its face. . . . But the utility may apply its own rules improperly to individual customers, in which case the customers may bring a claim in state court." *Vote Solar v. City of Farmington*, 2 F.4th 1285, 1290 (10th Cir. 2021). In *Exelon Wind 1, L.L.C. v. Nelson*, the Fifth Circuit described the analysis this way: "An implementation claim involves a contention that the state agency . . . has failed to implement a lawful implementation plan under § 824a–3(f) of PURPA, whereas an as-applied claim involves a contention that the state agency's . . . implementation plan is unlawful, as it applies to or affects an individual petitioner." 766 F.3d 380, 388 (5th Cir. 2014).

Recent years have seen a recurring fact pattern further complicate matters. As discussed, section 210(a) directed FERC to develop rules to promote QFs, including rules that require utilities to both sell electricity to QFs and purchase electricity from QFs. The former type of transaction represents a retail sale—that is, a sale of electricity for end-use consumption. The regulation of such sales falls exclusively to the states. *See, e.g.*, *Hughes v. Talen Energy Mkt'g, LLC*, 136 S. Ct. 1288, 1292 (2016) ("[T]he law places beyond FERC's power, and leaves to the States alone, the regulation of any other sale—most notably, any retail sale—of electricity." (quotations omitted)); *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 824 (D.C. Cir. 2006) ("FERC has jurisdiction over both the interstate transmission of electricity and the sale of electricity at wholesale in interstate commerce. States retain jurisdiction over retail sales of electricity. …"). Indeed, FERC itself advised in a policy statement issued in the wake of Order No. 69 that disputes over such sales appropriately went to state forums for resolution. Policy Statement Regarding the Commission's Enforcement Role Under Section of the Public Utility Regulatory Policies Act of 1978, FERC Docket No. PL83-4, 48 Fed. Reg. 29,475, 29,476 n.9 (June 27, 1983) ("The Commission notes that sales by electric utilities to qualifying facilities are retail sales which are not 'operations' under the Federal Power Act and are not, therefore, subject to Commission enforcement jurisdiction.").

Notwithstanding this precedent and FERC's advisory statement contemporaneously issued with its regulations implementing PURPA, on several occasions this century, FERC has acted in a way that indicates that enforcement jurisdiction under 210(h) might well lie in a federal court, even if the case involves a retail sale of electricity. *See ConocoPhillips Co. v. L.A. Dep't of Water & Power*, 110 FERC ¶ 61,368, P 7 n.5 (Mar. 28, 2005) (stating that "Petitioners have alleged facts that, if true, indicate LADWP's implementation of PURPA is inconsistent with our regulations"); *In re Michael Eisenfeld et al.*, 167 FERC ¶ 61,228 (June 18, 2019). Indeed, in three recent instances, FERC commissioners have expressly opined as much, without acknowledging or reconciling the underlying jurisdictional question. *See Schedler v. Salt River Project Agric. Improvement & Power Dist.*, 186 FERC ¶ 61,206 (Mar. 21, 2024) (Clements, Comm'r, concurring) ("While states and relevant non-jurisdictional entities such as SRP have retail rate authority, PURPA provides for federal jurisdiction over a utility or retail authority's implementation of PURPA's obligation to purchase from and sell to Qualifying Facilities."); but *see id.* (Christie, Comm'r, concurring) ("I write separately to state that I find persuasive the various arguments raised … that the issues presented in the underlying Petition for Enforcement are state issues, which should be addressed at the state level, not at the federal level."); *see also Bankston v. Ala. Pub. Serv. Comm'n*, 183 FERC ¶ 61,064 (Apr. 28, 2023) (Clements, Comm'r, concurring) ("[N]one of the pleadings in this proceeding alter the conclusion that Chairman Glick and I previously jointly expressed that this rate appears to violate the regulations set forth in FERC Order No. 69." (citing 175 FERC ¶ 61,181 (2021) (Glick, Chairman, & Clements, Comm'r, jointly concurring))).

With the change in administration, one might think an opportunity could be on the horizon for FERC to clarify matters and, at a minimum, reconcile some of its recent observations with the 1983 Policy Statement. The esoteric issues presented by these types of proceedings—whether a federal or state court should be deciding whether a particular retail electricity rate or program complies with PURPA, and what the contours of such a case are—requires resolution that only can be provided by a court. Orders like those cited above are nonbinding advisory opinions. See *Portland Gen. Elec. Co. v. FERC*, 854 F.3d 692, 702 (D.C. Cir. 2017) ("FERC could avoid a great deal of confusion and waste of judicial resources by not using words like 'shall' and 'must,' and by making clear in its orders—as opposed to later in this court—that its discussions of PURPA-related issues are advisory only."). And with respect to design of section 210, as crafted by the 1978 Congress, perhaps it is fitting that this unique jurisdictional question—which may be such that the traditional as-implemented versus as-applied paradigm does not suit the analysis at all—be decided by a federal court.

