<sup>361</sup> and are in exclusive control of key information,<sup>362</sup> they can easily frame their capital investments as “prudent” and their proposed rates as “just and reasonable.” If regulators fail—as they did in the National Grid rate cases—to adequately probe, challenge, and interrogate the assumptions underlying this framing, then the framing is simply accepted as true.<sup>363</sup>

In short, by allowing IOUs to define and manipulate the standards that govern utility rate case decision-making, regulators have effectively yielded the rate case terrain to IOUs. DPS’s failure to critically scrutinize and question National Grid’s claims about the safety, reliability, and prudence of its proposed capital investments was a manifestation of regulatory capture. One potential explanation of this failure is that regulators misconceive their role and purpose: rather than defining the rights and obligations of consumers and IOUs (which would require articulation and interpretation of the relevant standards) and then protecting consumers’ rights and enforcing IOUs’ obligations, regulators are instead fixated on “balancing” the interests of the two parties.<sup>364</sup> This balancing test inevitably favors the more powerful party in the proceeding—that is, the party setting the agenda and controlling the terms of the debate through selective information provision.<sup>365</sup>

The second prominent mechanism of capture in utility rate cases is the use of a negotiated process to achieve resolution, despite the absence

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<sup>357</sup> *Id.* at 486.

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> Payne, *supra* note 329, at 78-79.

<sup>361</sup> *See supra* Part III-B.

<sup>362</sup> *See supra* Part III-C.

<sup>363</sup> *See supra* Part III-B.

<sup>364</sup> *See Payne, supra* note 329, at 81-83.

<sup>365</sup> *See supra* Parts III-B, III-C.

of key conditions needed for successful negotiations.<sup>366</sup> As a preliminary matter, negotiations do not make sense in the rate case context because of “the basic tenet of monopolies: utilities should only request what they need, given that they have no competition.”<sup>367</sup> If IOUs did, in fact, request only what they need, then there would be no negotiations. But IOUs seek distribution rates far in excess of need: according to a comprehensive quantitative analysis of electric utility rate cases from 2002 to 2015, “utilities were on average granted approximately half of what they requested.”<sup>368</sup> As the author of the analysis noted, if IOUs actually needed the entirety of what they requested—only to receive about half—ratepayers would witness “significant deterioration” of infrastructure and “lack of capital expenditures,” and IOUs would be unable “to attract investors.”<sup>369</sup> None of this has come to pass.<sup>370</sup> Thus, it is only because of the failure of the monopoly utility system that rate case negotiations occur in the first place.

Moreover, the lack of meaningful public involvement in utility rate cases and absence of affected communities from the negotiating table—largely due to the technical expertise, time, and resources needed to participate in the proceedings<sup>371</sup>—have made the negotiation process farcical in nature, enabling IOUs and regulators to “play a ‘game’” in which the IOU requests more than twice what it needs, regulators reduce the requested amount by about half, and both parties claim success.<sup>372</sup>

Even if the public *were* meaningfully involved, several of the conditions needed for successful negotiations are missing in the utility rate case context. In a seminal 1982 article, the scholar Philip J. Harter proposed a set of conditions under which, he predicted, regulatory negotiations would be more likely to succeed.<sup>373</sup> Most notably, “the countervailing power among the parties” must be “balanced such that the outcome of the conflict is genuinely in doubt,” wrote Harter.<sup>374</sup> In utility rate cases, the imbalance of power between the parties is too steep for negotiations to be successful.<sup>375</sup> Harter also advocated for the establishment of deadlines in the negotiation process.<sup>376</sup> As others have noted,

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<sup>366</sup> See Payne, *supra* note 329, at 87-89.

<sup>367</sup> *Id.* at 104.

<sup>368</sup> *Id.* at 89.

<sup>369</sup> *Id.* at 104.

<sup>370</sup> *Id.*

<sup>371</sup> See *supra* Part III-D.

<sup>372</sup> See Payne, *supra* note 329, at 76, 78, 89 104.

<sup>373</sup> See Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 115 GEO. L.J. 1, 42, 52 (1982).

<sup>374</sup> *Id.* at 46.

<sup>375</sup> See *supra* Parts III-B, III-C, III-D.

