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PROBLEMS IN ELECTRICITY MARKET GOVERNANCE: AN ASSESSMENT

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INTRODUCTION

In most of the United States, electricity markets are organized into Regional Transmission Organizations (RTOs): businesses that operate but do not own the grid.¹ RTOs run auctions for electricity using the grid as the physical platform, ensuring the economically efficient use of the grid. They also make sure the grid is run in a manner that is reliable. Although RTOs may have once been considered to function like air traffic controllers, their remit has expanded significantly. For better or worse, RTOs now shape the value of the assets that produce and transmit power—and, in doing so, RTOs have a significant influence over the kind of power plants that are built and over the network that stitches them together with consumers.

RTOs play an important role in the American energy sector. But as organizations, they are highly unusual. They are neither government agencies nor ordinary businesses; they

1. Regional Transmission Organizations (RTOs) are also known as Independent System Operators (ISOs). There is no practical difference between these institutions. In order to use a single nomenclature, this paper will refer exclusively to “RTOs.”

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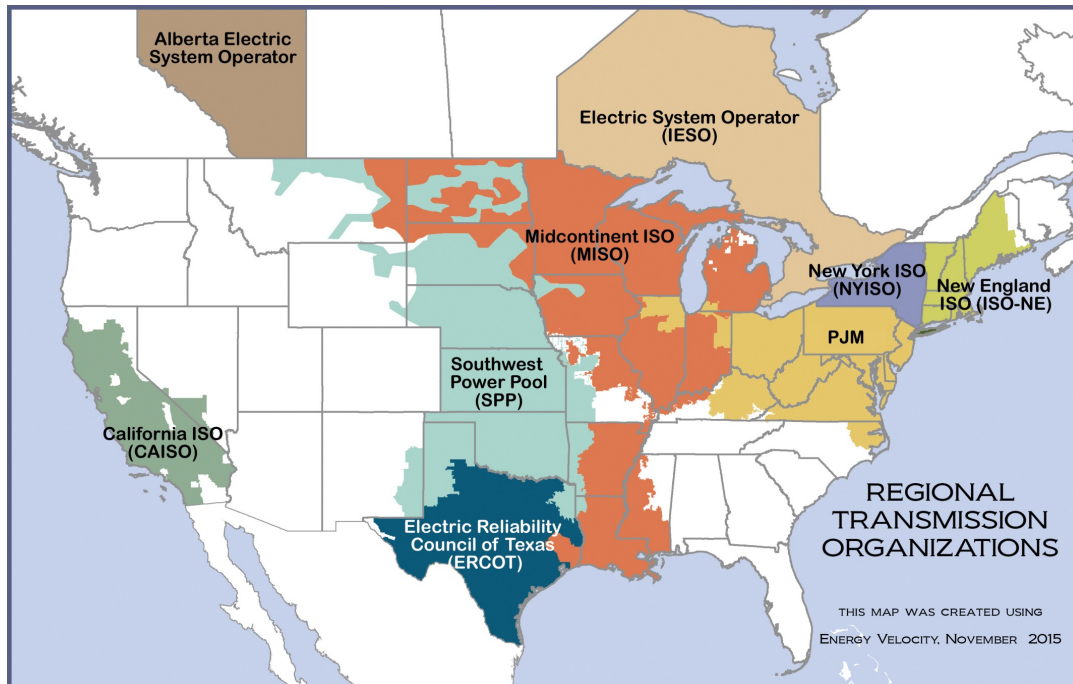
operate instead as quasi-autonomous nongovernmental organizations, or “quangos.” This paper examines how RTOs make decisions and how they are held (or not held) accountable. It does so by taking stock of the viewpoints offered by consumers—the ultimate intended beneficiaries of RTOs’ role in the electricity power sector. In the course of research for this paper, R Street conducted a nonscientific, survey-based assessment of consumer interests, receiving replies from 12 government offices that represent consumers, five nongovernmental consumer advocacy organizations, and six individual, large consumers. Their responses are for the most part confidential, but they inform the section of this paper titled “A Consumer-Focused Assessment of RTO Governance.”

Considering these impressions of RTOs’ governance, and drawing on the author’s own experience, the paper concludes by proposing several considerations for improvements to RTO governance in four categories:

- Independence of RTO decision-makers,
- Fair representation of consumer interests,
- Transparency in RTO decision-making, and
- Oversight of RTOs by the nation’s energy regulator, the Federal Energy Regulatory Commission (FERC).

A reader of this paper will come away from it with an understanding, at a minimum, of why a discussion on RTO governance matters—as well as an assortment of smaller and larger ideas for how RTO governance might change. This paper is not the beginning—and certainly not the end—of scholarship on RTO governance. Readers seeking a survey of the various RTOs’ decision-making processes may look to a previous R Street policy study, which details their practical

FIGURE I: RTOS MAP



Source: FERC. <https://www.ferc.gov/industries/electric/indus-act/rto/elec-ovr-rto-map.pdf>.

elements in a depth this paper does not attempt.² Meanwhile, professor Michael Dworkin's and Rachel Aslin Goldwasser's decade-old, but still gold standard, law review article on the same subject remains essential reading.³ Although Dworkin and Goldwasser did not use the term "quango" to describe RTOs, their view that RTOs "take a form that is between government and business, thus creating serious accountability problems" is a thesis upon which this paper elaborates.⁴

THE LEGAL GENESIS OF RTOS

Most businesses that own and operate electricity infrastructure are not entitled by law to charge their customers a rate of their own choosing. Instead, "public utilities" provide services whose rates are established by permission of FERC or

state utility commissions.⁵ FERC governs these rates when they concern the transmission of electricity, or when energy is sold not directly to the person using it but to an intermediary party.⁶ When the costs of doing business come to exceed the revenue a utility raises through its authorized rates, it must apply to FERC for permission to change those rates under Section 205 of the Federal Power Act (FPA).⁷ In the parlance of the industry, this legal authority to propose to

2. Mark James, Kevin B. Jones, Ashleigh H. Krick and Rikaela R. Greane, "How the RTO Stakeholder Process Affects Market Efficiency," R Street Policy Study No. 112, October 2017. <https://www.rstreet.org/2017/10/05/r-street-study-finds-stakeholder-governance-hasnt-kept-pace-with-changing-electricity-markets/>.

3. Michael Dworkin and Rachel Aslin Goldwasser, "Ensuring Consideration of the Public Interest in the Governance and Accountability of Regional Transmission Organizations," *Energy Law Journal* 28:543 (2007). https://www.eba-net.org/assets/1/6/10-Governance_of_RTOs.pdf.

4. *Ibid.*, p. 548.

5. "Public utilities" are the investor-owned utilities that, as it relates to this publication, are regulated by the Federal Energy Regulatory Commission (FERC). Confusingly, the Federal Power Act's (FPA) definition of a "public utility" excludes utilities that are owned by the public—such as municipal utilities and federally owned utilities. Like them, member-owned electricity co-operatives are also exempt from most regulation. This paper usually employs the term "utility" in instances where this legal distinction is not meaningful.

6. Formally, FERC regulates "the sale of electric energy at wholesale," which means the "sale of electric energy to any person for resale" and "the transmission of electric energy in interstate commerce." 16 U.S.C. § 824.

Through case law, this has come to mean FERC sets all rates for transmission at high voltage, with three important exceptions. First, Alaska and Hawaii have no interstate electricity transmission facilities and thus are not regulated. Most of Texas, meanwhile, has its own grid capable of being islanded; it is likewise not subject to FERC rate-setting. Second, transmission rates by certain providers, such as the federally owned utilities (e.g., Bonneville Power Administration), are not subject to FERC jurisdiction, except in certain circumstances where they offer transmission through a third party that is FERC-jurisdictional. Finally, FERC has declined to assert that it has the authority to set rates for transmission when it is bundled with the retail sale of electricity.

For a comprehensive analysis of these questions, see Jeffery S. Dennis, Suedeen G. Kelly, Robert R. Nordhaus and Douglas W. Smith, "Federal/State Jurisdictional Split: Implications for Emerging Electricity Technologies," *Lawrence Berkeley National Laboratory*, December 2016. <https://www.energy.gov/sites/prod/files/2017/01/f34/Federal%20State%20Jurisdictional%20Split--Implications%20for%20Emerging%20Electricity%20Technologies.pdf>.

7. 16 U.S.C. § 824d.

FERC the establishment of a new rate is called a “filing right.” When FERC approves a filing, the resulting “tariff” becomes binding on consumers as a matter of law, as surely as if they had signed a contract with the utility themselves. This is the primary reason why the government plays a key role in regulating these businesses: Consumers do not have the final say in what they are willing pay and, faced with a rate they would be unwilling to pay if given the choice, they usually cannot simply decline service because of the nature of the speed-of-light commodity they are consuming.

A utility may also use its filing rights to propose to substitute an administratively determined rate with a more market-like mechanism, such as a rate that derives from an index published by a third party, a rate that is the “clearing price” from an auction with many buyers and many sellers, or a rate contracted for by two sophisticated parties dealing at arm’s length. As utility service has become increasingly predicated on buying services from intermediaries who in turn rely on a diverse set of sellers, rather than a single monopoly, this style of rate-setting has grown in prominence. Because FERC (and not states) holds jurisdiction over these trades via intermediaries, its role has similarly grown.

Meanwhile, in order to facilitate such trades, numerous smaller transmission networks have been operationally consolidated to form more expansive networks, which are the physical platforms on which this trade in energy can occur. When one “public utility” transfers the control or ownership of any of its assets to another entity, that entity also becomes a “public utility” under the FPA.⁸ These two developments—the gradual supplanting of administratively determined rates by more competitive processes and the voluntary transfer of operational control of individual utilities’ assets to an independent third party with a more expansive footprint—have gone hand in hand. Together, they are the hallmark of RTOs.

