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COLLABORATIVE GOVERNANCE IN THE RESTRUCTURED ELECTRICITY INDUSTRY

*Charles H. Koch, Jr.**

I. INTRODUCTION

Electricity deregulation has been managed by the Federal Energy Regulatory Commission ("FERC"), but FERC allowed the industry to evolve the organizations for accomplishing it.¹ Deregulation of electricity required the vertical unbundling of the integrated utilities which had unified all the industry segments from generation to distribution. Thus, the major firms that held the industry together are disappearing, and the system is seeking a structure to fill the governance void those firms leave behind. After considerable experimentation, the emerging model is the Regional Transmission Organization ("RTO"), a not-for-profit authority that acquires electricity and transmits it for distribution. Because they sit astride the whole system, the RTOs' governance determines both the capabilities of the system and the fair treatment of all those it affects (which, given the nature of electricity in modern society, ultimately means everyone).²

A. *Collaborative Governance*

Obviously, the emerging electricity industry is inherently a collaborative enterprise. Therefore, the principles of "collaborative

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1. FERC took the wise course of evolving frameworks for the development of a restructured industry rather than dictating specific forms. The framework for restructuring was established by Order 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (May 10, 1996) (to be codified at 18 C.F.R. pts. 35, 385) [hereinafter Order 888]. The main framework for the development of transmission organizations, which is particularly relevant to this Article, was provided by Regional Transmission Organizations, 65 Fed. Reg. 810 (Jan. 6, 2000) (to be codified at 18 C.F.R. pt. 35) [hereinafter Order 2000].

2. A history of electricity restructuring can be found in RICHARD F. HIRSH, POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM (1999).

governance,” developed largely by Jody Freeman, offer guidance for these new public/private institutions.³ Collaborative governance seeks to reorient the conceptualization of administrative process around techniques of joint problem solving and controlled discretion.⁴ It seeks an alternative to adversarial government and explores concepts and processes which might replace interest group contests with cooperation and dialogue.⁵ The principles of collaborative governance seem to speak directly to the evolving electricity industry. For one thing, as Professor Freeman observed, “[a] collaborative perspective requires that we reconceive the relationships and responsibilities among public and private actors in the regulatory process.”⁶ Collaborative governance offers more in that it fosters the development of a coherent theoretic framework for those experimenting with alternatives to contest and coercive action. Collaborative governance is characterized by five features:

1. A positive problem-solving orientation;
2. Broad participation by interested and affected persons at all stages of the decision-making process;
3. Solutions that are provisional and subject to revision (plasticity);
4. Accountability; and
5. Synergistic, flexible, and engaged government institutions.⁷

The first feature exalts positive problem solving rather than contestability, compelled information sharing, and deliberation. The second feature, broad participation, has the normative goal of independent, democratic policymaking and the instrumental goal of effective problem solving. The third feature, plasticity, seeks

3. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 U.C.L.A. L. REV. 1 (1997) [hereinafter Freeman, *Collaborative Governance*]; Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003); see also Sallyanne Payton, *Professionalism as Third-Party Governance: The Function and Dysfunction of Medicare*, in MAKING GOVERNMENT MANAGEABLE: EXECUTIVE ORGANIZATION AND MANAGEMENT IN THE TWENTY-FIRST CENTURY 112 (Thomas H. Stanton & Benjamin Ginsberg eds., 2004). Professor Payton has, for years, explored this concept in her course “Law of Cooperative Federalism” at the University of Michigan Law School.

4. Freeman, *Collaborative Governance*, *supra* note 3, at 22.

5. Americans, not just their lawyers, have a great deal of difficulty with such behavioral norms. Much of the rest of the world finds it easier to engage in community-regarding dispute resolution. Our instinctive competitiveness is our strength and our weakness. Here, as perhaps elsewhere, this instinct can inhibit the attainment of the ultimate goal. Our inability to engage in cooperative decision making may accrue to our comparative disadvantage in the increasingly interconnected world.

6. Freeman, *Collaborative Governance*, *supra* note 3, at 95.

7. *Id.* at 22.

evolutionary decision making in which solutions to immediate problems do not foreclose rethinking of both solutions and goals. The fourth feature, accountability, undertakes new arrangements in which parties are interdependent and accountable to each other. The last feature, synergistic government, envisions coordinated roles for public agencies, such as serving as facilitators and information clearinghouses. While government may guide and monitor performance, it does not dictate operations.

The whole package adds up to a strategy of cooperative decision making. Understanding cooperative decision making among numerous diverse interests is advanced by Jim Rossi's insight that, even though classic governance strategies exult participation over all other values, the central consideration must be optimizing deliberation.⁸ Cooperative decision making, while valuing participation, must ultimately serve deliberative goals. Participation can establish an appearance of fairness but, in terms of effective decision making, has a diminishing marginal utility to the point of disutility. Focusing on effective and fair deliberation, rather than the contributory value of participation, effectuates cooperative decision making.

The collaborative governance package, applied to effective and fair deliberation, and ultimately decision making, will enhance governance in the electricity industry. The electricity industry requires more sophisticated thinking about these principles. A more collaborative, problem-solving goal for electricity governance will change the conceptualization of the interaction among the interests. Careful attention to the instrumental value of participation, as well as its normative value, is nowhere more important than in electricity governance. Applying this thinking, this Article seeks a governance model that will better serve problem solving and satisfy all the various interests that are involved in the substance as well as the form of governance.

Collaborative governance contemplates a system of optimum deliberation in the context of shared fundamental goals. The breakdown of the electricity market in California is example enough of the calamity of unrestrained self-interest in the interrelated electricity environment and the damage it can do even to those attempting to advance self-aggrandizing interests. In the short run, and certainly in the long run, all are served by assuring the best possible electricity system. Electricity governance is a complex prisoners' dilemma in which individual self-interest may in fact diminish the payoff for everyone, unlike most business relationships in which competition has social value. Mutual trust is obviously not enough; hence, positive governance is necessary. The governance

8. Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997) [hereinafter Rossi, *Participation Run Amok*].

structure must be effective and fair and also appear to be effective and fair. This Article makes a few suggestions as to how to achieve this governance goal.

B. The Emerging Governance Model

Fortunately, FERC has allowed restructuring to evolve rather than attempting to command any particular model. This process has provided experimentation and variety, but a general model is emerging. The emerging RTO governance model seems fundamentally sound, and improvements can build on this base. These improvements should enhance access and involvement for all interests. The model has attempted to assure participation by the various interests, but it may not afford equal and actual influence for all interests. The major obstacles are unequal expertise among the interest groups and the cultural norms established during the era of integrated utilities. Recommended are RTO-constituted and -supported "representative" committees, representing certain interests likely to be disadvantaged in presenting their views to the governing body.

Also recommended is a reconstitution of state and local energy authorities from second-tier and increasingly irrelevant regulatory entities to independent and well-armed protectors of these disadvantaged interests (in particular). At present, state and local energy authorities are slowly, and probably unintentionally, being co-opted by the RTOs. That is, while bringing state and local energy authorities into governance, the RTOs are actually turning them into nonentities. The public authorities should resist this pull and stay independent of the RTOs. So constituted, local authorities can find ways to help represent the public. They have the expertise and the established stature, and hopefully they will retain the resources to compensate for the advantages industry insiders have over other affected interests.

