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## **Grid Governance in the Energy-Trilemma Era: Remedying the Democracy Deficit**

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# GRID GOVERNANCE IN THE ENERGY-TRILEMMA ERA: REMEDYING THE DEMOCRACY DEFICIT

*Daniel E. Walters & Andrew N. Kleit*

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## GRID GOVERNANCE IN THE ENERGY-TRILEMMA ERA: REMEDYING THE DEMOCRACY DEFICIT

Daniel E. Walters\* & Andrew N. Kleit\*\*

*Transforming the electric power grid is central to any viable scenario for addressing global climate change, but the process and politics of this transformation are complex. The desire to transform the grid creates an “energy trilemma” involving often conflicting desires for reliability, cost, and decarbonization, and at least in the short run, it is difficult to avoid making trade-offs between these different goals. It is somewhat shocking then that many crucial decisions about electric power service in the United States are made not by consumers or their utilities, nor by state public utilities commissions or federal regulators. Instead, for much of the country, those decisions are made by entities known as regional transmission organizations (RTOs). These RTOs, which straddle and blur the boundary between private and public methods of social ordering, establish and run wholesale electricity markets, coordinate dispatch, keep the grid in balance, and plan infrastructure for the grid of the future. These responsibilities put RTOs at the center of the energy trilemma—a position that sits in significant tension with their ambiguous status, incentives, and accountability.*

*To fully understand how RTOs work and the role they play in the energy transition, it is necessary to examine where they came from, what assumptions animated their creation, and, finally, how those assumptions have been undermined by the changing landscape of the energy sector. This Article aims to both explain what RTOs have become and highlight what might need to change to make them effective arbiters of the tensions at the heart of the energy trilemma. Our central argument is that RTOs emerged as institutions wedded to a peculiar model of democratic regulatory governance—corporatism—that no longer fits in the trilemma era. Corporatist governance lodges responsibility for negotiating public policy in an exclusive committee of representative stakeholders from the private sphere, and this neatly encapsulates the historical roots and contemporary practice of RTOs. However, we argue that the challenges facing the corporatist model of grid governance have become intractable, as the energy trilemma has not only raised the stakes of the trade-offs involved but has also introduced new trade-offs and new stakeholders who have no seat at the corporatist table. As a result, a democratic deficit threatens to impede efforts to navigate the energy trilemma unless reforms are implemented—specifically, reforms to make RTOs more open and responsive to the full range of stakeholders in the energy-trilemma era.*

### INTRODUCTION

The front line in the war on global climate change is the battle over the electric power grid. Experts agree that successfully limiting global warming to two degrees Celsius, as the Paris Agreement found was necessary to prevent the

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worst impacts of climate change,<sup>1</sup> would require an unprecedented transformation and expansion of electric power service. Under the most plausible scenarios for meeting targets, virtually every energy-intensive activity in modern society, from industrial operations to commercial and personal transportation, would have to be electrified.<sup>2</sup> This “electrification of everything” would not only require a doubling of current electric power generation capacity but would also require a drastic reduction of carbon-intensive means of generation in the electricity system.<sup>3</sup>

The technical challenge is clear, but the policy and politics are not. Even if one agrees that governments should take drastic action to meet the Paris Agreement targets, there are vexing questions about how, precisely, the transformation of the grid should take place.<sup>4</sup> Energy policymakers speak of an “energy trilemma” in the energy transition, where the goals of energy affordability (including equity), energy security, and energy sustainability are often in direct conflict with one another, such that trade-offs must be made.<sup>5</sup> For instance, at least at the present moment, sustainable sources of power generation cannot be the only source of power generation without seriously jeopardizing the reliability of power service.<sup>6</sup> Solving that problem through infrastructural investments, such as high-voltage transmission and energy storage, in turn puts pressure on affordability, as the costs of these investments will ultimately be shouldered by ratepayers or taxpayers.<sup>7</sup> A move in the direction of distributed renewable generation poses its own distributional questions, at least until everyone, no matter their economic means, can defect

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1. Paris Agreement to the United Nations Framework Convention on Climate Change art. 2, Dec. 12, 2015, T.I.A.S. No. 16-1104.

2. Amy Myers Jaffe, *The Electrification of Everything: What You Need to Know*, WALL ST. J., <https://www.wsj.com/articles/electrification-of-everything-11620843173> (May 15, 2021, 5:30 AM).

3. *Id.*

4. There is, in fact, a scholarly website devoted to discussions of the idea that there are inevitable trade-offs in the energy transition. *See* ENERGY TRADEOFFS, <https://www.energytradeoffs.com/> (last visited Feb. 19, 2023).

5. Athanasios Pliosis et al., *A Multicriteria Assessment Approach to the Energy Trilemma*, ENERGY J. (SPECIAL ISSUE NO. 1), 2019, at 143, 145 (defining the energy trilemma as involving trade-offs between energy equity, energy security, and energy sustainability). The World Energy Council has popularized the framework, even providing an “index” that helps policymakers assess performance on each of the three legs of the energy-trilemma stool. *See World Energy Trilemma Index*, WORLD ENERGY COUNCIL, <https://www.worldenergy.org/transition-toolkit/world-energy-trilemma-index> (last visited Feb. 11, 2023). The concept of the energy trilemma has also informed the legal literature on the energy transition. *See, e.g.*, Michael H. Dworkin et al., *Rethinking the Scale, Structure, & Scope of U.S. Energy Institutions*, DÆDALUS, Winter 2013, at 129, 130.

6. Amanda J. Harker Steele et al., *The Impact of Variable Renewable Energy Resources on Power System Reliability*, ENERGY POL’Y, Apr. 2021, at 1, 15.