RTOs each have different origin stories. North America’s largest RTO, PJM Interconnection, emerged from a pre-existing power pool designed to share generating resources across utilities and maintain situational awareness of the grid’s operation. For most of PJM’s history, it was housed in the offices of a single utility. Only in the 1990s did it become an independent organization before formally becoming an RTO.⁹ Contrarily, the Midcontinent Independent System Operator (MISO) had no predecessor institution, forming in 2001 from whole cloth as an “independent platform for efficient regional energy markets.”¹⁰

One may reasonably expect the institutional culture of an organization to be strongly affected by its history. In this case, PJM’s history as a tightly knit association closely controlled by utilities likely has informed many of its current governance practices; for example, its board conducts its business privately, and PJM alone among RTOs is not organized as a tax-exempt nonprofit corporation (although as a practical matter, it does not turn a profit). The process of MISO’s creation, meanwhile, was suffused by a greater number of stakeholders and, rather than the organization assuming powers gradually, its conception was momentous—and attended to by significant “good government” protections, including board meetings conducted in public and a “social welfare” mission as embodied in its legal status as a 501(c)(4) corporation.¹¹

THE EXPANDING SCOPE OF RTOs

These RTOs are peculiar entities. They own none of their own generation or transmission, but they, like other public utilities, possess filing rights under Section 205 of the FPA. These filing rights may be employed to numerous ends. All RTOs use them to propose the design (and redesign) of energy auctions and to collect a rate associated with the RTO’s own operational expenses in the discharge of its duties to keep the system operationally reliable each hour of any given day. These basic functions can be understood as the RTO acting as a kind of traffic controller, and they are common to all RTOs.

Other RTOs have gone farther. The RTOs of the eastern United States have used their filing rights to propose auctions for future capacity, which entails both the RTO’s administrative determination of the volume of demand consumers are projected to require years hence and a reserve price based on the RTO’s assumptions about the default generator that might serve this hypothetical demand.¹² One RTO, the New York Independent System Operator (NYISO), is this year considering a Section 205 filing to FERC that would price greenhouse gas emissions within the power market that the RTO administers.¹³ To varying degrees, RTOs are also vehicles for the agglomeration of individual public utilities’ filing rights. For example, transmission owners who have come together to join an RTO might vest the practical exercise of their filing rights within an RTO for the purpose of establishing a unified transmission rate and transmission planning regime across the broader footprint. The expanding remit of RTOs has led Susan Kelly, former chief executive officer of the American

8. 16 U.S.C. § 824.

9. PJM Interconnection, “PJM History.” <https://www.pjm.com/about-pjm/who-we-are/pjm-history.aspx>.

10. Midcontinent Independent System Operator, “About MISO.” <https://www.misoenergy.org/about/>.

11. See footnote 20.

12. For more on capacity markets, see Travis Kavulla and Gürcan Gülen, “Missing Money and an Off-Ramp to the Capacity Debate,” *Electricity Journal* (August 2019). <https://www.sciencedirect.com/science/article/pii/S1040619019302040>.

13. New York Independent System Operator, “Carbon pricing integration in wholesale energy markets: First in nation proposal.” <https://www.nyiso.com/carbon>.

Public Power Association, to describe RTOs as “the blob”—a reference to the science-fiction classic about an oozing alien life form that absorbs everything it contacts.

RTOS AS “QUANGOS”

Meanwhile, even as RTOs’ duties have expanded, there are legal and structural reasons to assume some level of deference to RTOs by the nation’s energy regulator, FERC. First, the legal standard of review applied to Section 205 filings is not whether an RTO proposal is the best proposal, but merely whether it is “just and reasonable.”¹⁴ A particular FERC commissioner may have exacting views about what it means for something to be “just and reasonable” but, typically, a range of outcomes is countenanced as meeting this definition in order to avoid the perception that the regulator is micro-managing regulated parties. By contrast, when a consumer, another utility, a state commission or FERC itself challenges a rate it believes to be unfair, that challenging party must make a Section 206 filing and must both demonstrate that the existing rate is unjust or unreasonable and that the rate it proposes to substitute for it is just and reasonable.¹⁵

There are other reasons why FERC might tend to be deferential to what RTOs propose. RTOs have extensive stakeholder processes that precede the filing of important proposals to FERC.¹⁶ The FERC-jurisdictional RTOs are also governed by independent directors who are forbidden to have a financial interest in any market participant.¹⁷ These directors owe a duty to the RTO and to its mission which, unlike that of other public utilities, is not principally to shareholders and profits, but is instead usually framed in terms of promoting market efficiency and social welfare.¹⁸ RTOs are also subject to evaluation by independent market monitors, who “assess

the market rules and tariff provisions [of RTOs] to propose options that would enhance competitive performance.”¹⁹ Thus, any important RTO filing to FERC typically has been through some level of vetting already—unlike those filings of investor-owned utilities, which can be assumed to have gone through no check on the managerial prerogative that is exercised when a proposal is put forward under that utility’s filing rights. Additionally, at least in theory, the mission of an RTO board is relatively aligned to FERC’s own mission, while the mission of an investor-owned utility can be assumed to be maximizing its profits. FERC does apply to all public utilities the same legal standard—already a somewhat lenient one, as discussed above—but as a practical matter, the RTO’s institutional and corporate culture can promote deference to the conclusions of its internal process. Put another way, a Section 205 filing by an RTO can sometimes practically be regarded as a “give and take” position, negotiated through its stakeholder process where the matter was litigated intensively, while a Section 205 filing by an investor-owned utility merely heralds the beginning of litigation, which occurs at FERC itself.

It would be incorrect to think that FERC merely and always defers to RTOs. Instead, RTOs can be thought of as a kind of sandbox for FERC’s occasional policy innovations. Because RTOs are ready-made marketplaces with a diverse set of buyers and sellers, they are an easy target for policy experimentation to promote competition and the advent of new technologies. And since RTOs are large, they are a convenient locus for FERC’s regulatory authority. Focusing on RTOs and their consolidated tariffs also allows FERC to avoid requiring compliance from the hundreds of public utilities that a sweeping policy change might affect.

Indeed, FERC no longer even attempts to apply its most ambitious policy reforms to non-RTO areas. For example, FERC’s most profound reform in electricity policy in the last two years has been Order 841, a landmark step to open the electricity markets to the participation of energy storage devices at wholesale. In making this reform, FERC required RTOs (and only RTOs) to adopt policies in accordance with FERC’s order.²⁰ Utilities and consumers in vast swathes of the country where RTOs do not exist, such as the Southeast United States and much of the West, will be unaffected by FERC’s reforms in this regard. In a sense, this means FERC is a more active and less deferential regulator when RTOs are compared to non-RTOs but, as a practical matter, many of the implementation details required to meet the high-level policy commands of the regulator will be made within

14. Commissioner Richard Glick framed this standard in a separate statement recently: “This is a section 205 filing, meaning that ISO New England does not have to show that its proposal is the best option, only that it is a just and reasonable one (although, as should be clear by now, I do not believe it has met even that more lenient standard).” Richard Glick, “Statement of Commissioner Glick,” Federal Energy Regulatory Commission, Docket No. ER19-1428-001, Aug. 8, 2019. <https://www.ferc.gov/media/statements-speeches/glick/2019/08-08-19-glick.pdf>.

15. 16 U.S.C. § 824(e).

16. James et al., pp. 4-17. <https://www.rstreet.org/2017/10/05/r-street-study-finds-stakeholder-governance-hasnt-kept-pace-with-changing-electricity-markets/>.

17. This does not include the operator of much of Texas’ grid and power markets, the Electric Reliability Council of Texas (ERCOT), which is subject to regulation by the Public Utility Commission of Texas and is led by a hybrid board comprised of directors who are employees of market participants and independent directors. Electric Reliability Council of Texas, “Board of Directors.” <http://www.ercot.com/about/governance/directors>.

18. Differences exist in the type of not-for-profit status RTOs rely upon. The Midcontinent Independent System Operator (MISO), for example, is a 501(c)(4) “social welfare” not-for-profit corporation. Midcontinent Independent System Operator, “Midcontinent Independent System Operator, Inc.” *ProPublica*. <https://projects.propublica.org/nonprofits/organizations/431827033>. Its neighbor, Southwest Power Pool (SPP), is a 501(c)(6) corporation, organized as a “business league.” Southwest Power Pool, “Southwest Power Pool Inc.” *ProPublica*. <https://projects.propublica.org/nonprofits/organizations/710748158>. The PJM Interconnection alone among the RTOs is not organized as a 501(c) corporation, but describes itself as “profit neutral.” PJM Interconnection, “How Does PJM Make Money?” <https://learn.pjm.com/who-is-pjm/how-does-pjm-make-money.aspx>.

19. James et al., p. 10. <https://www.rstreet.org/2017/10/05/r-street-study-finds-stakeholder-governance-hasnt-kept-pace-with-changing-electricity-markets/>.

20. Federal Energy Regulatory Commission, *Order No. 841-A: Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Docket Nos. RM16-23-001, AD16-20-001, May 16, 2019. <https://www.ferc.gov/whats-new/comm-meet/2019/051619/E-1.pdf>.

the walls of the RTO itself. FERC has also retreated from a previous policy of “standard market design,” allowing RTOs to go in different directions on certain important questions. Only on certain priorities of the regulator, and specifically the chairman, has the agency led, using RTOs as a vessel for policymaking.