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The Infrastructure Investment and Jobs Act: Where Does Progress Stand?

Monica McCann

On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act (IIJA or the Act), a historic infrastructure legislation that injected $1.2 trillion into the United States' transportation and infrastructure sectors. Pub. L. No. 117-58, 135 Stat. 429 (2021) (codified as amended at 23 U.S.C. § 117). The

most ambitious infrastructure initiative since the American Recovery and Reinvestment Act of 2009, the IIJA provides substantial federal investment with a projected economic stimulus of 1.5 million jobs added to the U.S. economy. The Act's objective is to fund wide-ranging infrastructure improvements, including repaving roads; repairing railways; advancing power grid connectivity and transmission to accommodate renewable energy platforms such as electric vehicle chargers and solar panels; enhancing clean drinking water treatment and access; improving public transit systems, airports, and ports; restoring and reestablishing native ecosystems and habitats through efforts like native vegetation restoration; and removing dams and culverts to improve fish migration and population survival rates. *Id.* Specifically, the IIJA's funding allocates $110 billion towards major roadways, highways, and bridge infrastructure; $11 billion towards transportation safety programs; $39 billion towards public transportation; $66 billion towards rail systems and maintenance; $7.5 billion towards electric-vehicle charging systems and accessibility; $7.5 billion towards clean energy buses and ferries within public school systems; $17 billion towards aviation and port infrastructure and modernization; $50 billion towards water infrastructure; $55 billion towards clean drinking water projects; $65 billion towards broadband deployment and access; $21 billion towards environmental remediation; $65 billion towards clean energy, including $9.5 billion towards hydrogen energy programs; $250 million towards U.S. Forest Service (USFS) rural roads and trails improvement; and $1 billion towards renovation and reconnection within communities physically divided by outdated transportation systems. *See* The White House's Biden-Harris IIJA Fact Sheets Releases, dated May 13, 2024, and August 2, 2021. While the IIJA is intended to revolutionize, repair, and incentivize U.S. infrastructure, what does its track record evidence almost three years after passage? Has the Act lived up to its economic and sustainability promises? As the United States has transitioned into the Trump administration, this article briefly reviews the successes, efficacy, results, and current status of the Biden administration's historic legislation, the IIJA.

The IIJA's enactment presented many promises for the transportation and infrastructure sectors, and recent statistics exhibit where the Act has delivered tangible results. As of May 2024, the Biden administration announced that approximately $454 billion in IIJA funding had been allocated across 56,000 projects, within 4,500 communities, in all 50 states. The Act has reportedly triggered recognizable employment benefits under its promise to stimulate the economy through the addition of approximately 1.5 million jobs. Two years after the IIJA's passage, the administration had identified a 9% overall increase in construction employment and an 11% increase in civil engineering employment, amounting to an estimated 37,600 jobs resulting from projects under IIJA funding. *See* Julie Strupp, *2 Years in, Infrastructure Law Has Funded 40,000 Projects*, Constr. Dive (Nov. 16, 2023); The White House's May 13, 2024, Biden-Harris IIJA Fact Sheet Release.

The IIJA's implementation nonetheless has been criticized, particularly for projects administered at the state or local level. While funding allocation for federal agencies is pre-determined, state and local funding are allocated through a competitive grant application process for project proposals by state agencies and departments. By November 2023, only 20% of funding had been awarded through competitive grants. *See* Adie Tomer, *At Its Two-Year Anniversary, the Bipartisan Infrastructure Law Continues to Rebuild All of America*, Brookings Inst. (Nov. 17, 2023). The delay associated with grant funding is, however, not unexpected; the competitive grant application process proceeds at a slower pace compared to direct federal agency allocations given the need for project-specific review and approval by federal staff. *Id.* Direct spending allocations to federal agencies, by comparison to grant allocations, were more heavily utilized by the Act's two-year anniversary. By November 2023, 47% of IIJA allocated funding had been utilized by federal agencies. *Id*.