7. *See* Herman K. Trabish, *California’s Dilemma: How to Control Skyrocketing Electric Rates While Building the Grid of the Future*, UTIL. DIVE (Apr. 26, 2021), <https://www.utilitydive.com/news/californias-dilemma-how-to-control-skyrocketing-electric-rates-while-buil/597767/> (discussing the case of California, where “clean energy and electrification mandates as well as utility investments in system modernization” have led to residential rates rising “faster than inflation since 2013”).

from the macrogrid.<sup>8</sup> While in the long run there may well be win-win solutions,<sup>9</sup> in the short run there are inevitably trade-offs among affordability, security, and sustainability, and at a minimum, there are daunting questions about the pacing and sequencing of investments that may be necessary in the long run. We live in an energy-trilemma era where there is no escaping the need to make fundamentally political and distributional decisions. And that is all with an assumption of agreement about the need to aggressively address the threat of climate change; some do not even agree that this should be a priority.

It is somewhat shocking then that many crucial decisions about electric power service in the United States are made not by consumers or their utilities—that is, by markets—nor by state public utilities commissions or federal regulators—that is, by democratically responsive government institutions.<sup>10</sup> Instead, for much of the country, the task of managing the energy trilemma falls to obscure, esoteric, and clubbish entities known as regional transmission organizations (RTOs) or independent system operators (ISOs).<sup>11</sup> Straddling and blurring the boundary between private and public methods of social ordering, these RTOs establish and run wholesale electricity markets, coordinate dispatch, keep the grid in balance, and plan infrastructure for the grid of the future.<sup>12</sup> These responsibilities put RTOs at the center of the energy-trilemma era—a position in significant tension with their ambiguous status, incentives, and accountability.

How did we get here, where the resolution of the energy trilemma runs through RTOs that even the parties most invested in debates about the energy transition have a difficult time understanding or engaging? Despite some recent growth in attention to RTOs in the wake of the Texas power outage in the

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8. See Simon Langlois-Bertrand & Pierre-Olivier Pineau, *Pricing the Transition: Empirical Evidence on the Evolution of Electricity Rate Structures in North America*, 117 ENERGY POL'Y 184, 193 (2018).

9. See Alexandra Klass et al., *Grid Reliability Through Clean Energy*, 74 STAN. L. REV. 969, 969 (2022) (“[M]uch of the perceived tension between clean energy and reliability is a failure of law and governance resulting from the United States’ siloed approach to regulating the electric grid.”). There seems to be little doubt that in the long run, a renewables-powered grid is not only feasible but also more economical than retaining the current patterns of use of fossil fuel-based energy. See David Roberts, *A National US Power Grid Would Make Electricity Cheaper and Cleaner*, VOX (June 20, 2020, 10:00 AM), <https://www.vox.com/energy-and-environment/2020/6/20/21293952/renewable-energy-power-national-grid-transmission-microgrids> (discussing research showing that investment in a national grid would effectively resolve the energy trilemma in the long term by reducing the risks of climate change, facilitating a transition to ever cheaper forms of clean energy, and promoting reliability).

10. See Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, 109 CALIF. L. REV. 209, 215 (2021) (noting a “growing accountability gap, in which neither [the Federal Energy Regulatory Commission (FERC)] nor states have the authority needed to make electricity markets bend to democratically established prerogatives that harm industry incumbents”).

11. See Hari M. Osofsky & Hannah J. Wiseman, *Hybrid Energy Governance*, 2014 U. ILL. L. REV. 1, 7–9. For simplicity, we refer to both RTOs and ISOs as RTOs. There are some technical differences, but they are almost identical in every important respect.

12. See *infra* Part I.

winter of 2021<sup>13</sup> and despite increasing frustration with RTO governance among informed observers, RTOs remain an enigma. To fully understand how RTOs work and the role they play in the energy transition, it is necessary to examine where they came from, what assumptions animated their creation, and finally, how those assumptions have been undermined by the changing landscape of the energy sector. This Article aims to both explain where we are and highlight what might need to change with RTOs in order to make them effective arbiters of our public and private efforts to resolve the energy trilemma.

Our central argument is that RTOs emerged as institutions wedded to a peculiar model of democratic regulatory governance that no longer fits in the trilemma era. RTOs are what comparative democratic theorists would call “corporatist” institutions, meaning that they lodge responsibility for negotiating public policy in a committee of representative stakeholders from the private sphere.<sup>14</sup> This model of democratic governance is quite foreign to the United States, but it has been central to regulation in some European states.<sup>15</sup> The founders of the RTO model in the 1990s were aware that modern grid governance required trade-offs and that some form of democratic accountability would therefore be necessary for RTOs to maintain political legitimacy.<sup>16</sup> But in ensconcing corporatist methods of democratic governance in RTOs, the founders implicitly assumed that these trade-offs were limited to just two dimensions—reliability and affordability—and that the trade-offs in this relatively simple *d*ilemma could be weighed and resolved by a narrow and strictly defined set of industry stakeholders. That assumption has become intractable, as the energy trilemma has not only raised the stakes of the trade-offs that previously existed but has also introduced new trade-offs and new stakeholders who have been given no seat at the corporatist table.<sup>17</sup> As a result, a democratic deficit threatens to impede efforts to navigate the energy trilemma.

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13. Haya Panjwani, *ERCOT: What Is It, and Why Is It Responsible for the Power Outages Across Texas?*, KERA NEWS (Feb. 16, 2021, 5:34 PM), <https://www.keranews.org/texas-news/2021-02-16/ercot-what-is-it-and-why-is-it-responsible-for-the-power-outages-across-texas>.