RTOs, then, are unusual institutions. They are a sort of business—but one with no profit motive and whose corporate governance emulates the strictures of independence expected of regulators. They are a sort of government—but one that has come into being through the voluntary decision of for-profit businesses to join it. One can borrow the British term “quango” as perhaps the RTO’s best descriptor: a quasi-autonomous nongovernmental organization. A quango is a quintessentially hybrid institution that, either legally or by practice, has both businesslike and governmental characteristics and also owes a duty to both government and business.

It is in this light that we should consider the decision-making process of an RTO to be critical. Indeed, this process may be more dispositive of the important questions of electricity policy than the pronouncements of, say, a typical governor or state legislature, or state utility commission. This may especially be the case if FERC itself is either indecisive or deferential on either the essential questions or the details of electricity regulation, allowing RTOs to fill the void. The critical questions, then, are how these quangos go about making their decisions and how they incorporate the perspectives of customers.

A CONSUMER-FOCUSED ASSESSMENT OF RTO GOVERNANCE²¹

R Street’s survey of consumers revealed a few unified themes as well as significant differences of opinion.²² We evaluate some of those key takeaways in turn.

Understaffed Consumer Interests—The most common refrain we heard from consumers was that they were understaffed on RTO issues and under-represented in the decision-making processes of RTOs. Of the approximately two dozen detailed responses R Street received to its survey, the largest number of full-time equivalent employees (FTEs) working on RTO issues in a single office was 3.0, belonging to the government office dedicated to consumer advocacy in a state with a larger-than-average population. Most respondents had employees only devoted on a part-time basis to

21. This section relies on our survey-based assessment of customers. Where we have permission to quote a customer directly, we attribute it by footnote; where quotation marks are used without such a reference, it represents a direct quotation but for a customer who agreed to provide R Street information without direct attribution.

22. We refer generically to “consumers” to include both individual consumers—corporations with large energy supply needs—and the government offices and other organizations that represent consumer interests. Where pertinent, we identify them separately.

RTO issues, and those employees’ time cumulatively totaled less than 1.0 FTE per respondent. This was the case not just with government consumer-advocate offices, but even with individual corporations that are sophisticated consumers of electricity.

To overcome the individual lack of resources, large consumers have banded together in trade associations, including national-level associations (one for industrial customers and a nascent organization associated with renewable energy buyers). They have also organized in RTO- and state-specific groups, which are usually organized through law firms and consultancies that represent consumers. The governmental consumer advocates, meanwhile, come together with advocates for residential and smaller consumers through the National Association of State Utility Consumer Advocates (NASUCA) and the Consumer Advocates of the PJM States (CAPS). However, even an organization like CAPS has only a single employee.

Who are the “Customers” of RTOs?—RTOs do not regard consumers of electricity as an RTO’s “customers,” respondents said. Instead, when they think of “customers,” RTOs think of the suppliers and transmitters of energy who dominate their membership and who have larger staffs associated with monitoring RTO issues. This is consistent with the historical genesis outlined above, since RTOs are founded on the legal premise of creating a “wholesale” marketplace—and are not a market where consumer interests have been directly implicated. Yet today, consumers are more directly affected. For example, large corporate buyers desire to enter into long-term contracts that support the development of a renewable project. But the terms under which the project can be interconnected, and the ultimate value of the project’s production, are affected by the RTO’s market rules. Likewise, to use another example, many transmission costs that would have been reviewed by state utility commissions and vigorously contested by consumers are now decided either by FERC or, more indirectly, by RTOs.

“A Built-in Conflict of Interest”—RTOs are beholden to transmission owners as a practical matter, respondents suggested, because the consent of these utilities gave rise to RTOs in the first place. As long as transmission owners’ membership in RTOs is voluntary, as FERC has long agreed it to be, the transmission owners always have the threat of withdrawal at their disposal.²³ The matter is not merely theoretical. Transmission owners have previously decided to leave one RTO and join another for reasons that presumably concern their bottom line.²⁴ (In certain RTOs, large exit

23. Federal Energy Regulatory Commission, *Order No. 2000: Regional Transmission Organizations*, Docket No. RM99-2-000, Dec. 20, 1999, pp. 9-30. <https://www.ferc.gov/legal/mai-ord-reg/land-docs/RM99-2A.pdf>.

24. “FirstEnergy files to consolidate assets into PJM,” *Electric Light & Power*, Aug. 17, 2009. <https://www.elp.com/articles/2009/08/firstenergy-files.html#gref>.

fees or the requirements of state policy for transmission owners to belong to an RTO may reduce the importance of this dynamic.) This dynamic leads to a “built-in conflict of interest” where RTO management is always looking over its shoulder to appease transmission owners at the expense of other parties, including consumers.

RTOs are also subject to being vetoed or superseded on certain questions by the members that they are supposedly independent of. In the cases of PJM, ISO-New England, MISO and NYISO, the RTOs’ management and boards do not possess the ability to make an exclusive filing under Section 205 of the FPA on certain matters. Depending on the RTO, management either must obtain a vote in favor of such a filing within the stakeholder process or must share those filing rights with potentially rival proposals from stakeholders or state officials.²⁵ Awkwardly, both PJM and NYISO may also file a Section 206 complaint against their own tariffs—with the higher standard of review that entails. The management of the Southwest Power Pool (SPP), meanwhile, theoretically may make a Section 205 filing regardless of the outcome of its stakeholder process. As we shall see, however, this legal right is eclipsed by the practical realities of SPP’s decision-making process.²⁶ Only in the California Independent System Operator (CAISO) does the RTO not share jurisdiction with other parties or subject its Section 205 proposals to a vote of the stakeholders.

Finally, there are many practical examples where the day-to-day technical work of RTOs may go in different directions depending on whether “economic efficiency” or “service to business members” is the lodestar. Certain RTOs are responsible for the demand forecasts that are used to justify new transmission investments or to set the level of demand in RTO capacity auctions. Overoptimistic forecasts will mean that a greater level of revenue flows from consumers to transmission and/or generation owners. When asked whether there were parts of the RTO business model that should be divested from it, some consumers identified these aspects—demand forecasting and transmission planning—as potential candidates for this reason.

Who is Looking Out for Consumers?—The RTOs that are made up of vertically integrated utilities, which remain subject to close regulation by state utility commissions (PUCs), appear to be more responsive to pressure exerted by PUCs. Consumers often exert their influence at the PUC, which then can affect both utilities and RTOs. Although large consumers report that they believe PUCs can often fall under the sway of hometown utilities, they also report having a greater degree of confidence in their ability to access that

regulator than they do with respect to FERC to obtain some measure of relief. In the vertically integrated RTOs, which include MISO and SPP, PUCs also share or are delegated the Section 205 filing rights of these RTOs for certain topics, such as resource adequacy and transmission cost allocation. This unique arrangement is a nod to the fact that RTOs are in a position to make policy that implicates the traditional jurisdictions of PUCs, including ratemaking and integrated resource planning.

Meanwhile, the RTOs in the eastern United States are composed of restructured utilities, which have been disaggregated into separate (but frequently affiliated) generation and transmission businesses. The affiliates, even as they sometimes do business separately outside of RTOs, frequently come together under a single holding-company umbrella in their advocacy at RTOs—at PJM especially. But at the same time, these transmission utilities and generator owners are not subject to traditional PUC regulation, which might otherwise be a channel for consumer interests. These affiliates thus act as a vertically integrated monopoly might act within an RTO—but without the feedback loop that state regulation creates for MISO and SPP. As a result, consumers in the eastern RTOs feel as though there is nowhere to turn except the RTO and the independent market monitors to look out for their interests. Nearly all consumer advocates in PJM surveyed believe it is not representative of their concerns, although many cite confidence in the PJM’s independent market monitor. All told, about half of consumer advocates believe RTOs paid “too little” attention to “obtaining the least-cost supply of electricity.”

At a state PUC, consumers would be able to challenge utilities and obtain information through legal discovery in the PUC hearing room. “RTOs have essentially been delegated regulatory power that should come with due process protections,” the New Jersey consumer advocate contends.²⁷ One consumer advocate notes that the RTOs are under no obligation to respond to requests for information. Another notes that a large RTO often cites a lack of time and resources in declining consumer requests for analysis, even while prioritizing the work of the business interests who are members.

Consumer Issues Falling Between the Cracks—The restructuring of the sector also has led to occasional gaps where consumers are left unprotected. More than one consumer raised the example of “supplemental” transmission projects, which are upgrades to or replacements of existing lines. Utility members of certain RTOs have opportunistically announced these supplemental projects in their construction plans because they fall outside the RTOs’ independent transmission planning process and, because of the liberaliza-

25. James et al., pp. 7-9. <https://www.rstreet.org/2017/10/05/r-street-study-finds-stakeholder-governance-hasnt-kept-pace-with-changing-electricity-markets/>.

26. See discussion of SPP’s membership structure on pages 8-9.

27. Response of Stephanie Brand, New Jersey Division of Rate Counsel, to R Street survey, on Aug. 12, 2019.

tion of the state-regulated monopolies, are also not part of any state-regulated integrated resource plan. In PJM, this loophole appears to have swallowed what was supposed to be the rule for independent regional planning. As one group of consumers has noted, in the past several years, PJM transmission owners have proposed \$14 billion in self-planned and self-executed projects, with only \$2.1 billion in transmission capital projects coming through the independent, RTO-led plan.²⁸

These investments thus occur essentially through the regulation of monopoly transmission owners by themselves. The transmission owners contend they have their own utility-specific planning processes.²⁹ But these simply allow consumers to raise objections about a utility's plan to the utility itself. This is certainly an ironic and perverse effect of the way RTOs are presently governed, given the fact that the RTOs were created to dampen the influence of monopolies through competition and regionalize the planning that did take place, not to permit the sector's residual monopolies an escape valve from regulation.