Considering combined grant allocations and direct federal agency spending, IIJA funding utilized per sector by the Act's two-year anniversary included approximately $243 billion for transportation projects, inclusive of only $22 billion to grant applicants; $20 billion for energy; $22 billion for clean water; $46.5 billion for broadband connectivity, inclusive of only $5 billion to grant applicants; $11 billion for watersheds and coastal infrastructure; and $2 billion for environmental remediation programs. *Id*. Therefore, remaining allocation amounts by the two-year anniversary per sector included approximately $347 billion for transportation projects; $78 billion for energy; $36 billion for clean water; $4 billion for broadband connectivity; $16.5 billion for watersheds and coastal infrastructure; and $12 billion for environmental remediation programs. *Id.* As evidenced by the remaining allocation amounts, billions remain in the funding pool for utilization by states, localities, and federal agencies.

Although only 20% of IIJA funding had been allotted to competitive grant applicants and 47% to direct federal spending by the Act's two-year anniversary, the funding implemented thus far has initiated significant infrastructure repairs and upgrades across the United States as many IIJA projects are underway. *Id*. A few of the largest projects to receive funding over the past year include $250 million to improve the Brent Spence Bridge over the Ohio River between Cincinnati and Kentucky; $292 million to help complete the final section of concrete casing for the new Hudson River Tunnel outside New York City; $78 million for the Roosevelt Boulevard Multimodal Project in Philadelphia; $150 million to replace the I-10 Calcasieu River Bridge in Lake Charles, Louisiana; and $110 million to replace the Alligator River Bridge in North Carolina that will modernize travel to the Outer Banks. *See* Joshua Sadlock, *Two Years Later, What Has the Infrastructure Investment and Jobs Act Done?*, Engineering.com (Oct. 10, 2023).

The IIJA incentivizes transformative infrastructure projects that are duly intended to stimulate the economy, but implementation of IIJA-funded projects has met limitations and concerns related to state and local constitutional powers, energy demand, and climate change mitigation. The IIJA's promise to transform and enhance the country's infrastructure is focused, in part, on promoting sustainability and reinforcing infrastructure against the effects of climate change. The IIJA works in tandem with

subsequent legislation enacted by the Biden administration, the Inflation Reduction Act (IRA) of 2022, which allocates upwards of $370 billion in tax credits for a wide variety of renewable energy and sustainability projects, facilitating unprecedented funding and growth towards sustainable infrastructure. Pub. L. No. 117-169, 136 Stat. 1818 (Aug. 16, 2022). The IRA and IIJA work together through federal investments and renewable energy tax credits to advance the country's transformation towards sustainable energy. *Id.* An ambitious legislative duo, some commentators argue these two acts serve as an opportunity to reshape the country's energy landscape, encouraging a synchronous drive towards sustainability. *See* Samantha Strimling, *Shared Regulatory Space at the Nexus of Green Energy and Green Laws: Rethinking Administrative Deference*, 48 Harv. Env't L. Rev. 255, 257 (2024); *see also* Elizabeth Beairsto, Note, *Clean Energy and Justice for All: The Federal Government's Influence on State Energy Justice Legislation*, 25 Vt. J. Env't L. 307, 309, 324 (2024).

The IIJA and IRA subsidize the U.S. economy's transition to renewable energy within the next decade. However, in an effort to thwart the federal government's push towards renewable power, some states, towns, and cities are exercising state and local authorities to block sustainability initiatives and renewable power infrastructure. Steven Ferrey, *Down to the Wire: Connecting the Critical Path to Climate*, 48 Vt. L. Rev. 505, 507, 510–12 (2024). Approximately 35,000 cities and towns across the United States retain zoning and regulatory authority over projects proposed within their localities, while states can unilaterally block new interstate transmission line projects under state regulatory programs and legislation. *Id.* Since 2015, more than 300 localities have blocked proposed renewable energy projects, such as wind or solar plants, with an increase in project rejections since passage of the IIJA in 2021. *Id.* at 510–12. As of 2022, approximately 121 local policies in 31 states had been enacted for the primary purpose of restricting renewable energy project approval, while approximately 204 renewable energy projects had been legislatively or judicially challenged in 49 states, thus restricting the IIJA's widespread implementation. *Id.*