14. See *infra* Part II.

15. See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 84–85, 84 n.254 (1997) (noting a general “American intolerance for corporatism” rooted in a “fiercely anti-collectivist political culture”). There are small pockets of policymaking in the United States where we see echoes of the corporatist paradigm. Saule Omarova and David Zaring have suggested that regulation of the banking industry is organized along corporatist lines. See Saule T. Omarova, *Bankers, Bureaucrats, and Guardians: Toward Tripartism in Financial Services Regulation*, 37 J. CORP. L. 621, 631–32 (2012) (noting that some view the Dodd-Frank Act as corporatist in nature). See generally David Zaring, *Banks, Corporatism, and Collaboration in the Administrative State* (Aug. 1, 2021) (unpublished manuscript), [https://ccl.yale.edu/sites/default/files/files/Zaring\\_David%20\(Banks%2C%20Corporatism%2C%20and%20Collaboration\).pdf](https://ccl.yale.edu/sites/default/files/files/Zaring_David%20(Banks%2C%20Corporatism%2C%20and%20Collaboration).pdf). As we show though, the corporatist label is even more appropriate when it comes to governance of RTOs. See *infra* Part II. Like Zaring, we argue that corporatism should give way to more traditional methods of democratic governance and administrative law. See *infra* Part IV.

16. See *infra* Subpart II.B.

17. See *infra* Part III.

Recognizing the corporatist roots of RTOs and the continuing embrace of that model of democratic governance is not just important for descriptive accuracy. It is equally important because it points the way to an alternative. The foil to corporatist democracy is pluralistic democracy, which does not attempt to structure consensual or negotiated decision making through formally identified stakeholders.<sup>18</sup> Instead, pluralist democracy favors open-access institutions where anyone can participate, whether they voluntarily organize as interest groups or operate as individual citizens. It does this in part because it is more skeptical about the possibility of actual consensus over public policy serving the public interest, and certainly skeptical of corporatist institutions that attempt to provide a representational monopoly to a select group of stakeholders. Not only is pluralist democracy more in keeping with the American tradition, but it is also a better fit for the increasingly complex contemporary energy landscape. In particular, the pluralist model of democracy fosters legitimacy in RTO decision making by giving all comers a voice about the trade-offs that the RTO must ultimately make.

Our argument is presented in four parts. In Part I, we provide background information on the electric power sector and the critical role that RTOs and their existing stakeholder engagement processes play in running the power grid. In Part II, we argue that RTOs were designed from their onset as corporatist institutions, with very few exceptions. In Part III, we critique RTOs' corporatist governance in light of the energy trilemma. Finally, in Part IV, we explore the possibilities for reforming RTO governance along pluralist lines that would be much better suited for the energy-trilemma era.

## I. SETTING THE STAGE: RTOs AND THE ELECTRIC POWER SECTOR

When people flip on a light switch or plug in their cell phone charger, they may expect a certain chain of events will occur in microseconds to deliver the expected jolt of electric power, yet they most likely have no real understanding of what that chain of events entails. In reality, this process involves an enormously complex sequence of events, starting with grid operators observing a change of load,<sup>19</sup> dispatching available sources of power generation,<sup>20</sup> and setting a price for the electric power provided using massive auctions that are adjusted for local transmission constraints.<sup>21</sup> There are also all of the actions that had to occur before that moment to ensure that the system was ready for the moment: procurement of sufficient power generation capacity to cover peak

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18. See *infra* Subpart II.A.1.

19. See TODD S. AAGAARD & ANDREW N. KLEIT, *ELECTRICITY CAPACITY MARKETS* 10–13 (2022).

20. See *id.*

21. See *id.*

loads on the grid,<sup>22</sup> transmission-line planning to avoid transmission constraints that would drive prices up at consumers' expense,<sup>23</sup> and having detailed market rules to ensure that auctions function well and cannot be manipulated.<sup>24</sup> Understandably, many people would rather not think about any of this, let alone get involved with it.

But not everybody. Electricity can be costly and unreliable when power systems are stressed, as ratepayers in Texas found out the hard way in February 2021.<sup>25</sup> The generation of electric power also often creates externalities in the form of air pollution that harm the public.<sup>26</sup> Increasingly, the electric power sector is ground zero for fights over the government's response to climate change, with new entrants such as renewable energy and battery storage providers vying for market share against more established, carbon-emitting incumbents.<sup>27</sup> These impacts increasingly draw the attention of the public, shining light on the important policy decisions being made long before individual consumers plug into the system.

### A. *Introducing the Star of the Show: RTOs*

If one were motivated by these recent events and developments to pry open the hood and see what really makes the electric power sector run, they would most likely be surprised to find that the critical machinery for much of the United States consists of a set of mysterious entities called RTOs. These are textbook examples of what Anne Joseph O'Connell called the "bureaucracy at the boundary."<sup>28</sup> That is, they have attributes that resemble government agencies, including a statutory mandate and at least some accountability to more clearly public regulatory bodies, but they also have distinctively private

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22. *See id.*

23. JOSEPH H. ETO, U.S. DEP'T OF ENERGY, PLANNING ELECTRIC TRANSMISSION LINES: A REVIEW OF RECENT REGIONAL TRANSMISSION PLANS 18–20 (2016), <https://www.energy.gov/sites/prod/files/2017/01/f34/Planning%20Electric%20Transmission%20Lines---A%20Review%20of%20Recent%20Regional%20Transmission%20Plans.pdf>.

24. *See generally* ANDREW N. KLEIT, MODERN ENERGY MARKET MANIPULATION (2018).