RTOs' Role in Decarbonization—Consumers appear to disagree about the appropriate role of RTOs as it relates to public policies that either mandate or subsidize particular sources of energy. In R Street's survey of NASUCA members and associate members, the question "Do you believe RTOs put too much, too little, or an appropriate amount of emphasis on aligning RTOs with state policy goals such as carbon reductions?," the responses were almost evenly divided between "too much," "too little" and "appropriate."

The ongoing search for a new chief executive officer of PJM has provided an opportunity for a public exchange of views on these differing perspectives. Some government officials responsible for consumer advocacy have urged RTOs to be an "enthusiastic partner in state and localities' effort to address climate change, protect consumers, and promote green economic development."³⁰ The language of the organization representing all the governmental consumer advocates in the PJM footprint was more modest and put more of an emphasis on the traditional paradigm of "least-cost,

reliable service."³¹ Still other consumer advocacy organizations (although no government offices or large consumers) signed on to a letter spearheaded by the Natural Resources Defense Council arguing that "decarbonization will define the next twenty years of the power sector just as deregulation has defined the previous two decades. The Board must prioritize finding a leader who can lead PJM through this transition to a low-carbon electricity sector."³²

PJM and the other eastern RTOs have imposed minimum offer price rules (MOPRs) that have been used to prevent subsidies from reducing the price resulting from their capacity market auctions. States have adopted numerous subsidies and mandate programs for both existing power plants, especially nuclear plants, and for new, mostly renewable sources of generation. Government interventions that favor particular sources of generation sit uneasily with the RTO markets' intended competition.³³

The eastern RTOs believe states can subsidize power plants if they care to but that they should not undermine the subsidy-free competition that they argue occurs within their RTOs. Most consumer advocates disagree with this posture, contending that the MOPR policies needlessly impose costs on consumers in the face of the political reality of state policies.³⁴ However, this view is also not unanimous. The Ohio Consumers' Counsel has argued for MOPRs in numerous comments. "The emerging trend toward subsidizing uneconomic, existing generation, especially where that generation is not needed for reliability, is a significant threat to the ability of PJM's markets to produce just and reasonable prices for electricity."³⁵ Because competition has generally resulted in lower prices for consumers, the Ohio consumer advocate reasons, it is important to impose the MOPRs to ensure that this competition between generators at the market persists and is not replaced by a competition for government subsidies.

28. Marc Gerken et al., "Letter to PJM Board re: Supplemental Projects," PJM Interconnection, Feb. 6, 2019. <https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/20190208-amp-letter-regarding-supplemental-projects.ashx>.

29. Antonio P. Smyth et al., "Letter to PJM Board, PJM Board of Managers," PJM Interconnection, Feb. 21, 2019. <https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/20190221-to-letter-re-transmission-replacement-process.ashx>.

30. Karl A. Racine, Brian E. Frosh and Kathleen Jennings, "Letter from the attorneys general of the District of Columbia, Delaware and Maryland to the CEO Search Committee of PJM," PJM Interconnection, July 5, 2019. <https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/20190711-attorneys-general-dc-md-de-letter-re-pjm-president-and-ceo-search.ashx?la=en>. Each of these jurisdictions has a separate office to represent consumers. In Maryland, the attorney general appoints the consumer advocate.

31. Kristen Munsch, "Letter from CAPS to the Board of PJM," PJM Interconnection, June 28, 2019. <https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/20190701-caps-letter-re-pjm-leadership-transition.ashx?la=en>.

32. John Moore et al., "Letter of 27 environmental groups, renewable advocates and developers, and consumer advocates to the Board of PJM," PJM Interconnection, July 17, 2019. <https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/20190718-nrdc-sustainable-ferc-proiect-letter-re-pjm-ceo-search.ashx?la=en>.

33. Sarah Adair and Franz Litz, "Understanding the Interaction between Regional Electricity Markets and State Policies," *Nicholas Institute Primer*, November 2017. https://nicholasinstitute.duke.edu/sites/default/files/publications/ni_primer_17_01_0.pdf.

34. For a summary of this position as it relates to PJM, see Michael Goggin and Rob Gramlich, "Consumer Impacts of FERC Interference with State Policies: An Analysis of the PJM Region," Grid Strategies, August 2019. <https://gridprogress.files.wordpress.com/2019/08/consumer-impacts-of-ferc-interference-with-state-policies-an-analysis-of-the-pjm-region.pdf>.

35. "Comments of the Ohio Consumers' Counsel to Protect Electric Consumers from Paying Subsidies in PJM Markets," *PJM Interconnection*, Docket Nos. EL18-178 et. al., p. 5.

RTOs: Still Better Than the Alternative—As is clear by now, respondents to the survey voiced dissatisfaction about aspects of the RTO governance process. However, all large consumers surveyed also favored RTOs over doing business in places where there is no RTO and where an incumbent utility is the monopoly supplier of energy services. They cited more flexible, if more complex, options available to them in RTOs and the easier job of integrating renewables that many large consumers are obtaining through power purchase agreements. One corporation that has ambitious clean-energy goals and demand in numerous regions stated that it had only developed renewable projects in RTOs.

Meanwhile, each large consumer that expressed an opinion on its preferred RTO voiced support for the one centralized transmission and wholesale market operator that is not jurisdictional to FERC: the Electric Reliability Council of Texas (ERCOT). It is “the only RTO that harmonizes reliability policy with market efficiency” and is “overwhelmingly preferred by industrials.” One large company that is active in ERCOT cited a preference for ERCOT’s board—which is not fully independent but instead includes both independent directors as well as stakeholder representatives—as being more representative of consumer interests than the FERC-jurisdictional RTOs. Respondents also noted favorably that ERCOT received clear, direct and consistent regulation by the Public Utilities Commission of Texas.

Is There a Better Way to Make Decisions?—As discussed above, the manner in which RTOs are organized for decision-making is important—and all the more so if one conceives RTOs as quangos that exercise government-like powers while wearing the veneer of private business. In this regard, one can analyze two recent examples of governance within RTOs: One can be said to be “top-down,” with the RTO’s management and staff making a proposal and receiving reactions from stakeholders, while the other can be said to be “bottom-up,” where committees within the RTO staffed by employees of stakeholders do the bulk of the work. As we shall see, each of these examples have problems.

The first method of governance—the top-down approach—can be found within SPP. SPP prides itself on a mission of “reliability through relationships” with its members.³⁶ When a technical problem is identified or an improvement in the market is suggested, the matter is vested in a committee of the RTO, which is populated mostly by employees of SPP’s “members.” They do the work of developing any new or modified feature of the RTO’s market design that might be useful in addressing the challenge or seizing the new opportunity. Their proposal then filters to an overarching members committee, whose representatives take a vote on any proposal.

36. Southwest Power Pool, “About Us.” <https://www.spp.org/about-us/>.

While SPP’s board meets the financial conflict-of-interest provisions for independence, its decisions are made in a somewhat peculiar way. During its board meetings and before the board members are permitted to vote, SPP “solicit[s] and consider[s] a straw vote” of the members committee, which is dominated by the owners of power-generation and transmission assets.³⁷ Indeed, rather than separately noticing its board meeting, SPP jointly notices this meeting in a document titled “Board of Directors/Members Committee Meeting.”³⁸ Meanwhile, SPP’s board members are elected by its members in an annual meeting to three-year terms.³⁹ As a practical matter, the members of SPP rule the RTO—even if the SPP board may, as a matter of legal theory, overrule them.

So who are SPP’s members? Most of them are utilities. SPP has had a seat for large consumers on its members committee since 2003, but it went vacant for 15 years. (It was only when Walmart joined SPP as a member in 2018 that the seat was filled.)⁴⁰ As a result, no large consumer was entitled to a vote in the process by which policy was developed and forwarded to the RTO’s board for approval. The reason for this lack of membership is twofold. First, as discussed above, SPP has been for many years constituted primarily of vertically integrated monopolies; to the degree these utilities’ customers had objections to their business, including their participation and advocacy within the RTO, these customers could bring such complaints to state regulators.

Second, SPP imposed a remarkably high bar on all those wishing to become members. The RTO not only requires members to pay a \$6,000-per-year membership fee, it also exacts an “exit fee” on the organizations that cease their membership. This exit fee was approximately \$620,000 at a minimum, as calculated for a member that had no energy usage (such as a public interest advocacy organization).⁴¹ The American Wind Energy Association complained against the RTO for its exit fee in a Section 206 filing. In April 2019, FERC found that this rate was unjust and unreasonable but left it up to the RTO to propose a new exit fee.⁴² SPP has since voted to propose a flat \$100,000 exit fee for any member plus

37. Southwest Power Pool, “Governing Documents Tariff,” p. 42. <https://www.spp.org/documents/13272/current%20bylaws%20and%20membership%20agreement%20tariff.pdf>.

38. See, e.g., Southwest Power Pool, “Southwest Power Pool, Inc. Board/Members Committee Agenda,” Oct. 30, 2018. https://www.spp.org/documents/58873/annual%20mtg%20mbrs%20bod-mc%20materials%2020181030_pg.pdf.

39. Southwest Power Pool, “Governing Documents Tariff,” pp. 47–48. <https://www.spp.org/documents/13272/current%20bylaws%20and%20membership%20agreement%20tariff.pdf>.

40. Southwest Power Pool, “Southwest Power Pool, Inc. Board of Directors/Members Committee Meeting – Minutes,” July 31, 2018, beginning on p. 116. https://www.spp.org/documents/58873/annual%20mtg%20mbrs%20bod-mc%20materials%2020181030_pg.pdf.