II. EMERGING GOVERNANCE MODELS IN ELECTRICITY RESTRUCTURING

A. Industry Context

Even for the readers of an electricity symposium, a description of the recent evolution of the electricity industry is necessary to focus on the governance questions.⁹ In the former regime, electricity was delivered largely by integrated firms that supplied generation, transmission, distribution, and various ancillary services.¹⁰ The

9. A good basic overview of the industry and the challenges facing it is PETER FOX-PENNER, *ELECTRIC UTILITY RESTRUCTURING: A GUIDE TO THE COMPETITIVE ERA* (1997).

10. See Jeffery S. Dennis, *Federalism, Electric Industry Restructuring, and the Dormant Commerce Clause: Tampa Electric Co. v. Garcia and State*

integrated firm was a highly efficient organization that delivered reliable power at an acceptable price. Of course, integrated firms were built around geographic monopolies, with the defects that monopolies conjure up. Perceived failures of the regulation of these monopolies, rather than breakdowns in performance, led to deregulation. Restructuring started with the “unbundling” of three obviously related, but separate, segments of electricity production and delivery: generation, transmission, and distribution. Markets developed, with varying degrees of success, in generation and distribution, but a market structure for transmission has not been successfully implemented. Because transmission has defied pure market solutions, organizing the new industry has proven extremely difficult, belying simplistic pure market solutions. Yet, transmission sits astride the industry, connecting generation with distribution and other marketing processes, and market failures in transmission replicate the market failures of the old system that resulted in regulatory solutions.

The current model emerged from the existing transmission operation. Each integrated system had a central authority that directed the flow of electricity. The generation, transmission, and distribution segments in those systems were necessarily controlled by such central offices. Therefore, the technical operation of the electricity grid necessarily created a core operating authority. The office performing these technical transmission operations, the “system operator,” naturally transformed into the managing entity of each electricity system. Before restructuring, the system operator ran the system through command. Thus, the system operator could command the operation of the generators in the integrated system based on the demand or expected demand communicated by the distribution segment. With restructuring, the operation has moved from intrafirm management to interfirm leadership of some variation on a market.¹¹

B. Examples of RTO Governance Processes

Various organizations were proposed and experimented with, but in the end one archetypical organization emerged: the Independent System Operator (“ISO”). The ISO emerged from the technical manager of the former vertically integrated electric power system. Because it had to retain many of the monopolist aspects of

Restrictions on the Development of Merchant Power Plants, 43 NAT. RESOURCES J. 615, 622-23 (2003).

11. A recent study of the electricity industry found that both integrated and nonintegrated models had governance advantages and disadvantages. Magali Delmas & Yesim Tokat, *Deregulation Process, Governance Structures and Efficiency: The U.S. Electric Utility Sector*, at http://www.ucei.berkeley.edu/PDF/EPE_004.pdf (Univ. of Cal. Energy Inst. Working Paper Series, Mar. 2003) (finding that integrated firms offered stability through insulation and nonintegrated firms adapted better to new environments).

the old regime, the system operator needed to be independent in order to avoid monopolistic behavior.¹² The governance required special attention to structuring the central (ostensible) transmission authority to assure independence. Hence, governance strategies were and are the root of independence in the *independent* system operator. Assuring this independence required effective involvement of all interests from industry members to customers. Because ISOs linked all the factors of electricity production and distribution, their governance emerged as the key to an effective and nondiscriminatory electricity system. Generally, it has also led to ISOs being operated as not-for-profit entities.¹³

The industry's geography changed as well. The markets of the integrated utilities were "assigned" along state boundaries. For largely regulatory reasons, each state was an isolated electricity system. While this was never totally true because the systems had limited interconnection for emergencies and ownership was not limited by states, restructuring brought extensive, rather than just incidental, interstate interconnection. The transmission systems, and thereby whole integrated systems, became interstate. Therefore, the model that emerged was the RTO, the number and range of which have continued to evolve. The shift from state-defined entities to regional entities has governance implications, both in structuring the core entity and in transforming the role of state and local energy authorities. In addition, RTOs have increasingly taken on some international aspects. (Already, cooperation among U.S., Canadian, and Mexican systems has become a feature of the North American electricity industry, and closer organizational connections will certainly increase the complexity of governance.) All this has shown that the governing body must reflect not only the various interests, but an ever wider geographic range with more public and private institutions involved.

Predictions are that the country will ultimately end up with three RTOs (east of the Rockies, west of the Rockies, and Texas). Indeed, it seems likely that the whole North American continent, already somewhat interconnected, will eventually become structurally united under one entity. (If this fails to happen, it will

12. RTOs seem to be moving in the direction of not-for-profit, and such firms behave differently from for-profit firms. See Anup Malani et al., *Theories of Firm Behavior in the Nonprofit Sector: A Synthesis and Empirical Evaluation*, in THE GOVERNANCE OF NOT-FOR-PROFIT ORGANIZATIONS 181 (Edward L. Glaeser ed., 2003) ("[A] large body of theoretical and empirical work has emerged to describe and document how NFP firms behave, focusing in particular on how they behave differently than for-profit (FP) firms."). Given the differences, specific research into the behavior of ISOs/RTOs would be useful.

13. Experiments with for-profit entities, often called "transco," have failed, usually because they have not been able to demonstrate the requisite independence.

be engineering constraints that prevent it.) At present, however, there are significantly more than three RTOs. Six ISOs have attained RTO status.¹⁴ Since a variety of RTOs are vying for place, there are various governance models. While similar multifaceted and multilevel governance structures are essentially replicated throughout the existing RTOs, there are significant differences.¹⁵ PJM Interconnection, covering the northeastern United States ("PJM"), and California Independent System Operator ("CAISO") are two informative examples.

1. *PJM: Governance Using a Corporate Model*

PJM is the oldest RTO. It began before restructuring with the combination of utilities in Pennsylvania, New Jersey, and Maryland (hence the acronym). Today, it seems positioned to manage the entire East Coast grid. PJM is well established, with enough success and longevity to give it some stature among RTO organizations. PJM is steadily increasing its operating area and at present coordinates the movements of electricity through all or part of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and Washington, D.C. PJM has resolved key issues of independence, governance, and multi-state operation, and, therefore, serves as a useful RTO governance model.

In the PJM governance system, the central authority is the Board of Managers ("Board").¹⁶ The Board is charged with operating a fair energy market. No person who has a personal affiliation, ongoing professional relationship, or financial stake in any PJM market participant may serve on the Board.¹⁷ A Members Committee provides advice to the Board and has representatives from the key interests: generators, transmission owners, distributors, other suppliers, and consumers.¹⁸ A Nominating Committee made up of stakeholders and Board members fills

14. The current lineup is ISO New England, the New York ISO, the PJM Interconnection, the Midwest ISO, and the California ISO. Added to these is ERCOT ISO in Texas, which is not within FERC's jurisdiction.

15. F.E.R.C., RTO-ISO HANDBOOK 2-16 (2004).

16. PJM Interconnection, *Independence*, at <http://www.pjm.com/about/independence.html> (last visited Feb. 16, 2005).

17. PJM INTERCONNECTION, OPERATING AGREEMENT OF PJM INTERCONNECTION, L.L.C. § 7.2, at 30 (2003) [hereinafter PJM OA]. The agreement was approved by FERC through 2004. PJM also serves as a good example because its documents are so readily available, suggesting that transparency may actually be good business given PJM's success.