<sup>376</sup> Harter, *supra* note 373, at 75.

“[w]ithout a deadline, parties may purposefully delay or fail to focus on reaching a settlement.”<sup>377</sup> In the 2019 National Grid rate case, community groups pointed to the lack of a deadline—and its consequences—as one of the major reasons they walked out of confidential settlement negotiations.<sup>378</sup> In the press release announcing their walk-out, community members expressed frustration that after nine months of negotiations, no settlement had been reached.<sup>379</sup> In the meantime, National Grid had continued construction of the very fracked gas infrastructure at issue in the rate case.<sup>380</sup> Thus, the protracted negotiations enabled the company to create facts on the ground that would make it increasingly difficult for the Public Service Commission to deny rate recovery. Regulators are extremely reluctant to deny rate recovery for infrastructure that is already built (as evidenced by the PSC’s ultimate approval of recovery for all completed portions of the North Brooklyn Pipeline) because denial of rate recovery for existing infrastructure would cause an IOU greater financial harm than denial of recovery for investments not yet made.<sup>381</sup> In addition, as noted above, the Joint Proposal that emerges from negotiations need not be agreed upon by all parties or even most parties at the table.<sup>382</sup> Other than National Grid and New York State agencies, the only parties that supported the Joint Proposal were a real estate company, two nonprofit organizations, and an individual member of the public.<sup>383</sup> Seven organizations or companies and 15 individual members of the public submitted statements in opposition to the Joint Proposal.<sup>384</sup> Thus, the PSC ultimately approved a rate plan that a significant number of parties opposed.

After the PSC voted to approve the controversial Joint Proposal,<sup>385</sup> the PSC’s performance—in which the agency purported to deal a blow

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<sup>377</sup> Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 140 (1985) (discussing the theory and practices of negotiated rulemaking).

<sup>378</sup> See Press Release, No N. Brooklyn Pipeline, Citing Continuing Construction of Controversial Fracked Gas Projects, Environmental Groups and NYC Comptroller Walk out of Downstate National Grid Rate Case Negotiations Calling the Process “an Undemocratic Path to Climate Disaster” (Mar. 11, 2011), <https://perma.cc/83QD-VAFH>.

<sup>379</sup> See *id.*

<sup>380</sup> See *id.*; see also *Climate Activists Arrested in NYC After Shutting Down Construction of North Brooklyn Pipeline*, DEMOCRACY NOW (Oct. 27, 2020), <https://perma.cc/2YVR-9A7V>.

<sup>381</sup> See *id.*; Donovan, *supra* note 46.

<sup>382</sup> See Berkley & Wheelock, *supra* note 168, at 9.

<sup>383</sup> See Order Approving Joint Proposal, *supra* note 255, at 234.

<sup>384</sup> See Matter Master: 19-01092/19-G-0309, N.Y. STATE DEP’T OF PUB. SERV., <https://perma.cc/Y4KV-TK4P> (filter by “Joint Proposals and Stipulations” and search for “opposition”) (last visited May 12, 2022).

<sup>385</sup> See Order Approving Joint Proposal, *supra* note 255.

to National Grid while actually paving the way for the company's capital infrastructure projects—was a demonstration of regulatory capture, made all the more apparent by National Grid's satisfaction with the outcome.<sup>386</sup> Issuing a press release that declared, "PSC Dramatically Slashes National Grid Rate Hike Request," the PSC emphasized that the approved rate plan was "dramatically lower than what the company had initially requested" and repeatedly invoked the Climate Leadership and Community Protection Act.<sup>387</sup> A sub-headline of the press release proclaimed, "CLCPA Requirements Made Core Component of Historic Decision Designed to Reduce Amount of Natural Gas Being Sold"<sup>388</sup>—even though the Joint Proposal did not deny rate recovery for any fracked gas infrastructure (but rather, approved recovery for some infrastructure and permitted National Grid to seek recovery for the rest in the future).<sup>389</sup> Meanwhile, National Grid also hailed the outcome of the rate case: "The [PSC's approval of the Joint Proposal] will allow us to prioritize energy affordability while investing in programs necessary to maintain the safety and reliability of our natural gas networks," the company stated.<sup>390</sup> The "game" that National Grid and the PSC had just finished was on full display—and both players had won.