41. Order on Complaint, *American Wind Energy Association v. Southwest Power Pool, Inc.*, Docket No. EL19-11-000, April 18, 2019, pp. 52–53. <https://www.ferc.gov/whats-new/comm-meet/2019/041819/E-1.pdf>.

42. *Ibid.*

an adder commensurate with the exiting member's retail energy demands.⁴³ The dispute remains pending at FERC. SPP includes some of the most wind-rich areas in the United States. As corporate buyers enter into contracts with independent power producers to be off-takers of this renewable energy, the interconnection rules, market integration and economic value of that wind energy is tied up, to a significant degree, in the design of the SPP market. It therefore seems important that even markets such as these, which have historically been dominated by incumbents, be open to consumers.

The SPP example may lead a reasonable observer to question whether an apparently "bottom-up" decision-making process really is worthy of the democratic associations of that term's popular use. Instead, SPP's decision-making structure is, for better or worse, clearly guided by entities that have a financial interest in the RTO's outcomes.

An alternative to this is rule by the RTO's management, in the hope that its passion for a mission of promoting economic efficiency and social welfare will result in high-quality decision-making with ample opportunities for stakeholder input. This second, top-down method of RTO governance is apparent at PJM. Although PJM does have committees that develop proposals, at times, the RTO has not followed their lead. Over the last several years, PJM became convinced that the prices for electricity surfacing through its energy auctions were not representative of the scarce or stressed conditions that sometimes appeared. This led to the RTO's consideration of "reserve pricing" reforms—ways to define, quantify the need for, and ultimately price the reliability products one needs to ensure an adequate supply of energy in the system's real-time operations. Dissatisfied with stakeholder progress on the topic, the PJM board reiterated the importance of the work and demanded either "timely consensus" from stakeholders or, in the absence of such consensus, stated that the RTO would file a Section 206 complaint against itself to revise the market rules.⁴⁴ At about the same time as the RTO board issued this instruction, the PJM management released a white paper outlining a number of "proposed enhancements."⁴⁵

One consumer notes that by first releasing a proposal—even one without all the details included—RTO management in effect rendered the stakeholder-based decision-making pro-

cess ineffective. PJM's proposal was perceived as positive to certain interests within the market, and those interests could not reasonably be expected to bargain against or negotiate away elements of a proposal that favored them in the stakeholder process. In the words of one consumer advocate, "PJM has a tendency to bring a solution to the table, not a problem." Even when it issues a "problem statement," the euphemism is a thin veil for the RTO's intended solution. Such an act may render moot the stakeholder process or turn it into a proceeding that almost resembles a kind of litigation.

Additionally, PJM has had a long and acrimonious history with its independent market monitor. But rather than bringing the monitor into the discussions about problems and solutions in the first place, the RTO has sometimes treated the monitor not as a potential collaborator but an inevitable litigator.

Ideally, an RTO that leads with a kind of imperative for market efficiency—a rule by economists, so to speak—might be a least-worst option given the RTO's core mandate to find the least-cost reliable solution to a given region's supply of electricity. But given that RTOs are at least perceived as making political trade-offs—and not resolutely vindicating economic first principles—a top-down approach appears to have just as many problems as a bottom-up approach.

LOOKING TOWARD SOLUTIONS

Fair Representation versus Independence

RTOs are a voluntary-membership organization where the principal decision to join or leave the RTO is in the hands of financially interested asset owners—specifically, the transmission-owning public utilities. When transmission owners also own generation through affiliates, this creates an especially powerful lobby. If an RTO board understands, as most boards do, that the directors owe a fiduciary duty to the organization on whose board they sit, they and management will likely view a paramount element of their job as perpetuating the RTO's existence and growing its membership, at the possible expense of the most economically efficient design of the RTO's market. To put this in comparison, it would be a blow to NASDAQ if Microsoft decided instead to list its stock on the New York Stock Exchange, but it would not fundamentally compromise the business model of the former or reshape the latter. In contrast, when a crucial transmission owner decides to join or leave an RTO, it fundamentally reshapes the network that constitutes the market upon which the trade of electricity occurs. The question for such a construct is less whether the RTO is independent than whether it can really ever truly be independent when the monopolies that constitute the RTO's backbone retain such a substantial measure of control.

43. Southwest Power Pool, "Southwest Power Pool board approves policy recommendations to enhance reliability, planning and market functions," July 30, 2019. <https://www.spp.org/newsroom/press-releases/southwest-power-pool-board-approves-policy-recommendations-to-enhance-reliability-planning-and-market-functions/>.

44. "Board Directs PJM, Stakeholders on Reserve Pricing," *PJM Inside Lines*, Dec. 6, 2018. <http://insidelines.pjm.com/board-directs-pjm-stakeholders-on-reserve-pricing/>.

45. PJM Interconnection, "Price Formation: Energy Price Formation Senior Task Force," Dec. 14, 2018. <https://www.pjm.com/-/media/committees-groups/task-forces/epfstf/20181214/20181214-item-04-price-formation-paper.ashx>.

“Independence” has been defined by FERC as having an ultimate decision-making body within an RTO that is not beholden to “market participants.”⁴⁶ Meeting that standard as a matter of black-letter corporate bylaws belies a reality that is quite different. As discussed above, the RTO whose management and board have perhaps the greatest latitude per their bylaws—i.e., the most independence—is arguably SPP. But that obscures the practical reality, which is that SPP is largely controlled by its members—the market participants.

Does “Independence” Protect Consumers?—A discussion of “independence,” as it is meant by FERC, may too readily elevate form over substance. Maybe instead, the discussion of independence should occur with an eye toward “fair representation” between market participants and other stakeholders. Interestingly, large consumers expressed a significant degree of satisfaction with ERCOT. Paradoxically, Texas’ system operator may be successful in part because its governing board is not constituted exclusively of independent directors. Instead, its board includes directors who are employees of entities that have a financial interest in ERCOT’s operations—including consumers of various stripes, such as residential and industrial consumers and intermediaries such as municipal utility representatives and electricity retailers.⁴⁷

FERC warned of the potential isolation of RTO boards when it first ruled on the elements that constitute a FERC-approvable RTO: “Where there is a non-stakeholder board, we believe that it is important that this board not become isolated. Both formal and informal mechanisms must exist to ensure that stakeholders can convey their concerns to the non-stakeholder board.”⁴⁸ Although each of the FERC-jurisdictional RTOs now has a board that is exclusively composed of independent directors, FERC never ruled that this was a hard and fast requirement. Instead, it suggested it would bless board structures as “independent” so long as “no one class would be allowed to veto a decision reached by the rest of the board and that no two classes could force through a decision that is opposed by the rest of the board.”⁴⁹ A decade after FERC ruled as such in Order 2000, it reiterated its conclusion through its Order 719 in 2008, which was the last

time FERC has comprehensively considered the subject.⁵⁰ In a situation where the board’s independence is a veil for an RTO that is in fact controlled by market participants, it is worthy to consider whether a board exclusively composed of independent directors is really a meaningful protection.

Consumer Representation on “Independent” Boards—

Consumers arguably could also obtain representation on RTO boards even if the markets continue to live with an “independent director” board. That is because FERC’s definition of what constitutes independence has substantial flexibility. When it first developed requirements for RTOs, FERC had proposed that a “market participant”—which an independent director must not work for or own shares of—was “any entity that buys or sells electric energy in the RTO’s region or in any neighboring region that might also be affected by the RTO’s actions”⁵¹ But the agency retreated from this expansive definition when it adopted a final rule. The Code of Federal Regulations now defines “market participant” for the purposes of RTO regulation as:

Any entity that, either directly or through an affiliate, sells or brokers electric energy, or provides transmission or ancillary services to the Regional Transmission Organization, unless the Commission finds that the entity does not have economic or commercial interests that would be significantly affected by the Regional Transmission Organization’s actions or decisions; and

Any other entity that the Commission finds has economic or commercial interests that would be significantly affected by the Regional Transmission Organization’s actions or decisions.⁵²

Many of the consumers this paper surveyed would not meet the definition of “market participant” under 18 C.F.R. § 35.34(b)(2)(i) because they are consumers who receive supply from competitive suppliers or incumbent utilities that broker it within the RTOs. In other words, because the RTOs are a wholesale market, retail consumers are not “market participants.” This means that employees of these consumers could be represented directly on the board even in a board structure that is composed exclusively of independent direc-

46. Federal Energy Regulatory Commission, *Order No. 2000*, p. 230. <https://www.ferc.gov/legal/maj-ord-reg/land-docs/RM99-2A.pdf>.

47. Energy Regulatory Commission of Texas, “Board of Directors.” <http://www.ercot.com/about/governance/directors>.

48. Federal Energy Regulatory Commission, *Order No. 2000*, p. 230. <https://www.ferc.gov/legal/maj-ord-reg/land-docs/RM99-2A.pdf>.

49. *Ibid.*

50. Federal Energy Regulatory Commission, *Wholesale Competition in Regions with Organized Electric Markets*, Docket Nos. RM07-19-000, AD07-7-000, Oct. 17, 2008, p. 537. <https://www.ferc.gov/whats-new/comm-meet/2008/101608/E-1.pdf>.

In providing encouragement to a hybrid-board structure that was “independent such that no individual market participant is given undue influence over the decisions of the board,” FERC cited to its approval of the hybrid board structure it approved for the “regional entity” responsible for bulk electric system reliability in the Western Interconnection. It is noteworthy that this entity, now known as the Western Electricity Coordinating Council, has been reformed since 2008 to have a board, like the RTOs, constituted exclusively of independent directors.

51. Federal Energy Regulatory Commission, *Order No. 2000*, p. 196. <https://www.ferc.gov/legal/maj-ord-reg/land-docs/RM99-2A.pdf>.