18. *Id.* § 8.1.1, at 34. The Members Committee includes all members of PJM (approximately 330) and is too large to act as an effective governing body. PJM Interconnection, *PJM/MAAC Members Committee*, at <http://www.pjm.com/committees/members/downloads/mc.pdf> (last modified Mar. 23, 2005).

vacancies on the Board.¹⁹ The Market Monitoring Unit ("Unit") guards against the exercise of market power by any market participant.²⁰ The Unit analyzes market data and takes action to make structural or rule changes to ensure the integrity of the market.²¹ Various specialized committees, such as the Reliability Committee or the Finance Committee (collectively, the "Subject Matter Committees"), work to refine and improve rules, policies, and processes.²² Input also comes from User Groups, such as nuclear owners groups or environmental groups, and working groups (for example, the Black Start Service Working Group and the Retail Access Working Group).²³ PJM also pledges to "work closely with state regulatory commissions to identify and respond to local matters."²⁴ These state and local energy authorities are given liaison or *ex officio* status on the Subject Matter Committees.²⁵

2. CAISO: Governance Using a Government Model

Charles G. Stalon, a former FERC commissioner, contrasts the "relatively strong" PJM, as well as other northeastern RTOs, with CAISO.²⁶ The California governance structure has some of the same

19. PJM Interconnection L.L.C., 102 F.E.R.C. ¶ 61,188 (2003) (order accepting tariff sheets) (stating that PJM proposes to approve election to the Board by a simple majority). The Nominating Committee consists of seven voting members: one from each of the five sectors of the Members Committee (generation, transmission, distribution, other suppliers, and end users) and two members of the Board of Managers. PJM OA, *supra* note 17, § 7.1, at 29.

20. PJM Interconnection, *Market Monitoring*, at <http://www.pjm.com/markets/market-monitor/market-monitor.html> (last visited Mar. 24, 2005).

21. *Id.*

22. PJM Interconnection, *PJM Committees*, at <http://www.pjm.com/committees/pjm.html> (last visited Mar. 23, 2005).

23. PJM Interconnection, *Working Groups/User Groups*, at <http://www.pjm.com/committees/work-group.html> (last visited Mar. 23, 2005).

24. PJM Interconnection, *Independence*, at <http://www.pjm.com/about/independence.html> (last visited Mar. 23, 2005).

25. PJM OA, *supra* note 17, § 8.2.2, at 35.

26. Charles G. Stalon, *What Went Wrong in California*, at <http://www.icc.state.il.us/ec/docs/010214calstalon.pdf> (Feb. 8, 2001)). Stalon writes:

[The Northeastern ISOs] have much more information at their disposal than does the California ISO and PX [POOLCO].

In California both the ISO and PX had large "stakeholder" boards. In contrast [to California], the three Northeastern SOS have relative small "independent" boards. This has permitted the FERC to place important responsibilities on the Northeastern ISOs and for those ISOs to respond and make relatively quick reforms to make their system work better.

These boards are preserving the credibility of the markets in their territories despite the fact that the legislatures in the Northeast states have made some of the same compromises that were made in California, especially ones that created inelastic demand curves.

Id. at 5.

general components as the PJM.²⁷ Whereas the PJM structure evolved from the corporate model, however, CAISO reflects a governmental model. In 1997, CAISO started with a twenty-seven-member board, representing various interests in the electricity industry, from industry members to consumers. CAISO proved to be a triumph of participation over operational effectiveness. While CAISO had the political benefit of seating all the interests at the table, it proved incapable of governing itself.²⁸

In 2001, the California legislature passed legislation disbanding the CAISO board and creating the current five-member board appointed by the governor.²⁹ FERC rejected this design.³⁰ Although it applauded the improvement over the prior board, FERC decided that a governor-appointed board was insufficiently independent. Since California was a market participant, it was a significant stakeholder.³¹ FERC insisted on an independent, non-stakeholder board. The D.C. Circuit, however, vacated FERC's order "[b]ecause FERC has no authority to replace the selection method or membership of the governing board of an ISO, let alone to compel a corporation created by state law to employ a governing board chose in violation of that law. . . ."³²

Issues of authority aside, FERC's stakeholder objection seems myopic. Of more concern must be the Board's political nature. The CAISO board raises many of the same problems identified with other, often five-member, state regulatory agencies. In fact, the CAISO board is more problematic, because, unlike the regulatory authorities, the CAISO board has direct management responsibilities. Again, the successful system must incorporate principles of collaborative governance, where government and private authorities work together as problem solvers. As government institutes become more dominant, decision making

27. CAL. INDEPENDENT SYS. OPERATOR CORP., AMENDED & RESTATED BYLAWS OF CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORP., at <http://www.caiso.com/docs/2000/06/01/2000060110361815044.pdf> (Apr. 2001).

28. San Diego Gas & Electric Co., 93 F.E.R.C. ¶ 61,121, (2000) (stating that the Board was having "such difficulty reaching decisions on the complex and divisive issues confronting it that it has become ineffective" and it was coming under "undue pressure from various sources."); see also Stalon, *supra* note 26 ("In California both the ISO and the PX had large 'stakeholder' boards.").

29. A.B. 5, 2001 Leg., 1st Exec. Sess. (Ca. 2001); see also CAL. ASSEMBLY COMM. ON ENERGY COSTS AND AVAILABILITY, REPORT ON ELECTRICAL RESTRUCTURING (2001), available at http://www.leginfo.ca.gov/pub/0102/bill/asm/ab_00010050/abx1_5_cfa_20010111_171856_asm_comm.html; CAL. ASSEMBLY SENATE ENERGY, UTILITIES AND COMMUNICATIONS COMM., BILL ANALYSIS (2001), available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0001-0050/abx_5_cfa_20010117_114651_sen_comm.html.

30. Mirant Delta, L.L.C., 100 F.E.R.C. ¶ 61,059, at 61,227 (2002).

31. *Id.* at 61,222 ("[The Department of Water Resources] is now the largest purchaser of energy in the California wholesale market.").

32. Cal. Indep. Sys. Operator Corp. v. F.E.R.C., 372 F.3d 395, 398 (D.C. Cir. 2004).

becomes political rather than technical and economic. While a stakeholder board raises the specter of discrimination against one or more interest groups, a political board presents the danger of exogenous motivations.

Members of a board chosen by an elected official are also more likely to be selected for their political competence than for their knowledge of the electricity industry.³³ Competent management of the system is crucial. Chaos in California revealed the potential damage from sophisticated gaming of the system and from governance characteristics that make a system incapable of dealing with such conduct.³⁴ In short, governance cannot rely on members to deal honestly with their RTOs. The inability of CAISO to respond to events, including obvious dishonesty, provides a lesson for RTO design. The California crisis also demonstrates that collaborative governance must be capable of dealing with the worst motives of any market participant.³⁵ This experience emphasizes the danger of putting broad participation, even if politically beneficial, ahead of viable decision making. In other words, a governing organization must not only be able to manage a complex electricity system, it must also be able to make decisions in the face of highly sophisticated efforts to manipulate any system.