#### CONCLUSION

This Article has used the 2016 and 2019 National Grid rate cases to illustrate the procedural injustice of the utility regulation system in New York, as well as the substantive—and disproportionately adverse—consequences of this procedural injustice for Black, Brown, and low-income communities. As evidenced above, utility rate cases fail to meet the four elements of procedural justice laid out by Sovacool and Dworkin<sup>391</sup>: (1) affected communities lack access to information as a result of steep information asymmetry and the IOU's ability to withhold information that does not align with its financial interests; (2) affected communities cannot access or meaningfully participate in decision-making due to insufficient public notice requirements, the power of the IOU to set the rate case agenda and frame the terms of the decision-making process, communities' lack of resources and technical expertise, and confidentiality rules that shroud settlement negotiations in secrecy;

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<sup>386</sup> *Id.* at 104; N.Y. STATE PUB. SERV. COMM'N, *supra* note 48; Donovan, *supra* note 46.

<sup>387</sup> *See* N.Y. STATE PUB. SERV. COMM'N, *supra* note 48.

<sup>388</sup> *Id.*

<sup>389</sup> *See* Order Approving Joint Proposal, *supra* note 255, at 104; Donovan, *supra* note 46.

<sup>390</sup> *See* Donovan, *supra* note 46.

<sup>391</sup> *See* Sovacool & Dworkin, *supra* note 210, at 437.

(3) regulators are “captured” by the IOU and therefore biased; and (4) affected communities are generally unable to challenge unfavorable rate case decisions in court because they lack the significant resources required to bring legal proceedings.<sup>392</sup>

The substantive consequences of this procedural injustice are patent and include the disproportionate location of fossil fuel infrastructure—and its attendant health and safety effects—in marginalized communities; adverse impacts on greenhouse gas emissions and the climate; and increases in ratepayers’ energy burdens and energy insecurity, which disproportionately affect Black, Brown, and low-income households.<sup>393</sup>

While ostensibly neutral, utility regulation procedures facilitate the inequitable distribution of environmental harms resulting from the activities of the utility sector. Attempts to rectify these procedures, moreover, cannot cure the deeper problem of which procedural injustice is merely a symptom: the private, profit-driven utility model at the heart of our energy system. The perverse financial incentives that drive IOUs are fundamentally incompatible with environmental and energy justice, energy democracy, and energy sovereignty: as long as these incentives exist, regulators—with the assistance of an “investor-oriented” legal standard—will continue to prioritize the financial viability of utility companies over the interests of ratepayers, and utilities will remain unaccountable to the communities directly affected by their operations.

There is, however, a viable path forward: the current regime of investor-owned utilities must be replaced with an alternative, publicly-owned energy system.<sup>394</sup> Public ownership of utilities is neither new in the United States (consumer-owned utilities currently provide electricity services to about 25% of the U.S. population)<sup>395</sup> nor a panacea for systemic racism in our energy system.<sup>396</sup> Nevertheless, transitioning from utilities centered on shareholder profits to utilities centered on the needs of customer-owners is a crucial first step to fully democratizing energy and realizing the goals of environmental and energy justice. Only when communities are no longer dependent on profit-driven monopolies for essential services and have seized control and ownership of energy resources and decision-making can we begin to develop an energy system grounded in racial, economic, and environmental justice.

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<sup>392</sup> See *supra* Part III.

<sup>393</sup> See *supra* Part I-C.

<sup>394</sup> See Johanna Bozuwa, *Public Ownership for Energy Democracy*, DEMOCRACY COLLABORATIVE (Sept. 3, 2018), <https://perma.cc/96PK-SWNZ>.

<sup>395</sup> See JIM LAZAR ET AL., *ELECTRICITY REGULATION IN THE US: A GUIDE* 12 (2d ed. 2016), <https://perma.cc/2WNN-3SC9>.

<sup>396</sup> See John Farrel, *Being Black Still a Barrier to Rural Cooperative Board Membership*, ILSR (May 23, 2016), <https://perma.cc/SM6X-A4A7>.