52. 18 C.F.R. § 35.34(b)(2).

tors. The one obvious issue with this approach is that one reason for giving consumers a seat on the board is that they have a significant interest in the RTO's decision-making, but such candor might implicate the more nebulous provision in subsection (ii) of the rule. One may argue, in reply, that such an interest is de minimus in the context of the consumer's overall economic life. In short, there is a plausible legal case to be made that it would be acceptable to have consumers directly represented on an RTO board composed entirely of "independent" directors, even while it clearly would not be appropriate to have an employee of a utility company serve as a director.

Consumer Representation in the Stakeholder Process—

Finally, fair representation for consumers should be achieved in the stakeholder-based decision-making process in RTOs. Putting aside the difficulty of even achieving a seat at the table in SPP, the more practical difficulty in most RTOs is fielding a sufficient number of resources to participate meaningfully within the process. A decade ago, when the Government Accountability Office last tabulated the stakeholder meetings that RTOs held in a sample year, they ranged from 57 for CAISO to a whopping 611 for MISO.⁵³ Even assuming consumers would not be interested in a majority of them, these are bewildering numbers.

There must be a way to ensure that the representation of consumer interests is not defeated by the diffuse nature of RTO workloads. A "principal members committee" provides a lens for that representation, as government consumer advocates have suggested through their association, NASUCA.⁵⁴ In order to avoid the hazards of either the top-down or bottom-up decision-making models discussed above, this committee might be empowered to deliberate and provide policy direction to subcommittees and technical work groups. This direction would then cabin the work of these lower committees, which are likely to be dominated by utility employees, so that these interests did not devise something that would be unacceptable to consumer interests.

At the moment, most RTOs have in place a "principal members committee"—for example, MISO's advisory committee—where consumers are represented.⁵⁵ Similarly, if one looks to PJM's organizational chart, the analogous members committee sits above many committees where stakeholder-

related work occurs.⁵⁶ But open communication with the RTO's board takes place through a separate liaison committee, which holds meetings immediately before PJM's board meetings and which provides each sector of membership the opportunity to speak to PJM's board members.⁵⁷ This seems to attenuate to some degree the purpose of a principal members committee, although it is an attempt to promote clear communication between PJM's members and its board, which is discussed next.

Transparency

Certain RTOs do not conduct themselves in a transparent manner. PJM's board meets privately; important committee meetings are open only to members.⁵⁸ Moreover, states and the independent market monitor are not "members" of PJM. Even certain basic documents, such as a roster of those serving on the members committee, are not readily available to the public—even while other RTOs publish them online as a matter of course.⁵⁹

To be sure, there is a balancing act between the candor that derives from the ability to communicate matters in private and the transparency that derives from a fully public process. But for a quango like an RTO, which exercises powers that resemble those of government, it is unusual not to apply conventions of government to their meetings process. (Realizing this, one RTO, CAISO, directly borrowed language from state open meetings laws to apply to its board meetings.⁶⁰)

Simply put, members of the public—both financially interested parties and other stakeholders alike—should have a right to understand clearly what information the RTO's decision-makers are relying on and the reasons they have for making important decisions. Either holding open, deliberative meetings can accomplish this, or the RTO may accomplish it by documenting its reasoning. These hallmarks of good decision-making on matters of intense public concern echo the familiar requirement to which utility commissions are subject, which is to make decisions that are not "arbitrary

53. Report to the U.S. Senate Committee on Homeland Security and Governmental Affairs, *Electricity Restructuring: FERC could take additional steps to analyze Regional Transmission Organizations' benefit and performance*, Government Accountability Office, September 2008, p. 34. <https://www.gao.gov/new.items/d08987.pdf>.

54. National Association of State Utility Consumer Advocates, "Model Corporate Governance for Regional Transmission Organizations and Independent System Operators," 2009, p. 16.

55. Advisory Committee, "Mission Statement," Midcontinent Independent System Operator. <https://www.misoenergy.org/stakeholder-engagement/committees/advisory-committee/>.

56. PJM Interconnection, "PJM Stakeholder Process Groups Diagram." <https://www.pjm.com/-/media/committees-groups/committee-structure-diagram.ashx>.

57. PJM Interconnection, "Liaison Committee." <https://www.pjm.com/committees-and-groups/committees/lc.aspx>.

58. Last year, a misunderstanding arose about who was allowed to attend the meetings of the liaison committee, but the members committee has "enforced" a policy where only members and not others, including state regulators or the market monitor, are allowed to attend the committee's meetings with the PJM board. Michael R. Borgatti, "Letter to Andy Ott Re: Members Committee Action Regarding Liaison Committee Charter," PJM Interconnection, Oct. 1, 2018. <https://www.pjm.com/-/media/committees-groups/committees/lc/postings/letter-regarding-enforcement-of-lc-charter-attendance-provisions.ashx?la=en>.

59. Midcontinent Independent System Operator, "2019 MISO Advisory Committee." <https://cdn.misoenergy.org/2019%20AC%20Members-Alternates315720.pdf>.

60. Nancy Saracino, "Memorandum re: Open Meetings Policy," California Independent Operator Corporation, Sept. 7, 2012, p. 3. http://www.caiso.com/Documents/Decision_on_CorporatePolicies-Memo-Sep2012.pdf.

and capricious.”⁶¹ A large body of law designed to ensure that regulators provide a reasoned basis for their decisions has developed. “To require an agency explain itself,” therefore, is “one way to protect against irrational, unchecked agency action.”⁶² While government regulators are expected to go through a more formal administrative process, this principle of regulatory decision-making is easily translatable to the RTO decision-making process at the board level. The legitimacy of the RTO decision-making process relies on its decision-makers articulating their reasons for taking (or not taking) a certain action in some kind of a public forum.

Another way of facilitating this public exposure of the decision-making process is by having RTOs engage in a “hot topics” forum, as MISO does. Here, MISO’s board of directors solicits through a conceptual document the written views of stakeholders on an important question of market design.⁶³ This provides an avenue for the technology and policy changes that are poised to affect the sector to be discussed in a way that cuts across numerous, smaller market-design issues. As with the stakeholder process structure, where a principal advisory committee allows for representation of consumer interests, this more high-level stakeholder process allows the board and stakeholders to communicate with each other on a policy level. PJM’s liaison committee is similarly designed to promote discussion on such topics.

Oversight

FERC has wide, but by no means unlimited, latitude to shape how RTOs make decisions—or, for that matter, to assume the decision-making responsibility on important topics itself. As discussed in the earlier sections of this paper, FERC has exclusive jurisdiction to approve or reject the rates that utilities may charge for a variety of important services. FERC also exercises a significant measure of regulatory oversight over utility practices, but only so long as those practices affect the rates that utilities assess against their direct customers or ultimate consumers of electricity. FERC may also conduct rulemakings that set broad parameters for the design of electricity markets. However, FERC’s authority specifically relating to RTO decision-making practices remains open for contention. That is because of a lingering and unresolved dividing line between the RTO practices that affect the rates they charge and those that do not.

FERC has fought—and lost—a major battle over its jurisdiction on significant RTO governance questions. In 2004, the

61. See, e.g., Louis J. Virelli III, “Deconstructing Arbitrary and Capricious Review,” *North Carolina Law Review* 92:3 (2014).

62. *Ibid.*, p. 743.

63. For a recent example, see the September 2019 solicitation: Midcontinent Independent System Operator, “Market & grid strategy in an era of transformative industry change.” <https://cdn.misoenergy.org/20190918%20AC%20Market%20and%20Grid%20Strategy%20Hot%20Topic%20Overview%20and%20Questions363506.pdf>.

Circuit Court of Appeals for the District of Columbia handed FERC a loss when it overturned the agency’s attempt to void the manner in which CAISO’s board of directors was selected. FERC reasoned that since the board was appointed by the governor of California, this process violated FERC’s independence requirements because the state itself was a major market participant in the electricity markets. FERC cited to its statutory authority to regulate practices affecting rates as the legal basis for its authority to countermand the California statute. California agencies challenged the decision and the court agreed, finding that FERC’s rationale contained no reasonable limiting principle. If FERC was right about its legal authority, a unanimous panel found, FERC could control the “choice of CEO, COO, and the method of contracting for services, labor, office space, or whatever one might imagine.”⁶⁴ This would be the case not just for RTOs, but for all other public utilities, because FERC relies on the same legal authority under the FPA to regulate both RTOs and individual utilities.⁶⁵ In the same ruling, however, the court observed that since what constituted an RTO was up to FERC, the agency could find that certain business models were not compliant with FERC’s otherwise legitimate requirements that public utilities charge rates in a manner that provide third parties nondiscriminatory access to their networks.⁶⁶ FERC did not pursue this option, possibly fearing that too heavy a hand could unravel the RTO altogether.

After its loss in *CAISO v. FERC*, the agency has become more cautious—and more explanatory—about how the RTO practices over which it assumes jurisdiction are related to the rates that RTOs charge. One may view FERC’s authority to have expanded significantly when the U.S. Supreme Court ruled in favor of the agency on a challenge to a rulemaking it made related to “demand response”—where consumers participate in the RTO marketplace by making an offer not to buy energy in a particular interval when energy is especially valuable.⁶⁷ The ruling established that the agency, if it finds that a practice “directly affects” rates, may exercise its jurisdiction under the FPA.

When applied to the RTO decision-making process, this

64. *California Independent System Operator v. Federal Energy Regulatory Commission*, 372 F.3d 395, 403 (D.C. Cir. June 22, 2004). <https://caselaw.findlaw.com/us-dc-circuit/1344700.html>.