25. *See* Giulia McDonnell Nieto del Rio et al., *His Lights Stayed On During Texas' Storm. Now He Owes \$16,752*, N.Y. TIMES, <https://www.nytimes.com/2021/02/20/us/texas-storm-electric-bills.html> (Feb. 23, 2023). Particularly jarring for Texas ratepayers were electricity bills for February going up to \$9 per kilowatt-hour. *See id.* These bills were driven by Texas's highly deregulated retail energy market, where resellers like the infamous "Griddy" were able to offer variable price contracts that passed all of the costs of spiking wholesale energy purchased on the state's stressed power grid market to consumers. *See id.*

26. *See* Maninder P.S. Thind et al., *Fine Particulate Air Pollution from Electricity in the US: Health Impacts by Race, Income, and Geography*, 53 ENV'T SCI. & TECH. 14010, 14015–16 (2019).

27. *See* Felicia Jackson, *Five Market Trends Driving Energy Transition*, FORBES (Jan. 25, 2021, 12:21 PM), <https://www.forbes.com/sites/feliciajackson/2021/01/25/five-market-trends-driving-energy-transition/?sh=3f8ad5825077>.

28. Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 841–42 (2014).



attributes, such as a corporate charter, executives, and governing boards.<sup>29</sup> In a seminal article, Michael Dworkin and Rachel Goldwasser invoked a memorable metaphor to capture the essence of RTOs:

[O]ne can think of an RTO as the elephant, from the ancient fable, which is being described by a committee of the blind, or perhaps in our case, just the severely near-sighted. Each person touches one part of the animal. The person touching the leg thinks quite rightly that an elephant is like a tree. The person touching the tail correctly describes the elephant as a strand of rope. Meanwhile, the person touching the tusk accurately suggests that the elephant is similar to a sword. Each is describing precisely what their limited experience evidences, but none captures the essence of the elephant.

In the same way, differing observers may each see an RTO as similar to a commodities exchange, to an entity delegated regulatory power from the FERC, or to a monopoly that must itself be closely regulated. Seeing only one of these elements obscures the whole.<sup>30</sup>

Put more bluntly, RTOs defy classification—they are “quangos,” or quasi-nongovernmental organizations.<sup>31</sup> RTOs are the product of a wave of new governance initiatives in the 1990s that sought to utilize quasi-nongovernmental organizations to collapse the divisions between the public and private sectors.<sup>32</sup> In part because they are quasi-nongovernmental, they are also able to straddle traditional jurisdictional divisions between the state and federal levels and operate at a potentially more appropriate regional level.<sup>33</sup> Under traditional utility regulation, which occurred at the state level, the grid was balkanized. Utilities began to seek out ways of overcoming this balkanization to achieve gains from trade, forming tight power pools<sup>34</sup> that crossed state lines but created

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29. See Michael H. Dworkin & Rachel Aslin Goldwasser, *Ensuring Consideration of the Public Interest in the Governance and Accountability of Regional Transmission Organizations*, 28 ENERGY L.J. 543, 548 (2007). One might think that the private elements of RTOs might give them First Amendment rights, including the right of association, that would shield them from any mandate to open their processes in accordance with the recommendations in Part IV of this Article. See James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 464–68 (2015). We do not delve deeply into this challenge but would note that many existing regulations of RTOs by FERC would seem to be in tension with the rights of associations to exclude. See *infra* notes 70–73 and accompanying text.

30. Dworkin & Goldwasser, *supra* note 29, at 548.

31. TRAVIS KAVULLA, R ST. INST., POLICY STUDY NO. 180, PROBLEMS IN ELECTRICITY MARKET GOVERNANCE: AN ASSESSMENT 4 (2019), <https://www.rstreet.org/wp-content/uploads/2019/08/FINAL-RSTREET180.pdf>. For a general overview of the idea of quasi-governments, see KEVIN R. KOSAR, CONG. RSCH. SERV., RL30533, THE QUASI GOVERNMENT: HYBRID ORGANIZATIONS WITH BOTH GOVERNMENT AND PRIVATE SECTOR LEGAL CHARACTERISTICS (2011). Quasi-governments are closely related to the idea of self-regulated organizations (SROs). See Emily Hammond, *Double Deference in Administrative Law*, 116 COLUM. L. REV. 1705, 1713–21 (2016).

32. See Welton, *supra* note 10, at 220. For a general overview of this movement in public administration and administrative law circles, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

33. See Osofsky & Wiseman, *supra* note 11, at 4–5.

34. Clinton A. Vince et al., *What Is Happening and Where in the World of RTOs and ISOs?*, 27 ENERGY L.J. 65, 76 & n.94 (2006) (defining tight power pools as arrangements that “dispatch[] the generation resources of [their] members on an integrated basis to minimize production costs”). Tight power pools centrally

coordination problems with regulators.<sup>35</sup> RTOs formalized all of this, and by getting the scale of governance more on plane with the scale of efficient service, RTOs helped to facilitate more efficient governance that would unleash ever greater operational efficiencies.<sup>36</sup>

RTOs arose from a series of events that attempted to bring more competition to electricity markets. In a set of orders, the Federal Energy Regulatory Commission (FERC) sought to separate energy services that had been provided together as vertically integrated and price-regulated bundles.<sup>37</sup> In order to do that, FERC interpreted the Energy Policy Act of 1992 to allow the Commission to mandate transmission-line owners to eliminate any discriminatory or preferential pricing of transmission services that might inhibit competition in wholesale energy transactions.<sup>38</sup> While this mandate could have been implemented in a variety of ways, FERC chose to advance the formation of ISOs.<sup>39</sup> The idea was that ISOs would assume control of transmission lines owned by utilities and operate the system under a single nondiscriminatory tariff (i.e., a set of rules), greatly simplifying the operation of the grid. Over time, FERC began to see ISOs (or, as they were increasingly called, RTOs) as not only operating the grid but also as useful for managing competitive auctions for wholesale electric power sales.<sup>40</sup> Although FERC stopped short of effectively mandating that regions form RTOs, it indicated that its objective was for “all transmission-owning entities in the Nation, including nonpublic utility entities, to place their transmission facilities under the control of appropriate RTOs in a timely manner.”<sup>41</sup> Today, almost two-thirds of the electric power generated and used does indeed pass through an RTO’s domain,<sup>42</sup> and there are persistent rumblings that California’s ISO will expand to encompass much of the

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dispatch their generation units across all members, with the lower-marginal-cost generators being dispatched first.