In sum, positive government is necessary in the electricity industry. Yet, the classic corporate governance form of the integrated era must be replaced by more broadly accessible, accountable, and transparent decision-making structures. Breakdowns in some attempts to develop governance organizations provide experiential information that will spur the evolution of optimum RTO governance. Of more value is the governance process used by the most successful RTO. This organization has modified the corporate model in a way that is sensitive to these broader goals and should form the foundation for a universal governance model. Nonetheless, examination of the impediments to full accomplishment of the collaborative government principles suggests some improvements on that model.

33. Mirant Delta, L.L.C., 100 F.E.R.C. ¶ 61,059, at 61,229 ("As the Audit Report details, the current Board members, for the most part, 'have no prior utility experience.'").

34. See, e.g., Jacqueline Lang Weaver, *Can Energy Markets Be Trusted? The Effect of the Rise and Fall of Enron on Energy Markets*, 4 HOUS. BUS. & TAX L.J. 1 (2004); see also Timothy P. Duane, *Regulation's Rationale: Learning from the California Energy Crisis*, 19 YALE J. ON REG. 471 (2002).

35. See generally CAL. ISO BD. OF GOVERNORS, REPORT BY THE CALIFORNIA ISO BOARD OF GOVERNORS REGARDING MATTERS RAISED BY THE SENATE SELECT COMM. TO INVESTIGATE PRICE MANIPULATION OF THE WHOLESALE ENERGY MKT., at <http://www.caiso.com/docs/2004/06/04/2004060408060514905.pdf> (June 2004).

III. IMPEDIMENTS TO COOPERATIVE DECISION MAKING

Being “in the room,” does not mean having influence in the electricity industry. Electricity is a unique commodity in terms of both engineering and economics. Affecting decision making requires considerable sophistication in engineering, “the business,” and a specialty brand of law. In addition, the industry has been operating for more than one hundred years and, over that time, interest groupings have been established that will not soon be dissipated. In short, cooperative decision making, as opposed to mere pro forma broad participation, must adjust for unequal expertise and an entrenched industry culture.

A. *Importance of Expertise to Influence*

Electricity is not like other products. For one thing, its “units” are not just fungible but identical. While electricity is described in units (for example, it is sold in kilowatt hours), one unit is indistinguishable from another. Where one unit of electricity ends, another begins without interruption. Indeed, electricity is a continuous flow. One who buys a kilowatt hour does not know the source of that particular kilowatt hour. One who produces a kilowatt hour does not know who actually consumes that kilowatt hour. In short, the industry cannot be envisioned in terms of the normal operation of a market, with buyers purchasing a particular unit through a negotiation with a particular seller. Simply for a consumer to reach a contract with a generator to supply electricity is impossible. Thus, after the elimination of the integrated system (wherein consumers bought a bundled end product from an integrated supplier), the “contract path” (through which the generated electricity passed from the generator through the transmission lines and distribution system to an end user) became a fiction that allowed market participants to visualize an electricity market in traditional terms. But this vision is not real in either engineering or market terms.

Adding to potential misunderstanding by the uninitiated is the engineering reality of “transporting” electricity. Electricity cannot be directed. A unit of electricity cannot be loaded on a truck and shipped to a designated destination, nor can its transportation be accurately visualized in those terms. Electricity cannot even be directed by valves and pumps, as can water and gas; it must be teased along through engineering that even those in the industry do not fully grasp. In short, outsiders are at sea and easily deceived, especially by language that tends to convey a sense of control that is not reality.

Both engineering and market features create an inherent advantage for those who understand the engineering and commercial realities of the industry. Conversely, the same engineering and commercial complexities create impressive

impediments and overwhelming disadvantages for outsiders. For example, an outsider might think that building new facilities will necessarily upgrade the system. However, insiders know that it is possible that building a new generator or even transmission line might result in a decrease in available electricity. Even if the new facility succeeds in injecting additional electricity into the system, more expensive new electricity might displace cheaper established electricity. The complexity of generating and transmitting electricity makes broad participation, accountability, and understandable transparency equally complex goals.

Issues relevant directly to generation and transmission are further clouded by the variety of "ancillary" services associated with getting the electricity to its markets. Control of ancillary services can bias an electricity system. One not familiar with the actual operating components of the electricity industry will not understand the implications of decisions and policies relating to this conglomeration of often very technical services. The ancillary services themselves in the restructured industry create a whole body of new and challenging scientific and economic questions. The uninitiated, however, may see them as, well, ancillary and—even if they understand their importance—will have difficulty understanding the policy choices these services present.

In sum, the absence of not just expertise but real understanding of the realities of generating, transmitting, and distributing electricity makes participation by outsiders somewhat *pro forma*. Even without conscious efforts to deceive, the values built into the system by insiders might be questioned by representatives of less knowledgeable interest groups, if such groups were as knowledgeable as the insiders. Unfortunately, knowledgeable outsiders are a rarity. The inequality of engineering and commercial expertise between insiders and outsiders cannot be compensated for by "book learning." Actual operating experience is crucial, yet this experience is available only to those within the industry. Overcoming the expertise deficit is a special challenge for cooperative decision making in the electricity industry.

B. Restructuring the Cultural Hierarchy

Culture is resilient, and significantly displacing established cultures is a long and uncertain process. The segments of the electricity industry were united in a vertically integrated culture as well as corporate form. This culture and its concomitant hierarchies will be the last remnants of the old regime to disappear in the restructured electricity industry. This embedded stratification continues to dictate the relationship among industry participants in the new regime. In addition, this culture skews the participation by players in the system, both public and private, who for generations orbited these dominant bodies. These interests are struggling to

find places within the new restructured regime. The new culture, perhaps more than the old, vertically integrated structure, remains a major impediment to true cooperative decision making.

1. *The Integrated Industry Culture*

The central authority of the integrated utility derived from control of the "big wires" (the cross-country, "wholesale" transmission assets). When integrated utilities were forced to "unbundle," they tended to retain ownership (and thereby control) of transmission and to divest generation and (where, possible) distribution functions. As ISOs evolved into RTOs, they aimed to separate control from ownership of transmission because control of the big wires meant control of the system. Still, even with nominal control of the lines by the ISO or RTO, transmission owners retained their dominant position, much like the old aristocracies in nineteenth-century democracies. The continued dominance of the transmission owners persists, and they have substantial say, no matter the form of participation, in the new system. The cultural stratification of the industry has continued into the restructuring era.

Two key segments that were once part of the integrated firm, generation and distribution, retain adjunct status and thereby maintain insider status, which results in coordinate relationships. Restructuring has focused on the problem of "affiliates." Affiliate firms are firms that are separate in corporate form but have common owners; affiliates sometimes continue their old relationships, to the detriment of the market. Despite efforts to limit the flow of information among affiliates, many find that inappropriate communication still exists and negatively affects the performance of the industry. A level playing field would go a long way in creating real separation and independence among the segments of the former regime, but insiders have had difficulty breaking free of the old power relationships.