65. *Ibid.* As the court found, “If FERC can today remove, replace, and reform a state-created ISO, it can tomorrow without any further precedent or any further claim of expanded power, remove and replace the board of directors of, for example, Duke Energy, Reliant Resources, Inc., or Dynegy Power Marketing, Inc.” *Ibid.*

66. *Ibid.* Rejecting a decision that FERC relied upon to justify its legal authority, the D.C. Circuit noted, “In *Central Iowa*, FERC conditioned the approval of the power pool on removal of the membership criteria, rather than ordering the power pool to change those criteria directly. Here FERC has taken a much more extreme step. Rather than merely threatening to revoke CAISO’s [RTO] status if it did not remove its board, similar to what it did in *Central Iowa*, FERC has instead decided to order CAISO directly to change its board.” *Ibid.*

67. *Federal Energy Regulatory Commission v. Electric Power Supply Association*, 136 S.Ct. 760, 774 (2016).

principle has produced mixed results at FERC's hands. As discussed above, FERC rejected a major provision that limited who becomes a member of the SPP but did so on the basis that the RTO restricted membership by charging an exorbitant fee in connection with membership—which is to say, a rate. Such a rate is clearly within FERC's jurisdiction. Meanwhile, FERC found that journalists employed by *RTO Insider*, a widely read trade publication, did not have a right to attend the meetings of the primary stakeholder committee that feeds into the work of ISO-New England.⁶⁸ The publication then sought to become a member of the committee. When the committee, defensively, proposed membership reforms that would have restricted the publication from membership, FERC rejected those restrictions, reiterating that “the stakeholder process within an RTO/ISO is a practice that affects the setting of rates, terms, and conditions of jurisdictional services of the type that the Supreme Court has held falls within the Commission's jurisdiction.”⁶⁹

Given the Supreme Court's recent jurisprudence, it seems plausible that FERC could assert authority over many RTO decision-making practices, since one can make a reasoned case that nearly any particular practice affects rates. The question is not so much one of law as it is one of regulatory discretion—specifically, how much control does FERC wish to exercise over RTO decision-making processes, and to what end?

Some—mostly conservative legal scholars—have questioned the “administrative state” because it lacks political accountability and exercises a wide delegation of political power that Congress has either improvidently given to administrative agencies or that these agencies have arrogated unto themselves.⁷⁰ It may be tempting to adopt this critique, and thus view deference by FERC to RTOs' and other public utilities' Section 205 filings as a hallmark of an appropriately humble approach to the exercise of government power. However, such a philosophy misses the mark when applied to FERC. That is because the well-meaning critique of the administrative state, were FERC to adopt it for the purposes of abstaining from RTO oversight, would not erase the inappropriate policymaking function within current utility regulation; it merely would outsource it to RTOs. In other words, the same

critique of the administrative state can be aimed at—and even amplified with respect to—the RTOs.

That is because, as described above, RTOs are quangos. If FERC leaves a vacuum of policy, RTOs can and will fill it—but they would do so in a manner that is even less politically accountable than it would be were FERC to exercise its authority. For example, if FERC does not lead in reconciling state policies for subsidies to an intended “unsubsidized” competition in RTOs, the RTOs could do it for FERC—and in the process resolve what really is a question for those who occupy a place in the legitimate political structure. When an RTO makes a Section 205 filing on issues that implicate such questions, it is acting more like a policymaker than a business; it is using its central position in the region's power infrastructure to propose a redistribution of wealth from certain captive parties to other captive parties. If FERC views these proposals deferentially, in the name of the modest exercise of government power, its paradoxical result is to promote a form of government that is even less accountable than the current form.

Therefore, in exercising its oversight of RTOs, FERC may take a number of actions. These may be broadly categorized into two channels:

- Reforming RTOs' decision-making processes, or
- Reasserting leadership over topics that have either been expressly or tacitly deferred to those RTO decision-making processes.

FERC does not need to swim in either of these lanes exclusively, but they represent two very different approaches to regulation. At some fundamental level, the agency needs to choose, in the words of the regulatory attorney Scott Hempling, whether it wants to “preside or lead.”⁷¹ It is worth exploring approaches in which FERC might reshape the RTO decision-making process as well as approaches where FERC might repossess this decision-making process.

The informal consumer assessment conducted in the course of researching this paper suggests that many large consumers regard as superior the only organized wholesale market for electricity that is not FERC-jurisdictional: Texas' ERCOT. In a similar vein, consumer advocates do not believe that consumer interests have a central role in RTOs' decision-making. They appear to believe that state utility commissions remain a better defender of consumer interests than the federal regulator. These takeaways together should give FERC a reason for at least some measure of introspection.

68. Specifically, FERC found that “reporting on NEPOOL meetings lacks a direct effect on filings.” Order Dismissing Complaint, *RTO Insider v. New England Power Pool Participants Committee*, Docket No. EL18-196-000, April 10, 2019, p. 17. <https://www.ferc.gov/CalendarFiles/20190410160719-EL18-196-000.pdf>.

69. Order Rejecting Revisions, *New England Power Pool Participants Committee*, Docket No. ER18-2208-001, Jan. 29, 2019, p. 19. <https://www.ferc.gov/CalendarFiles/20190129153631-ER18-2208-001.pdf>.

70. For one of the best-articulated critiques along these lines, see Joseph Postell, *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government* (University of Missouri Press, 2017). See also the review of this work by Ted Hirt, “Can Americans Reconcile Our Constitutional System with an Expansive Administrative State?” *Federalist Society Review* 19 (Sept. 24, 2018). <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/yubrAWNhvszPEHSpORfH04dQWQUd-PXaNERKkLY3m.pdf>.

71. Scott Hempling, *Preside or Lead: The Attributes and Actions of Effective Regulators* (Scott Hempling Attorney at Law LLC, 2013), 2nd edition. <https://www.scotthempinglaw.com/preside-or-lead>.

Redefining RTO Governance Standards—FERC issued Order 2000 as the new millennium was about to dawn, and it iterated upon Order 2000 in the more modest Order 719, issued in 2008. These orders defined the minimum acceptable standards for RTOs. But even since 2008, the role of RTOs has changed dramatically, as described early in this paper. As RTOs enter their third decade as quangos that are only growing in importance to the power sector, it is probably appropriate, at a minimum for the sake of a kind of regulatory hygiene, to consider through either technical conferences or a notice of inquiry what a third iteration would look like.

It is not clear that all RTOs have problems related to their governance. This would be one drawback of a plenary FERC order, like Order 2000 and Order 719. FERC could instead target RTOs about which it hears the most informal complaints and either send a regulatory signal for parties to file a Section 206 complaint or initiate one itself to remedy deficiencies within particular RTOs' decision-making process.

Empowering the Independent Market Monitors (and Other Economists)—RTOs are presumed to promote economic efficiency in their role as independent operators of the wholesale electricity marketplace and the transmission assets that constitute the physical network on which that marketplace exists. In this sense, the high-level role of an RTO is similar to that of FERC. Yet for the reasons discussed in this paper, it is more appropriate to assume cautiously that RTOs may be too beholden to their asset-owning members to always make economic efficiency the paramount consideration of their marketplaces. In this light, it would seem important to ensure that there be someone with a central role in the RTO decision-making process who does have that consideration in mind. The obvious actors to fill this role are the independent market monitors. FERC has wisely upheld, in PJM, the monitor's ability to file complaints and intervene at FERC.⁷² (Electing a strange battle to fight, the RTO had sought to silence the PJM independent market monitor in the context of these proceedings.)

FERC can vindicate its own mission, and promote confidence in the integrity of the market's core purposes, when it identifies and prioritizes actors within or nearby the RTO decision-making process that generate data-driven economic analysis of the RTO's existing and proposed market designs. Such analysis should be at the core of decision-making on RTO policy. It can be assumed that each "stakeholder" is going to look out for its own interests. It can likewise be assumed that board members and regulators who are conceptually independent may look at their roles as being about "balancing" the interests of these stakeholders. But balancing interests

is not the same as making decisions on an economically rigorous basis. FERC's sister agency, the Federal Communications Commission, has established under the leadership of Chairman Ajit Pai an Office of Economics and Analytics.⁷³ FERC has significant talents in this field already, although many of them are tasked with enforcement and not with market-design policy as such. FERC should consider how it might further empower the independent market monitors to be the agency's deputies in a similar manner. Because the monitors each have their own particular views about what constitutes an economically efficient market model, it may also be wise to borrow a fixture of the CAISO marketplace. Its market surveillance committee—a three-member body of professional economists—renders written opinions as RTO proposals are developed.⁷⁴

Introducing Due Process to RTOs' Decision-Making—Regulatory agencies may be criticized as being part of an unaccountable administrative state, but at least their exercise of power is subject to the procedural strictures of law. Statutes like the Administrative Procedures Act and the National Environmental Policy Act provide avenues for affected parties to obtain relief if the way in which the agency considered a matter or came to a decision was insufficient. While these laws have generated a stream of litigation that sometimes has not served the public interest by delaying actions that are in the public interest, it might be wise for FERC to borrow the best parts of them and consider their application to RTOs.

At least two important concepts from these laws might usefully be adapted to the RTO decision-making process:

- A consideration of alternatives to the RTO's Section 205 proposal. This consideration might be conducted through the analysis of alternative scenarios suggested by RTO stakeholders to see how contingent the RTO's proposal is on certain assumptions about market conditions, or to test alternative market designs against the assumed market conditions.
- The right of parties to a documented decision-making process that shows a full and detailed explanation of the reasoning of the decision-makers.⁷⁵

72. Order Conditionally Accepting Compliance Filings and Denying Motion for Clarification, *PJM Interconnection, LLC*, Docket Nos. ER16-372-003, ER16-372-004, ER16-372-005, April 29, 2019. <https://www.ferc.gov/CalendarFiles/20190429160158-ER16-372-003.pdf>.