35. See STEVE ISSER, *ELECTRICITY RESTRUCTURING IN THE UNITED STATES: MARKETS AND POLICY FROM THE 1978 ENERGY ACT TO THE PRESENT* 18 (2015) (arguing that utilities “mudd[ed] through” market transitions through experimentation with tight power pools).

36. See Steve Cicala, *Imperfect Markets Versus Imperfect Regulation in U.S. Electricity Generation*, 112 AM. ECON. REV. 409, 438–39 (2022) (showing the substantial efficiency and consumer benefits of opening regional markets for electric power).

37. In the interest of space, we do not detail this transformation (or the arrangements that it replaced) here. For general overviews, see RICHARD F. HIRSH, *POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM* (1999).

38. 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. 21540, 21541 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385) [hereinafter Order No. 888].

39. *Id.* at 21593–94, 21594 n.417.

40. See generally William Boyd, *Ways of Price Making and the Challenge of Market Governance in U.S. Energy Law*, 105 MINN. L. REV. 739, 782–805 (2020) (discussing the construction of “competitive” markets in the RTOs).

41. Regional Transmission Organizations, 65 Fed. Reg. 810, 811 (Jan. 6, 2000) (codified at 18 C.F.R. pt. 35) [hereinafter Order No. 2000].

42. Dworkin & Goldwasser, *supra* note 29, at 544.

American West and that the hodgepodge of utilities in the South will form a Southeastern RTO.<sup>43</sup>

Abstracting from the mind-numbing complexities of their tasks, RTOs do essentially two things. First, RTOs plan for the future. Building electric power infrastructure—transmission lines, new power plants, etc.—takes time and is best done with some forethought. RTOs help to coordinate these decisions to ensure that the regional grid for which they are responsible is operating well enough that consumers are never left without their lights on. Second, RTOs often set up marketplaces for energy services in order to arrive at a competitive price for wholesale energy that is likely to meet the statutory mandate of the Federal Power Act of just and reasonable prices. This latter task generally involves running auctions (both for power to be delivered in real time and also for power to be delivered twenty-four hours in the future), where the price charged equals the amount bid for the last power plant necessary to come online to balance the grid, adjusted for system constraints—such as congestion on transmission lines—that necessitate inefficient rerouting of power.<sup>44</sup>

Different RTOs accomplish these two basic tasks in different ways. For instance, some plan for future needs for power generation by operating “capacity markets” that try to estimate the value of additional generation to the grid at some point in the future<sup>45</sup> while others rely on the promise of scarcity pricing in the real-time markets to do the trick.<sup>46</sup> Different RTOs also have different market rules that lay out how wholesale sellers and buyers can access markets and use the grid.<sup>47</sup>

What is more, RTOs do all of this with limited oversight from FERC. FERC does retain authority to reject market rules or other decisions from RTOs if those rules or decisions are determined to be unjust and unreasonable.<sup>48</sup> Any change RTOs want to make must generally be submitted to FERC under Section 205 of the Federal Power Act,<sup>49</sup> and any existing rule

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43. See Jeff St. John, *Southeastern Utilities Launch Plan for Regional Energy-Trading Market*, GREENTECHMEDIA (Dec. 14, 2020), <https://www.greentechmedia.com/articles/read/southeastern-utilities-launch-plan-for-regional-energy-trading-market>; Kassla Micek, *Sixth Utility Joins Evaluation of RTO Expansion in the Western Interconnection*, S&P GLOBAL (Apr. 9, 2021, 8:06 PM), <https://www.spglobal.com/platts/en/market-insights/latest-news/electric-power/040921-sixth-utility-joins-evaluation-of-rto-expansion-in-the-western-interconnection>; see also Statement of Comm’r Christie, Ala. Power Co., No. ER21-1111-002 (FERC Oct. 20, 2021), [https://elibrary.ferc.gov/eLibrary/filelist?accession\\_number=20211020-4004&optimized=false](https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20211020-4004&optimized=false).

44. Boyd, *supra* note 40, at 791.

45. AAGAARD & KLEIT, *supra* note 19, at 3–4.

46. Gavin Bade, *The Great Capacity Market Debate: Which Model Can Best Handle the Energy Transition?*, UTIL. DIVE (Apr. 18, 2017), <https://www.utilitydive.com/news/the-great-capacity-market-debate-which-model-can-best-handle-the-energy-tr/440657/>.

47. See generally Boyd, *supra* note 40, at 782–805.

48. MARK JAMES ET AL., R ST. INST., POLICY STUDY NO. 112, HOW THE RTO STAKEHOLDER PROCESS AFFECTS MARKET EFFICIENCY 3 (2017), <https://www.rstreet.org/wp-content/uploads/2018/04/112-1.pdf>.