True cooperative decision making requires real influence for groups that were industry outsiders under the old vertically integrated regime. Small firms and public power organizations are chief among these. After *Otter Tail Power Co. v. United States*,³⁶ public power and cooperatives provided the only real competition, indeed countervailing force, in the industry. Since restructuring, public power and cooperatives retain their pariah status within the

36. 410 U.S. 366 (1973). This case is seminal because it recognized the possibility of competition in the electricity industry and began the restructuring movement. Significant even today is the example of abusive behavior by the large, integrated utility. The utility attempted to drive out competition from small municipal utilities which were able to sell electricity at prices well below those of the dominant utility. Such conduct continues to be a potential danger.

electricity establishment.³⁷ On the other hand, they still provide the best opportunity for retail competition in many markets. Bringing such entities into the structure, and perhaps facilitating their growth, should be a goal of the RTOs. Listening to the needs of public power and cooperative organizations will enable them to continue to serve as the best hope for mitigating market dominance and indeed challenging the practices of the central governing entity. RTO governance must promote such a role.

2. *Customers and Industry Culture*

Restructuring actually intensified the divide on the other side of the market: the consumer side. For convenience, consumers may be segregated into three groups: large business, small business, and residential.³⁸ In the integrated culture, large businesses dealt on a somewhat equal business footing with their soul mates, the large integrated utilities. The contestability of their relationship was somewhat "off-stage." Even large consumers in a regulated environment took what the system gave them. However, large consumers could be players in the political environment of perhaps equal stature to that of the utilities. Large consumers have enough economic power to create alternatives, even when their local utility has some degree of market power. Restructuring has opened a contest in the marketplace as well as the political arena. Indeed, in this new regime, the large business customers might obtain some economic advantage since alternatives to the local utility have evolved to compete for their business. Moreover, as the power of the utilities is diminished by unbundling, the utilities tend to need alliances with their large customers to dominate the political environment. New alliances in the political arena create a danger of utilities and their large and politically powerful consumers exercising unified power in RTO governance.

Neither small business nor residential consumers gain bargaining power through restructuring, and both continue to be price and service takers. In the former regime, they were protected by regulation. Now small consumers depend on a real, functioning market and are the most likely victims of market failures. While big consumers have the power to assure against such failures, small business and residential consumers must depend on the protection afforded by collaborative action with the RTO.³⁹ Their stake in RTO

37. See Order 2000, *supra* note 1, § H.1, at 930-31.

38. One convenient divide, for example, defines large commercial and industrial customers as those that use more than one hundred to two hundred kilowatt hours. ABA SECTION OF PUBLIC UTILITY, COMMUNICATIONS, AND TRANSPORTATION LAW, 2004 ANNUAL REPORT 189 (2004).

39. See generally John E. Kwoka, Jr., *Governance Alternatives and Pricing in the U.S. Electric Power Industry*, 18 J. L. ECON. & ORG. 278 (2002). This study finds that public ownership and the commensurate public influence had very different effects among consumer groups, with residential customers

governance is highest. Yet, small consumers may find big business and utility owners dominating RTO governance. Small businesses and, even more, residential consumers are both individually powerless. Residential consumers find it particularly difficult to organize for their own protection. Fair RTO governance must assure a voice for these small consumers that is not surreptitiously dominated by the more powerful interests. It must assure that the small consumers are not submerged within a universal "consumer" interest as defined by large industrial and commercial consumers.

The tendency to measure success of restructuring in aggregates and averages hides the real impact on small business and residential consumers. As the industry opens to farther ranging market opportunities, there will be losers. For example, Virginia historically has had relatively low rates. It is now joining PJM and, as a result, Virginia utilities will have access to the northeastern markets, in which rates are high. Virginia's utilities lobbied hard for this opportunity to sell in markets that offer higher profits despite opposition from state regulators.⁴⁰ Victory for the utilities means they can expect to move electricity into these new, more lucrative markets. In aggregate, east coast rates might decrease, but prices are equally likely to increase for Virginia's small business and residential consumers, who are not able to bargain for long-term contracts. RTO management will not intervene to equalize bargaining power among consumer groups. The disincentive for RTO management to protect these small consumers increases the vulnerability of these politically weak consumer groups. Adequate opportunities to participate in governance decisions, as well as transparency and accountability in RTO decisions, may lead to choices that will mitigate this impact as the mechanics of true cooperative decision making are developed.

The influence of residential consumers is further weakened by the realities of the electricity market. For retail consumers, restructuring is the triumph of theory over practice. Retail consumers are not likely to assume what economists call the "search costs" to make a viable competitive residential market. Thus, if residential consumers are to get a fair deal (let alone an advantage) from restructuring, it will be through the vigilance of the RTO governing entity and government energy authorities. Hence, these consumers in particular need adequate representation in the RTO governing entity.

benefiting most, commercial customers less, and industrial customers not at all. *Id.* at 291-92. If similar behavior can be expected from RTOs which are made truly responsive to the public, then that real representation can be expected to have tangible benefits for residential consumers.

40. See generally VIRGINIA STATE CORPORATION COMMISSION, REVIEW OF FERC'S PROPOSED STANDARD MARKET DESIGN AND POTENTIAL RISK TO ELECTRIC SERVICE IN VIRGINIA (Jan. 3, 2003), available at http://www.scc.virginia.gov/caseinfo/reports/ltrf_addendum_02.pdf (last visited Jan. 3, 2004).

3. *The Underrepresented*

There is another group of consumers for which the danger is not underrepresentation, but no representation. These are the consumers who were protected under the old regime by the "universal service" principle.⁴¹ In 2005, even the lowest economic level of the community requires electricity. The old regulatory regime could assure service by fiat, but guaranteed service is inimical to a market approach. Restructuring means that protection of service must be dealt with outside the electricity market mechanisms. Rather than being imposed by regulatory authorities, universal electricity service must be part of the social benefits package. Nonetheless, choices will be made that affect those unable to pay market prices, and those interests must be effectively represented in RTO governance. Cooperative decision making in this regard may mean surrogate representatives, either public or private, for interests that have no ability to represent themselves.

4. *Captive Researcher Issue*

All of the above interests are visible, though some are not adequately represented in electricity governance. The stealth players in the old ménage who may be perhaps even more dominant in the new regime are the captured research organizations and scholars. Utility wealth allows it to finance research and scholarship in policy advocacy as well as in technical innovation. (Indeed, a motivation for restructuring was the assertion that the old monopolies lacked incentives to advance technology and conversely were unduly motivated to engage in policy advocacy.) The alliances of these information generators were disclosed to me when I suggested to several associations representing the various electricity interests that an objective, impartial research undertaking to provide objective, independent study and information was needed. The lack of interest surprised me until one association official told me they did not want such impartiality. An exposé of the Harvard group further supports skepticism as to the relationship between key scholars and the industry.⁴² Transparency and a special type of accountability are essential to the effective and fair policymaking future of the industry. Yet the foundational information on which policy is based continues to be provided by scholars and research organizations of questionable alliances and motivations. Unless this group of captive researchers can be

41. Jim Rossi, *The Common Law "Duty to Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1288-99 (1998); Jim Rossi, *Universal Service in Competitive Retail Electric Power Markets: Whither the Duty to Serve?*, 21 ENERGY L.J. 27, 38-47 (2000).