73. Office of Media Relations, "FCC Opens Office of Economics and Analytics," Federal Communications Commission, Dec. 11, 2018. <https://docs.fcc.gov/public/attachments/DOC-355488A1.pdf>.

74. California Independent System Operator, "Market Surveillance Committee," last updated Aug. 21, 2019. <http://www.aiso.com/informed/Pages/BoardCommittees/MarketSurveillanceCommittee/Default.aspx>.

75. At FERC, RTOs already carry the "burden of proof" to support their Section 205 proposals with a sufficient amount of information to demonstrate them to be "just and reasonable." Here, the suggestion is for RTOs to go a step further and document the process they followed, the alternatives they considered, and the evidence that suggests their proposed approach is superior to others.

Repossessing the Stakeholder Process: Federal Advisory Committees

—The Federal Advisory Committee Act of 1972 (FACA) offers agencies the ability to seat stakeholder committees to provide government decision-makers the views of industry in a transparent and collaborative manner.⁷⁶ Most regulatory agencies make use of advisory committees established under the FACA. The Commodity Futures Trading Commission (CFTC) has six advisory committees.⁷⁷ (This includes its Energy and Environmental Markets advisory committee, which includes consumer representatives.⁷⁸) The FCC also extensively uses FACA committees.⁷⁹ FERC does not.

Advisory committees are most purposefully employed when an agency needs advice on a complex subject, where expertise (and points of view) are dispersed widely among industry actors but where the subject clearly implicates public policy. A recent example from the FCC is the plague of unwanted robocalls that American telephone users experience on a daily basis—clearly a major public policy item. But the likely solution to this problem is technical; it requires a third-party entity that can administer a technology protocol that allows companies to authenticate and sign through digital tokens phone calls as coming from verified numbers. The FCC probably could have ordered telephone companies to come up with a solution. Instead, it decided to take on more direct oversight of the issue by referring the matter to its North American Numbering Council, a FACA advisory committee.⁸⁰ A subcommittee of the advisory committee met frequently to write an extensive report, which was sent to the FCC.⁸¹ The chairman of the FCC then accepted the advisory committee's recommendations.⁸² The robocalling issue is an instructive example because the function required to stop them is similar to that of an RTO: It has visibility into the data of, ideally, all telecommunications firms and must authenticate calls in real time.

76. The Federal Advisory Committee Act of 1972 is codified as an appendix to Title 5 of the U.S. Code. Federal Advisory Committee Act, U.S.C. Appendix 5a. <https://www.law.cornell.edu/uscode/text/5a/compiledact-92-463>.

77. United States Commodity Futures Trading Commission, "CFTC Committees." <https://www.cftc.gov/About/CFTCCommittees/index.htm>.

78. United States Commodity Futures Trading Commission, "Energy & Environmental Markets Advisory Committee." <https://www.cftc.gov/About/CFTCCommittees/EnergyEnvironmentalMarketsAdvisory/index.htm>.

79. Federal Communications Commission, "Advisory Committees of the FCC." <https://www.fcc.gov/about-fcc/advisory-committees-fcc>.

80. Kris Anne Monteith, "Letter Re: Call Authentication Trust Anchor: Selection of Governance Authority and Timely Deployment of SHAKEN/STIR," Federal Communications Commission, Dec. 7, 2017. http://nanc-chair.org/docs/mtg_docs/Dec17_NANC_Referral_Call_Authentication.pdf. In the interest of full disclosure, the author chaired this advisory committee during the relevant period.

81. Call Authentication Trust Anchor Working Group, "Report on Selection of Governance Authority and Timely Deployment of SHAKEN/STIR," North American Numbering Council. <https://docs.fcc.gov/public/attachments/DOC-350542A1.pdf>.

82. Office of Media Relations, "Chairman Pai Welcomes Call Authentication Recommendations from the North American Numbering Council," Federal Communications Commission, May 14, 2018. http://nanc-chair.org/docs/mtg_docs/May18_FCC_Chairman_Welcomes_CATA_Recommendations.pdf.

FACA advisory committees can work differently in the context of each agency. At the FCC, the chairman largely controls their charters, membership and the referrals they receive. At the CFTC, different commissioners sponsor particular advisory committees. Commonly, however, the agency scopes the problem the advisory committee will address, allows for a discussion of rival points of view and, if a regulatory action is intended relative to the topic, directs that a report of the advisory committee be prepared, which the regulatory agency can act upon. From a transparency and "good government" perspective, these advisory committees have the benefit of being required to comply with the requirements of FACA, which emphasize transparent meetings that leave a documentary trail.

Were FERC to use an advisory committee to solve certain core issues within one or more RTOs, it would have the effect of FERC's repossession from RTOs a policymaking function that has been alienated from the agency over time. It would also give FERC more direct control over the framing of the question and would allow FERC to set clear expectations that a consensus emerge—one that has been elusive when RTOs themselves have tried to cajole stakeholders into a common position. It provides FERC an avenue to be a leader but without pre-ordaining outcomes, and can be considered a happy medium between an appropriately modest role for regulation and a system of government that demands accountability in policymaking.

A Federal-State Joint Board—FPA provides for joint decision-making between FERC and PUCs.⁸³ For certain questions in RTO policy—which are driven by how the RTO market design should respond to or be designed for the purpose of accommodating state policy enactments—this method of decision-making may provide a potential off-ramp to the current state of confusion and discord. This seemingly innovative provision of law has been on the books for about a century. But FERC has seldom used it, and its only use in recent times has been when Congress required FERC to do so.⁸⁴ Nevertheless, FERC already has a robust set of rules in place to govern how state joint boards would work.⁸⁵

FERC's reluctance to seat "joint boards" composed of FERC commissioners and state utility regulators almost surely has something to do with the agency's desire to avoid losing control of its process. This concern in the present context is misplaced, however, in light of FERC's indecision on major questions of RTO policy, which has effectively caused it to defer many important questions to the RTOs themselves. It

83. 16 U.S.C. § 824.

84. Federal Energy Regulatory Commission, *Order Convening Joint Boards Pursuant to Section 223 of the Federal Power Act*, Docket No. AD05-13-000, Sept. 30, 2005. <https://www.ferc.gov/industries/electric/indus-act/joint-boards.asp>.

85. 18 C.F.R. § 383.1301 et. seq.

would evince more leadership on the part of FERC and go beyond the occasional lip service to “cooperative federalism” were FERC to bring state policymakers within the FPA tent to resolve certain policy questions that have arisen out of conflicts between state laws and RTO policy. If it wished to do so, FERC could convene in a joint board with states to understand how its jurisdictional markets can be reconciled to the policies of states—an undertaking on which a growing number of states themselves are asking RTOs to show leadership.⁸⁶

In any case, concerns about a proceeding resulting in a loss of control by FERC are probably unfounded. The agency has enacted rules to ensure that such a proceeding does not go off the rails. It is in the first instance up to FERC to “issue an order referring *the particular matter*” to a joint board and to define the “force and effect” of a potential action of a joint board.⁸⁷ In other words, while FERC would have to share decision-making authority over a question, it would define that question and the potential remedies in advance. It is possible that a joint board would not reach a happy and successful conclusion, but in that case, FERC retains its exclusive jurisdiction and could not easily be blamed for any potential recalcitrance on the part of states, were they given a seat at the table.

It is also worth noting that FERC’s historical unwillingness to rely on this joint decision-making is once more a contrast to FERC’s sister agency, the FCC. Historically, the FCC has made wide use of its “joint boards.”⁸⁸ While the major questions of telecommunications policy are now mostly federalized, and thus some of the FCC’s joint boards are practically defunct, the same clearly is not true of electricity policy, where state utility commissions and legislatures continue to exercise wide control and where conflict between federal and state policy appears to be on the rise.

CONCLUSION

The role that RTOs play in the U.S. energy economy will continue to evolve and be a matter of fierce debate. There is no uniform view of RTOs’ appropriate role, even among con-

sumers themselves. In light of the ongoing debate on what kind of decisions an RTO should be making, it is essential to seek agreement at least on how RTOs make the decisions they do make. This is the seminal reason why the foregoing discussion of RTO governance is important.

This paper has outlined why RTOs’ decision-making processes should encourage participation and demonstrate transparency. In a similar vein, we may conclude that it is even more important that the ultimate decision-makers are geared toward the core public purpose of an RTO—economic efficiency—and not subject to conflicts that lead the RTOs astray from this mission. To the degree that RTOs’ corporate identity is a matter of inevitable self-conflict, accountability and oversight matter. FERC has much work to do on this point to assess itself and the RTOs that are subject to its jurisdiction.

ABOUT THE AUTHOR

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86. “Letter to Independent System Operator-New England Re: ISO-NE 2020 Work Planning: Markets and State Laws,” New England States Committee on Electricity, July 16, 2019. http://nescoe.com/wp-content/uploads/2019/07/WorkPlan2020Request_16July2019.pdf.

87. Emphasis added. 18 C.F.R. § 383.1304.

88. The FCC still has several, and the most important is the Federal-State Joint Board on Universal Service. Wireline Competition Bureau, “Federal-state Joint Board on Universal Service,” Federal Communications Commission, updated June 5, 2019. <https://www.fcc.gov/general/federal-state-joint-board-universal-service>. Probably the most analogous to the exercise of FERC’s powers on market design and ratemaking is the Federal-State Joint Board on Jurisdictional Separations, although this board, as a practical matter, does little in the current era because the liberalization of the sector has rendered its core purposes less relevant. Wireline Competition Bureau, “Jurisdictional Separations,” Federal Communications Commission, updated Aug. 15, 2017. <https://www.fcc.gov/general/jurisdictional-separations>.