49. *Id.*

can be challenged before FERC through a petition under Section 206 of that Act.<sup>50</sup>

As a practical matter, though, FERC generally defers to RTOs' filings.<sup>51</sup> This may be partly because the courts have disallowed FERC from modifying RTOs' filings,<sup>52</sup> leaving FERC in the uncomfortable position of having to essentially either accept a proposal or remand an entire matter to the RTO with attendant delays. FERC therefore faces enormous practical pressure to approve RTO filings if changes need to be made, even if it would prefer to do something differently than RTOs did. Some of FERC's deference may also have to do with many of the filings being perceived as technocratic changes that run very little risk of running afoul of the broad statutory mandate and FERC's orders.<sup>53</sup> FERC can be more proactive when using its Section 206 authorities to mandate changes in RTOs' operations, but Section 206 proceedings are much less common than Section 205 proceedings and they carry a heightened statutory burden of proof.<sup>54</sup> For all of these reasons, RTOs generally get to do the important things that they do with only a light-handed review from FERC.

Perhaps not surprisingly, FERC's deferential posture translates to deference in judicial review of FERC's decisions to approve RTO policies. This phenomenon of "double deference" emerges quite frequently in the context of self-regulating organizations (SROs), including in the energy field. As Emily Hammond argues, reliability standards developed by the North American Electric Reliability Corporation (NERC) and other SROs and ultimately codified as law are given only a very light review by courts, in part because of a recognition of the greater expertise of such SROs but also because courts tend to (mistakenly) think that SROs are "agents" of their oversight agencies.<sup>55</sup> In other words, courts tend to believe that SROs have already been properly checked by their agencies, but in fact, they often have not been. RTOs, which share many features with NERC (though not all)<sup>56</sup> and SROs are similarly unlikely to be scrutinized by courts when policies are challenged.

This deferential posture on the part of FERC and the courts transfers the real locus of decision-making authority from the public process of justification

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50. *Id.*

51. Dworkin & Goldwasser, *supra* note 29, at 555; JAMES ET AL., *supra* note 48, at 17.

52. *See, e.g.*, NRG Power Mktg., LLC v. FERC, 862 F.3d 108, 110 (D.C. Cir. 2017).

53. The operative language is broad indeed. Under the Federal Power Act, rules and regulations filed in a tariff need only be "just and reasonable" to be approved by FERC. *See* 16 U.S.C. § 824d(a).

54. Dworkin & Goldwasser, *supra* note 29, at 577 n.185.

55. Hammond, *supra* note 31, at 1752–55.

56. If anything, NERC is held more to account—the standards-development process includes many features that are completely missing in RTO decision-making processes, including notice-and-comment processes. *See* N. AM. ELEC. RELIABILITY CORP., STANDARD PROCESSES MANUAL 3 (rev. ed. 2019), [https://www.nerc.com/AboutNERC/RulesOfProcedure/Appendix\\_3A\\_SPM\\_Clean\\_Mar2019.pdf](https://www.nerc.com/AboutNERC/RulesOfProcedure/Appendix_3A_SPM_Clean_Mar2019.pdf). This makes NERC's double deference even less substantial than RTOs' double deference.

before the Commission or in courtrooms to the relatively nonpublic process of internal RTO policy development. We turn now to those processes.

### B. *How RTOs Work*

When it comes to internal governance processes, RTOs share some broad features, but they are not monolithic. Each RTO has its own unique history, faces its own particular challenges, and has its own process of making decisions. We cannot hope to exhaustively describe every detail about each RTO's internal governance, but in this Subpart, we describe some of the main ways that RTOs are similar to one another in their internal governance as well as some of the key differences among the RTOs.

As a starting point, RTOs are nonprofit corporations.<sup>57</sup> There is usually a board of directors that holds the ultimate authority over the RTO, and the board usually delegates day-to-day operational and leadership authority to an executive staff.<sup>58</sup> For most of the RTOs, the board is designed to be independent of the member stakeholders of the RTO (i.e., the industry actors who use the grid),<sup>59</sup> which reflects FERC policy.<sup>60</sup> For instance, PJM's board members are prohibited from having a financial stake in the business that PJM oversees,<sup>61</sup> and consequently, the board has little special expertise in the electric power sector. The Electricity Reliability Council of Texas (ERCOT) is the exception: the ERCOT board is partially selected by the membership to represent various sectors of the industry.<sup>62</sup> This "hybrid" model, where a board is closely affiliated with member stakeholders, is only possible in Texas, where, due to a lack of FERC jurisdiction over the carefully crafted intrastate grid in Texas, the ERCOT Board does not have to follow FERC rules and be independent of the member stakeholders.<sup>63</sup>

Filing rights are an important concept in RTO governance, as they determine who can interact with FERC and speak for the RTO.<sup>64</sup> Generally, it is the responsibility of the RTO board or the executive management to make Section 205 filings before FERC when the RTO seeks to make a change to rules

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57. Dworkin & Goldwasser, *supra* note 29, at 580. Functionally, even the for-profit RTOs operate as nonprofits. *Id.*

58. Stephanie Lenhart & Dalten Fox, *Participatory Democracy in Dynamic Contexts: A Review of Regional Transmission Organization Governance in the United States*, ENERGY RSCH. & SOC. SCI., Jan. 2022, at 1, 6–10.

59. *Id.* at 6 ("Under FERC guidance, RTO boards can be composed of stakeholders, independent experts, or a hybrid of both.").

60. Order No. 2000, 65 Fed. Reg. 810, 842 (Jan. 6, 2000) (codified at 18 C.F.R. pt. 35); Order No. 888, 61 Fed. Reg. 21540 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385).

61. PJM, NOMINATING COMMITTEE CHARTER (2013), <https://www.pjm.com/-/media/committees-groups/committees/nc/postings/charter.ashx>; PJM, BOARD CODE OF CONDUCT 1 (2022), <https://www.pjm.com/-/media/about-pjm/who-we-are/bom-code.ashx>.