42. Harvard Watch, *Trading Truth: A Report on Harvard's Enron Entanglements*, at <http://www.harvardwatch.org> (Jan. 31, 2002).

counterbalanced, interest groups without such support will participate at a great disadvantage. The RTOs should fill the gap. To avoid similar capture, their study arms should operate under conditions of extreme transparency and should define their "clients" as the entire universe of market participants, related interests, and information users.

Culture is, of course, the most persistent of human institutions. Changing the structure of the electricity industry no more changes its culture than it does in other human endeavors. Governance design, therefore, must confront the remnants of the old integrated culture and not assume that institutional change is unaffected by that culture. But cultures do change and, over time, participation, accountability, and transparency become vehicles for changing the culture of the electricity industry. However, restructuring now ignores the depth of these integrated company instincts at the expense of its ultimate performance.

IV. CUSTOM DESIGN FOR COOPERATIVE RTO DECISION MAKING

As we know, electricity is not an industry in which deregulation can be a simple matter of setting the industry free. Deregulation required a sophisticated new industry design, "restructuring." As the market devices must be special, so too must the industry's decision-making mechanisms be specially designed with careful attention to the nature of the industry and the organizational culture. In addition, the RTOs must be public-regarding. While they should not replicate the general political process, they cannot regard themselves as merely private businesses.⁴³ Diversity of interests requires cooperative decision making, and cooperative decision making is impeded by inequalities in resources and position. At present, these difficulties are glossed over by superficial opportunities for broad participation. But, as we have seen, the focus must be on thoughtful deliberation and sound and impartial decision making.⁴⁴ The process goal must be to design a collaborative problem-solving organization that allows a real public dialogue in the face of unique impediments to that dialogue.

A. *A Proposal for the Next Step in Governance*

Proposed here is a design in which an impartial board decides and each interest group has its own independent representative to the impartial board. Charles Stalon has observed that a small, impartial core governing body works better than large, seemingly inclusive bodies.⁴⁵ The optimal central board provides a mechanism

43. See Kwoka, *supra* note 39, at 280 ("[A] privately owned utility is ultimately responsible to its shareholders and therefore should pursue profit maximization rather than managerial benefit or consumer group preference.").

44. See Rossi, *Participation Run Amok*, *supra* note 8.

45. See Stalon, *supra* note 26.

for competitive policy development rather than inclusion. A dialectic within this governance structure assures real consideration of all the diverse interests. Such a dialectic should result in the movement of deliberation toward a consensus even in an organization with clearly distinct interests among its members. In an industry with as many competing interest groups as electricity, the airing of all views and the competition between those views will work so long as the deliberation works toward the common optimum performance goal. (As opposed to, say, making profit for certain industry segments or promoting environmental extremism.) The common goal of a sound and acceptable electricity system in the end should compel shared objectives.

The vision then is a core impartial deliberative body with interests organized to represent themselves and with the organizational structure designed to assure all these interests have real influence. That is, instead of various interests submerged within the deliberative body, each interest is organized, recognized, and represented as a discrete force. To accomplish this, the RTOs should constitute "Representative Committees," whose members would come entirely from members of an interest. These committees would have staffs that provide them with information and help them with the presentation of their interest.

Superficially, the RTO model seems to have adopted this approach. That is, there is a strong movement towards an impartial managing board with various committees promoting policies in their specialized areas. Suggested here, however, is that this approach, while close, fails to foster effective, equal, and transparent participation by each of the basic interests. Both expertise and cultural tendencies allow the old regime to continue to control RTO governance within these committees and on the central governing board.

B. Building on PJM's Model

PJM, because of its longstanding success, serves as a good example of a basic RTO governance organization.⁴⁶ The foundational model, as described above,⁴⁷ is a general corporate approach, but with an effort to bring into governance the various divergent interests.

Each interest has input into the ultimate authority. Additional interest representation is provided by the hierarchy of Subject Matter Committees that advise the board.⁴⁸ These committees

46. PJM OA, *supra* note 17, at 29-40. The agreement was approved by FERC through 2004. PJM also serves as a good example because its documents are so readily available, suggesting that transparency may actually be good business given PJM's success.

47. See *supra* notes 16-25 and accompanying text.

48. PJM INTERCONNECTION, PJM MEMBERS HANDBOOK 6 (2003), *available at*

provide concentrated and expert recommendations on specialized issues. The Members Committee and each of the Subject Matter Committees include representatives of five sectors: generation owners, other suppliers, transmission owners, electric distributors, and end-use customers. This sector representation allows participation by divergent members within these committees. The PJM governance materials state:

The committees and user groups provide a forum through which stakeholders share their positions and resolve difficult issues. Market committees are an essential component of PJM's governance structure for administering an open-access, transparent grid and markets.

This collaborative approach—a hallmark of the way PJM conducts business—enhances our ability to manage the grid, maintain reliability and assure robust markets.⁴⁹

This system is inclusive as far as it goes, but cooperative decision making requires more than just adjunct “forums.”

In order to assure real voice, as opposed to mere form, I would add to the existing committee structure “Representative Committees.” Representative Committees would differ from the Subject Matter Committees currently incorporated in the general RTO/ISO model.⁵⁰ The Subject Matter Committees, like the Board of Managers, mask the relationship between the various interests and prevent some interests from having their own influence. Each member is represented on these committees, but this merely replicates the same alliances and cultural positions that existed in the integrated industry.⁵¹ Thus, the committees can be dominated

<http://www.pjm.com/committees/handbook.pdf> [hereinafter PJM MEMBERS HANDBOOK]. The handbook notes:

PJM's Committee structure includes three Senior Standing Committees (Members, Electricity Markets and Reliability Committees), three additional Standing Committees (Market Implementation, Operating and Planning Committees), subcommittees or working groups created by these six committees, and user groups established in accordance with PJM's Operating Agreement.

Reports and proposals will flow from the subcommittees and working groups to their “parent” Standing Committee and from there to the “parent” Senior Committee. User groups' report and proposal procedures are defined in PJM's Operating Agreement.

Id.; see also *id.* at 7 (outlining a graphic diagram of PJM committee structure).

49. PJM Interconnection, *Committees and Groups*, at <http://www.pjm.com/committees/committees.html> (last visited Mar. 23, 2005).

50. An example is PJM. Its committees are described in PJM MEMBERS HANDBOOK, *supra* note 48.

51. See PJM Interconnection, *Committees and Groups*, at <http://www.pjm.com/committees/committees.html> (last visited Mar. 23, 2005).

by the same interests that dominate the core decision-making authority. Representative Committees would give each sector a distinct voice.

Moreover, Subject Matter Committee representation does not necessarily give a voice to the diverse interests within a sector. Of particular concern is the end-use consumer sector. Big business interests will likely represent consumers on these Subject Matter Committees, and their interests may differ significantly from those of residential consumers. A Representative Committee would encompass all consumer groups. Its positions would reflect an aggregate. Indeed, their positions could reflect disagreement among consumers. Regardless, the Representative Committee would allow transparent airing of several consumer positions and would add weight to a consumer position in both the Subject Matter Committees and the central management board.