Energy demand only continues to increase alongside modernization and population growth; nonetheless, the IIJA fails to provide prolonged funding for growing energy demands. To facilitate renewable energy development under the IIJA, prolonged funding would be needed to support growing energy demands that require expanded power generation capacity, transmission capability, and power grid infrastructure. Steven Ferrey, *Legal Asynchrony: Constitutional "Bridges" Inverting Elemental U.S. Technology*, 95 U. Colo. L. Rev. 575, 578–80 (2024). The U.S. National Renewable Energy Laboratory has predicted that U.S. annual electricity consumption will increase by a factor of 1.6 by 2050; therefore, electric power capacity must double along with electric transmission infrastructure to maintain a capable and modernized power grid to meet projected consumption needs. *Id.* Although proposed renewable energy projects under the IIJA satisfy growing energy production, capacity, and storage needs, such projects are met with the inability to connect to the power grid due to state and local rejections of transmission line infrastructure. *Id.* Supply-chain barriers resulting from insufficient rare-earth mineral availability further delay the IIJA's implementation and, in turn, the country's transition to renewable energy, due to how renewable electricity requires far greater quantities of rare-earth minerals compared to conventional power. *Id.* at 578–80.

While critics weigh in on the IIJA's inability to overcome energy demands, others applaud the IIJA's program funding allocation intended to stimulate new energy markets for clean hydrogen research and development, such as the Regional Clean Hydrogen Hub Program (Regional Hub Program). The Regional Hub Program is the first effort in the United States to develop viable, interconnected networks of hydrogen producers and consumers that deploy hydrogen at a consumable scale. *See* Miranda Barfield, *The Role of Clean Hydrogen in the U.S. Transition to a Net-Zero-Carbon Economy*, 15 San Diego J. Climate & Energy L. 1, 16–18 (2024). Regional hubs under the IIJA were selected for federal funding on October 13, 2023, where the Department of Energy confirmed an offer up to $7 billion in funding for seven regional hubs across the United States, which brought substantial competition for grant funding. *Id.*

The investment necessary to sustain renewable energy and infrastructure development and demand in the forthcoming decades is immense, as is the investment needed for adaptation to climate change and the effects of extreme weather events. *See* John C. Derbach et al., *The Lawyer's Duty of Competence in a Climate-Imperiled World*, 92 UMKC L. Rev. 859, 884 (2024). The IIJA has been criticized for its failure to account for increasing response and remediation costs corresponding to extreme weather events. *See* Morgan D. Gafford, *There Is No More New Frontier: Analyzing Wildfire Management Efforts in the United States*, 50 J. Legis. 403, 421–22 (2024). A 2017 U.S. Forest Service report found that "fire suppression expenditures had increased from about [fifteen] percent of the agency's appropriated budget to more than [fifty] percent in 2017," evidencing a rise in funding needs even seven years ago. *Id.* at 421–22. While the current level of funding may not be enough to keep up with increasing climate response and adaptation costs, the IIJA does allocate over $3 billion to wildland fire management to ensure "wildfire prevention, preparedness, and response" remains a top priority. *Id.* The IIJA also created the Wildland Fire Mitigation and Management Commission, comprised of representatives from federal, state, local, and Tribal governments. *Id.* While IIJA funding may not parallel increasing costs related to climate events, the IIJA succeeds in bringing climate change adaptability into focus by providing financial and organizational stimulus.

The IIJA is an ambitious funding regime that incentivizes and subsidizes infrastructure modernization across the United States, involving federal, state, local, and Tribal entities; however, uncertainty plagues infrastructure project funding following the Trump administration's January 2025 executive order freezing all funding under the IIJA. *See* Exec. Order 14154, Unleashing American Energy, 90 Fed. Reg. 8353 (Jan. 29, 2025). The Office of Management and Budget (OMB) subsequently issued a memorandum to agency and department heads clarifying that appropriated funds will be reviewed