62. *Governance*, ERCOT, <https://www.ercot.com/about/governance> (last visited Feb. 26, 2023).

63. See Dworkin & Goldwasser, *supra* note 29, at 548, 588.

64. JAMES ET AL., *supra* note 48, at 3–4.

or respond to FERC requests.<sup>65</sup> For instance, in the Midcontinent Independent System Operator (MISO) and the Southwest Power Pool (SPP), all of the Section 205 filing rights lie with the board.<sup>66</sup> However, in some of the RTOs, filing rights are shared with members of the RTO.<sup>67</sup> Some refer to these as “shared governance” models, and they are exemplified by the New York Independent System Operator (NYISO) and PJM.<sup>68</sup> Occasionally, things can get more complicated, as is the case with Independent System Operator of New England (ISO-NE). There, the stakeholder group, New England Power Pool (NEPOOL), can force the board to file a separate NEPOOL proposal alongside the ISO-NE filing along with an explanation of why the board did not support NEPOOL’s position.<sup>69</sup>

Whatever the precise form of power sharing among the board, executive management, and member stakeholders, most all of the RTOs make extensive use of stakeholder-engagement processes in the leadup to decision making. This is partly the result of FERC’s Order No. 719, which in general terms requires RTOs to have processes in place to ensure the responsiveness of RTO leadership to stakeholders and customers.<sup>70</sup> Under the Order, FERC established an “obligation for each RTO and ISO to make reforms, as necessary, to increase its responsiveness to customers and other stakeholders” and stated that the agency intended to “assess each RTO’s or ISO’s compliance using four responsiveness criteria: (1) [i]nclusiveness; (2) fairness in balancing diverse interests; (3) representation of minority positions; and (4) ongoing responsiveness.”<sup>71</sup> The adoption of stakeholder-engagement processes is also partly the result of RTO’s own tightrope walk to maintain membership. FERC has consistently declined to mandate that transmission owners be required to belong to particular RTOs.<sup>72</sup> Thus, RTOs must be careful not to alienate

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65. *Id.* at 4.

66. *Id.*

67. *Id.*

68. *Id.*

69. Dworkin & Goldwasser, *supra* note 29, at 569–70.

70. Wholesale Competition in Regions with Organized Electric Markets, 73 Fed. Reg. 64100, 64102 (Oct. 17, 2008) (codified at 18 C.F.R. pt. 35) [hereinafter Order No. 719]. At the same time, RTO boards and executive management are also required by FERC orders to maintain independence from stakeholders. Order No. 888, 61 Fed. Reg. 21540, 21596 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385); Order No. 2000, 65 Fed. Reg. 810, 847–48, 857 (Jan. 6, 2000) (codified at 18 C.F.R. pt. 35). This is in some tension with Order No. 719’s mandate to be responsive to the stakeholders. *See* RTOGov Researchers, Comment Letter on FERC’s Proposal to Create an Office of Public Participation, at 6–7, 15 (May 10, 2021), [https://elibrary.ferc.gov/eLibrary/filelist?accession\\_number=20210510-5013\\_](https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20210510-5013_)[hereinafter Comments of RTOGov Researchers].

71. Order No. 719, 73 Fed. Reg. at 64102. It is worth noting that RTOs may adopt additional strategic goals. PJM, for instance, has adopted governance principles that include “[i]ntegrity, [c]ommunications, [a]ccountability, [r]espect[,] and [e]xcellence.” PJM, 2020 IMPACT REPORT: POWERING A CULTURE OF CARING AND AN INCLUSIVE FUTURE FOR ALL 6 (2021), <https://pjm.com/-/media/library/reports-notices/special-reports/2021/2020-impact-report.ashx>.

72. *See* Order No. 2000, 65 Fed. Reg. at 911–13; *see also* CHRISTINA SIMEONE, KLEINMAN CTR. FOR ENERGY POL’Y, PJM GOVERNANCE: CAN REFORMS IMPROVE OUTCOMES? 14 (2017),

members, lest they enter a death spiral of membership attrition.<sup>73</sup> RTOs therefore have strong incentives to share the formal power that they have with members.

RTOs realize these stakeholder engagement goals in different ways.<sup>74</sup> For instance, PJM uses a process it calls Consensus-Based Issue Resolution (CBIR) to allow member stakeholders to develop proposals for changes to market rules.<sup>75</sup> This process is structured to encourage negotiation and consensus among participating stakeholders.<sup>76</sup> While most RTOs follow PJM's lead in giving member stakeholders a significant, formal role in the proposal-development process, the California Independent System Operator (CAISO) is, again, something of an outlier. CAISO uses a less structured process for developing proposals, allowing stakeholders to comment on proposals advanced by CAISO staff but affording them none of the formal power that stakeholders in other RTOs tend to have.<sup>77</sup> The result is a CAISO board and staff that have significantly more independence from the member stakeholders than the rest of the RTO boards have.<sup>78</sup>

RTOs also have rules for apportioning power among stakeholder groups in the stakeholder-engagement process. Most every RTO has a high-level members committee that takes a formal position on proposed changes to policies (and, in shared governance RTOs, makes separate Section 205 filings with FERC). When governance is not shared with the membership, RTO boards do not have to follow the position of members committees, but they often do, so the way that power is distributed among the various categories of members in voting is often critical for what the board ultimately files at FERC.