Members of a Representative Committee would all come from a specific interest. In this way, the Representative Committee would publicly espouse those interests. The key to success will be the open expression of each interest's position on matters of particular importance to it. This open contestability for RTO policymaking will promote a real dialogue on issues. The disparity in resources and expertise of the various interest groups, however, means that each Representative Committee must be specially constituted to assure that it can actually represent the interest. A residential consumer committee, for example, would be useless unless its members had analytical resources as well as time and commitment. The experience with Negotiated Rulemaking tells us that a public interest representative cannot match industry in assuring that they "have a voice."⁵² The lesson that Negotiated Rulemaking teaches us is that participatory opportunities must be carefully tailored to the interests less able to represent themselves. Because resource inequality is a major impediment to giving voice to these interests, the Representative Committees should be funded by the RTOs in the same way as the Subject Matter Committees. Since some of these interests necessarily lack expertise, the RTO should assure that some, at least, of these Representative Committees have expert advice available through either permanent staff or consultants.

C. Implementation Concerns

Perhaps public advocacy will not be enough. More weight could be added by giving the Representative Committees' views special weight. This process would require that, for specified types of decisions, Representative Committees of specially impacted

("Members can designate a representative for any committee using an online form.").

52. See CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 4.36 (2d ed. 1997).

interests would be consulted, and their views would have special weight in the adoption of a measure. No interest, even nominally “public interests,” on the other hand, should have essentially a veto over any matter, even those of special concern to the interest. Giving Representative Committees weight without shifting the balance so that they have undue influence would be the key. One approach would be that changes suggested by that Representative Committee may only be rejected by a supermajority of the board. Under other previously identified conditions, Representative Committee views would require special justification and support for a measure.

Now I have created the platform for a multitude of committees. The Subject Matter Committees are themselves numerous as well as useful. Representative Committees, however, may not be similarly numerous. Not all interests need a Representative Committee. Large transmission owners and large industrial consumers can safely be discriminated against in this regard. They are likely to have sufficient influence absent participation in the Representative Committees.

Moreover, there can be a distinction between a direct interest that requires a RTO-supported Representative Committee and other more indirect interests, such as general business, broad environmental advocacy, or local governments. Some Representative Committees might be identified as advocacy-only committees. The RTO should assure access to the Representative Committee structure for other interests, which are left to choose how they will organize themselves. As to these less-structured interests, the RTO, while not sponsoring the interest, should concern itself if these interests are not represented in some form. For example, the RTO should assure the participation of social welfare advocates concerned with universal service issues, even though these problems in the market environment will generally be dealt with elsewhere.

The emerging governance regime has potential in that the RTO Subject Matter Committee approach assures the participation of diverse interests, as in the case of the PJM. However, the danger is that because of disparities in expertise and stature, mere representation on each Subject Matter Committee will not assure real participation and accountability. Representative Committees provide a single voice for each crucial interest, and supplying the Representative Committees with advice and expertise will allow these otherwise underrepresented interests to have actual influence in the governance process.

V. RESTRUCTURING STATE AND LOCAL ENERGY AUTHORITIES

As direct governance shifts to regional (multistate) authorities and remaining regulation by necessity becomes national and is

dominated by FERC, state and local energy authorities are slowly being pushed off the stage.⁵³ These authorities have fought this movement politically, but practically they seem increasingly irrelevant. They cling to their status under the Federal Power Act,⁵⁴ but their loss of real power is inevitable. Yet this new regime creates new opportunities if the state and local energy authorities have the vision to seize them. These institutions could play vibrant and perhaps crucial roles in the restructured industry.

A. *A Mere Change in Character*

The current regime has been evolving a role for state and local energy authorities. RTO entities are developing ways to bring these authorities within their compass.⁵⁵ While this movement may be attractive to the authorities as they contemplate the loss of real regulatory authority, it may trap them in a superficial role. Rather than gratefully letting FERC and the RTOs impose this inferior role, they should redefine their own role in the new regime. This role should clearly separate these governmental authorities from the private business operations. The state regulators should avoid becoming hollow relics of the regulatory age and transform themselves into public representatives, investigative/disclosure vehicles, ultimate monitors/whistleblowers, and the instruments for resolving individual disputes between their citizens and the electricity industry.⁵⁶

53. In a way, this may be an overstatement. While there is a strong movement among electricity entities toward creating or joining regional transmission organizations, many states are not actively restructuring. Status of State Electric Industry Restructuring Activity as of February 2003, at <http://www.eia.doe.gov/cneaf/electricity> (Feb. 2003). Even though the Supreme Court accepted the notion that FERC could assert jurisdiction over regional electricity organizations in *New York v. F.E.R.C.*, 535 U.S. 1, 23-24 (2002), the ultimate function of state regulatory authorities in the emerging system has yet to be decided. As always, that will be a political question.

54. 16 U.S.C. §§ 791a-93, 796-818, 820-23, 823a-25r (2000).

55. For example, governmental authorities may have ex officio status on any Subject Matter Committee and/or be represented through a "Liaison Committee." See PJM OA, *supra* note 17, § 8.2.2, at 35; see also PJM Interconnection, *PJM Committees*, at <http://www.pjm.com/committees/pjm.html> (last visited Feb. 16, 2005). ("The State Commission Liaison Committee, consisting of all the PJM state utility commissioners, meets annually with the PJM Board of Managers to discuss matters of mutual interest.").

56. In a sense, state agencies may have come full circle. The Massachusetts Board of Railroad Commissioners under Charles Francis Adams, the first important regulatory-like authority, was committed to these types of roles:

[Adams' and his fellow railroad commissioners'] theme, in a word, was *voluntarism*, promoted by publicity and disclosure, disciplined by the unwavering support of the state legislature. When the question at hand involved general policy, the commission initiated. When the issue had to do with some particular controversy, the commission reacted. In all cases, the agency advised rather than coerced. It

State and local energy authorities could inject truly independent elements into the restructured regime. The state Public Utility Commission or Public Service Commission staffs, along with many local energy authorities, offer a pool of expert and independent workers who could be employed in many public interest roles and perform functions that cannot be expected to be accomplished otherwise. As discussed above, real participation requires expertise. Many of the interests affected by RTO decisions, even with access, cannot expect to have influence because they cannot hope to marshal equal or even adequate understanding of the complex engineering and commercial issues at stake. The state and local energy authority staffs already employ the necessary experts.

In addition to expertise disparities, as discussed above, existing industry culture often dictates the role of the players in the restructured industry. The state and local energy authorities traditionally play the roles of monitor, public representative, and ombudsman in individual disputes. Both the industry and the citizenry are accustomed to the state regulators playing those roles. The established culture does not need to be changed in order for them to continue to do so, and they can easily reconfigure themselves into these roles. At the same time as they are losing some direct control over a part of the industry, they could seamlessly upgrade and concentrate on these roles. In the end, the state regulators could fill a very special and pervasive role, projecting them into every aspect of the industry, including those from which they had been excluded under the old regime.

B. Various Roles State Regulators Could Assume

The existing expertise and stature of the state and local energy authorities is too valuable a resource to be squandered. In order to make full use of this resource, state and local governments, as well as the agencies themselves, must leave behind the past functions associated with direct regulation over retail rates and performance. Their new roles could include acting as public representatives, information gatherers and disseminators, monitors of general industry conduct, and protectors of their citizens in individual disputes with industry players.