and determined accordingly under new policy (1) encouraging energy exploration and production on federal lands and waters; (2) producing and processing nonfuel minerals; (3) ensuring abundant supply of reliable energy; and (4) eliminating the "electric vehicle mandate" where agencies were ordered to pause all funding until further analysis of funds implicated by new the objectives has taken place. *See* Memorandum from Matthew J. Vaeth, Acting Dir., Off. of Mgmt. & Budget, to Heads of Dep'ts & Agencies, Guidance Regarding Section 7 of the Executive Order *Unleashing American Energy*, M-25-11 (Jan. 21, 2025); Memorandum from Matthew J. Vaeth, Acting Dir., Off. of Mgmt. & Budget, to Heads of Exec. Dep'ts & Agencies, Temporary Pause of Agency Grant, Loan, and Other Financial Assistance Programs, M-25-13 (Jan. 27, 2025). Ensuing lawsuits immediately challenged the freeze, including *National Council of Nonprofits v. Office of Management and Budget*, alleging Administrative Procedure Act (APA) and constitutional First Amendment violations, where the U.S. District Court for the District of Columbia issued a stay temporarily pausing the freeze on funding disbursement until February 3, 2025, and *New York v. Trump*, brought by 22 states and the District of Columbia, where the U.S. District Court for the District of Rhode Island issued an initial temporary restraining order (TRO) on January 31, 2025, prohibiting the implementation of funding freezes based on Memo M-25-13 and EO 14,154, and, on March 6, 2025, granted a preliminary injunction ordering the Trump administration to release federal funds to states, finding Memo M-25-13 and EO 14,154 freezing federal payments approved by Congress "fundamentally undermines" the separation of powers and causes irreparable harm by imposing "a categorical mandate on the spending of congressionally appropriated and obligated funds without regard to Congress's authority to control spending." *See State of New York v. Trump*, Case No. 25-cv-39-JJM-PAS, 2025 U.S. Dist. LEXIS 40346, at *12 (D.R.I. Mar. 6, 2025); *Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget*, No. 25-239 (LLA), 2025 WL 368852 (D.D.C. Feb. 3, 2025); *see also* Julie Manganis, *Trump Administration Ordered to Release Funds to States*, Law350 (Mar. 6, 2025). Amid ongoing litigation, the OMB rescinded Memo M-25-13, but the Trump administration emphasized the recission *did not* encompass a recission of the federal funding freeze directive, leaving many uncertain on the status of IIJA funding. *See* Nicholas R. Vallorano et al., *Updates and Summary of the Evolving Executive Federal Funding Freeze*, Mayer Brown (Feb. 4, 2025). Even though M-25-13 has been rescinded and *New York v. Trump* bars agencies from "pausing, freezing, blocking, canceling, suspending, terminating, or otherwise impeding the disbursement of appropriated federal funds to the States under awarded grants, executed contracts, or other executed financial obligations," Trump administration directives surrounding federal funding freezes will face continued challenges, creating uncertainty as guidance, litigation, and policy evolve over the coming months. *See State of New York*, 2025 U.S. Dist. Lexis 40346, at *61.

While the IIJA has triggered the funding of numerous projects and initiated a widespread transition to renewable energy over the past three years, the Act's implementation continues to encounter obstacles of state and local restrictions, increasing energy demands, increasing costs of climate change adaptation, and, most significantly, ongoing and rapidly changing federal funding and policy uncertainty that will impede the Act's longer-term success.

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Supreme Court to Review NRC Storage Authority

Temple Stoellinger

The United States faces a growing crisis in managing its spent nuclear fuel. While nuclear power plants across the country continue operating, they must store their spent fuel on-site because the nation lacks consolidated interim storage facilities (CISFs). These facilities would serve as centralized locations designed to temporarily store spent nuclear fuel from multiple reactor sites until a permanent underground repository can be established. *See* Jason O. Heflin, Cong. Rsch. Serv., *Consolidated Interim Storage of Spent Nuclear Fuel: Recent Licensing Decisions*, Legal Sidebar LSB11199 (July 15, 2024). Currently, most spent fuel remains stored at individual reactor sites in either spent fuel pools or dry cask storage systems, with a small number of away-from-reactor storage facilities also in operation. *Id*. This dispersed storage approach raises significant security and safety concerns, as it requires maintaining multiple secure locations and increases the complexity of monitoring and protecting these hazardous materials. *Id*.

In an effort to address this challenge, the Nuclear Regulatory Commission (NRC) recently licensed two private CISFs: one in Andrews County, Texas, and another in Lea County, New Mexico. However, both licenses were invalidated by the U.S. Court of Appeals for the Fifth Circuit, which held that the NRC lacked statutory authority to license private away-from-reactor storage facilities. *State v. Nuclear Regul. Comm'n*, 95 F.4th 935 (5th Cir. 2024); *Fasken Land & Mins., Ltd. v. Nuclear Regul. Comm'n*, No. 23-60377, 2024 WL 3175460 (5th Cir. Mar. 27, 2024).

This legal impasse traces back to two key pieces of legislation: the Atomic Energy Act of 1954 (AEA) and the Nuclear Waste Policy Act (NWPA) of 1982. AEA, Pub. L. No. 83-703, 68 Stat. 919 (1954) (codified as amended at 42 U.S.C. §§ 2011–2297h-13); NWPA, Pub. L. No. 97-425, 96 Stat. 2201 (1982) (codified as amended at 42 U.S.C. §§ 10101–10270). The AEA established the foundation for civilian nuclear power development in the United States, authorizing private commercial use of nuclear materials and creating a regulatory framework for nuclear power plants.