1. Public Representative

The best representative for the public and other especially representationally disadvantaged interests could be the state and local energy authorities. While FERC regulates, the state and local energy authorities might represent. Representing interests in the several electricity forums, RTO government, FERC, and legislatures

served now as broker, now mediator, now ombudsman.
THOMAS K. MCCRAW, *PROPHETS OF REGULATION* 25 (1984).

is a difficult business. Public representation is particularly disadvantaged. Issues in the industry are complex and arcane. On one hand, fear of damaging the delivery of reliable service often inhibits public representatives, including legislators, from questioning industry policymaking. On the other hand, simplistic answers may, in fact, do more harm than good. More importantly, the true impact of choices may not be recognized, and representatives of the public and other interests can be easily teased along with solutions that might not adequately reflect concern for those interests.

In the old regulatory regime, the role of state and local energy authorities was defined within the national regulatory system. Their function was always subordinated to the larger whole. The new regional configuration could set them free to become independent public representatives, unimpeded by system constraints. With such freedom, each state and local authority will be alert, creating multiple independent and public-sensitive oversight opportunities. Cooperation and sharing of resources and information with other interests will make them stronger and more influential. Indeed, a tacit division of labor might arise that will be valuable to these always underfunded entities. On the other hand, unity among state regulatory authorities will give them more influence with Congress, FERC, and the RTOs. Imagine the impact that, say, the unified views of New York, Pennsylvania, and Ohio energy authorities might have on national and RTO policymakers.

This role of public advocate and defender of the underrepresented will create a positive image for state regulators. Such a role may acquire much more stature than the second class, often deadweight, role of their former position. Certainly, it will be superior to the coconspirator image they often acquired in the regulatory days and may be in danger of retaining in the new regime. Even though they seem to be losing their former direct power, in the end they could become stronger and more important to the efficient and fair performance of the electricity industry.

2. *Investigative / Disclosure Vehicles*

Transparency, while it might protect the market, is not enough to protect the public.⁵⁷ Electricity is so fraught with business and engineering complexity that even honest disclosure, as such, is of no use to many interests. State and local energy authorities have the expertise to understand the information made available by the RTO and the incentive to evaluate that information from the public's point of view. These authorities can digest and develop information for both the general public and interests that cannot do so

57. See Final Report on Price Manipulation in Western Markets—Fact-Finding Investigation of Potential Manipulation of Electricity and Natural Gas Prices, 99 F.E.R.C. ¶ 61,272 (2002).

themselves.

State and local authorities also have the expertise and, hopefully, will retain the resources to conduct independent study and investigation. As we have seen, the industry has for generations controlled the freestanding study organizations and high-profile scholars. Public representatives and those of several other interests simply lack the resources to replicate that research and scholarship. The staffs of state and local regulatory authorities can fill the analytical gap to the benefit of the public representatives, as well as the furtherance of crafting a new role of governmental energy authorities.

3. *Monitors/Whistleblowers*

Implicit in the above, but more confrontational, is direct oversight. Hopefully, public-regarding conduct will follow public representation and transparency, but such a collaborative ideal seems unrealistic given the industry's history.⁵⁸ It is likely that from time-to-time, the public interest will require more than honorable aspirations and full disclosure; its representatives will have to employ coercive means.

Publicity can be a powerful tool. State and local energy authorities may resort to the coercive effect of publicizing industry misconduct. Drawing attention to the real impact of the conduct of the RTOs or their members may be an effective, yet non-intrusive, device for curbing public-disregarding behavior. Fear of disclosure may be a deterrent that will make actual whistleblowing rarely necessary.

Direct action may be found necessary under certain conditions.⁵⁹ It may be that the state and local energy authorities themselves should retain some coercive mechanisms, but that will quickly raise many of the questions which plagued the old regime. A cleaner approach may be to transform them into independent advocates for public-regarding policies before FERC, Congress, and state legislatures. More directly, they may also be given authority to take court action on behalf of the public or groups who lack the resources to do so.

4. *Individual Complaints*

In addition to monitoring general policy and conduct, the state and local energy authorities could perform an equally valuable

58. See, e.g., RICHARD RUDOLPH & SCOTT RIDLEY, *POWER STRUGGLE: THE HUNDRED-YEAR WAR OVER ELECTRICITY* (1986) (outlining the clashes of various interests during the industry's last century).

59. See Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 VAND. L. REV. 1591, 1626 (2003) ("In a deregulated market, enforceable remedies for misconduct are important to deter fraud and other types of strategic market manipulation.").

function regarding individual relations with the RTO and its members. The mediation character of an ombudsman, rather than an adversarial approach, seems preferable here. Ombudsmen try hard to work with decision makers to correct problems. However, this approach requires a good deal of public trust. In the first instance at least, regulators acting as ombudsmen act informally and within the organization. They often find in favor of the organization instead of the individual complainant. In those cases, the individual must, in the end, believe that the ombudsman operated with integrity. On the other hand, the ombudsman must have the respect of the system. The RTO must recognize that compliance with the ombudsman's decision is in the best interest of the organization, even when they believe that the decision was not balanced.⁶⁰

While the function of ombudsmen is to "work out" differences, resolution of some controversies may ultimately require some coercive authority. Such dispute resolution does not seem to have been given much attention in RTO design except as between members.⁶¹ RTOs probably assume that an administrative process will address such disputes. The new role for state and local energy authorities should include consideration of the extent and nature of their adjudication of individual disputes with the RTOs and their members. One approach is for the governmental authorities to provide the forum for dispute resolution. Alternatively, the RTO could provide its own adjudicative process. While this might raise some superficial questions of impartiality, the dispute resolution process could be designed to assure independence from the RTO.⁶² The governmental authority then could provide independent advocates to complainants, who would not be part of the RTO's adjudicative entity.

VI. CONCLUSION

We are well into the first generation of organizing the restructured electricity industry. The future no doubt holds obstacles and glitches. Nonetheless, some sound work has been done. System designers, both public and private, have moved us along in measured steps with due regard for the peculiarities of the industry. Justifiably, they have concentrated on managing the business. However, a system as pervasive and crucial to our society

60. The ABA Section of Administrative Law and Regulatory Practice has an ongoing ombudsman project from which guidance could be obtained. For a summary of both public and private ombudsman functions, see Mary Rowe & Dean M. Gottehrer, *Similarities and Differences Between Public and Private Sector Ombudsmen*, at <http://www.abanet.org/adminlaw/ombuds/g&rsimilar.html> (1997).

61. PJM OA, *supra* note 17, § 16.5, at 53.

62. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

as electricity must be acceptable to the whole community. Attention to principles of participation (real rather than apparent), accountability, and transparency will foster community satisfaction. But those features will also enhance the overall performance of the RTO-governing institutions. What economists call “rents” are as available from a dominant position in internal governance as from a dominant position in the market. Therefore, sound governing institutions are as important to efficiency as they are to fairness and acceptability. This Article has made some observations and recommendations for furthering the goals of collaborative governance. In the end, the message is that much more thinking and experimentation are necessary. There undoubtedly are many other issues that will need to be identified and addressed as best governance practices are implemented. The electricity system is too important and too complex to ignore the views of any interest, and this Article suggests some first steps in realizing the goal of ensuring both broad and effective representation of all affected interests.