Most of the RTOs use weighted sectoral voting to keep power balanced among what each RTO feels are the relevant member-stakeholder groups. For instance, both NYISO and PJM give roughly equal voting weight to five sectors: transmission owners, generation owners, power marketers, electric distributors, and end-use consumers.<sup>79</sup> SPP reduces representation to transmission owners

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<https://kleinmanenergy.upenn.edu/wp-content/uploads/2020/08/PJM-Governance-Reforms-1.pdf> (describing Order No. 2000 as having adopted an “open architecture” approach to the formation and evolution of RTOs).

73. See Dworkin & Goldwasser, *supra* note 29, at 558 (describing this as a “complex dance”).

74. Lenhart & Fox, *supra* note 58, at 2 (“Within RTOs, stakeholders seek to exert influence over market rules or planning practices by proposing solutions, exchanging information, voicing positions and interests, as well as engaging in learning, bargaining, deliberation, and in many cases voting.”).

75. MICHELE GREENING, PJM, CONSENSUS BASED ISSUE RESOLUTION 7 (2021), <https://www.pjm.com/-/media/committees-groups/task-forces/iprtf/2021/20210423/20210423-item-07-consensus-based-issue-resolution.ashx>.

76. *Id.* at 9.

77. Welton, *supra* note 10, at 229–30.

78. See *id.*

79. Lenhart & Fox, *supra* note 58, at 10 fig.7. We note that firms in these sectors, such as independent generators and power marketers, will compete against each other in restructured electricity markets. In RTO matters, however, they are likely to have common interests and therefore support each other's positions. For example, generators as a group are likely to support RTO measures that will increase prices paid to generators.

and transmission users in part because it does not run wholesale markets.<sup>80</sup> CAISO and ISO-NE give a portion of the vote to alternative-resource owners (i.e., distributed generators).<sup>81</sup> Through these sectoral weightings, RTOs aim to maintain a balance between members—a critical design feature if the goal is to generate consensus policies.

It is important to note, however, that even where voting power is fairly equally divided among recognized sectors, formal voting power in RTO decision-making generally excludes certain perspectives. MISO and CAISO are alone in giving voting weight to non-industry actors, such as civil-society interest groups and states.<sup>82</sup> Far more common is for these constituencies to be informally present but formally powerless. At PJM, for instance, states and public-interest groups have specially recognized groups—the Organization of PJM States (OPJMS), which organizes state regulators to amplify their (informal) voice in the process,<sup>83</sup> and the Public Interest and Environmental Organizations Users Group (PIEOUG), which represents certain civil-society interests not entitled to membership<sup>84</sup>—that are authorized to interact with PJM processes. And while civil-society interest groups and states are able to access the stakeholder process before a vote, only in CAISO are they on an equal footing with RTO members in deliberations—and in this case only because CAISO does not do anything to structure its stakeholder-development process or give any party most favored stakeholder status and because it literally is an arm of the state government (unlike every other RTO).<sup>85</sup>

In sum, “RTO governance in the United States follows a tiered governance structure with an independent board and committees or other venues for stakeholder engagement.”<sup>86</sup> RTOs differ in terms of how they execute this tiered governance model, but with the sole exception of CAISO, the RTOs go to great lengths to give formal, structured authority to a select group of member

80. *Id.*

81. *Id.*

82. *Id.*

83. See ORG. OF PJM STATES, INC., <https://opsi.us> (last visited Feb. 26, 2023). PJM’s leadership team “regularly meets” with OPJMS but not on the same terms as “members.” See SUSTAINABLE FERC PROJECT, UNDERSTANDING ENERGY: PJM EXPLAINED 3, [https://www.nrdc.org/sites/default/files/media-uploads/pjm\\_explainer\\_-\\_sustainableferc.pdf](https://www.nrdc.org/sites/default/files/media-uploads/pjm_explainer_-_sustainableferc.pdf).

84. See *Public Interest & Environmental Organizations Users Group*, PJM, <https://www.pjm.com/committees-and-groups/user-groups/pieoug> (last visited Jan. 26, 2022). PIEOUG is the only listed “user group” in PJM, which are defined by PJM as:

[A] stakeholder group formed by any five or more voting members who share a common interest in an item they feel has not been resolved to their satisfaction through the standard stakeholder process. A user group is not permitted to be formed until an issue has gone through the standard stakeholder process and failed. Membership is limited to the forming members, provided that they may invite other members to join the user group. A user group may meet among itself, can utilize PJM assistance and can forward proposals directly to the Members Committee and the Board of Managers as needed.

*User Groups*, PJM, <https://www.pjm.com/committees-and-groups/user-groups> (last visited Feb. 27, 2023).

85. Lenhart & Fox, *supra* note 58, at 6–10.

86. *Id.* at 10.



stakeholders while simultaneously excluding or diminishing the role of certain other categories of participants. In the next Part, we explain how these broad patterns can be usefully understood as corporatist in design and purpose.

## II. THE RTO STAKEHOLDER ENGAGEMENT PROCESSES AS CORPORATIST DEMOCRACY

In the United States, it is presumed that policymaking institutions will be democratically responsive. Few are willing to accept a completely autonomous bureaucracy that makes policy decisions without regard to any public inputs. American law therefore goes to great lengths to keep policymaking institutions tethered to public preferences.<sup>87</sup> With federal agencies, for instance, there are limits on the extent to which they can ignore the direction of elected leaders, whether in Congress or in the White House.<sup>88</sup> Likewise, elaborate rights of participation afforded to the public in administrative law guarantee that agencies must consider the expressed views of the public before taking any actions.<sup>89</sup> From two different directions, then, federal administrative agencies are held accountable by the people they govern.

As Part I showed, there is something different about RTOs. It is not that they do not make important policy decisions—they do, like when they set up market rules that determine the prices that will be paid to renewable power generators or when they make decisions about whether to build new transmission infrastructure that could facilitate the transition to a clean electric grid. The difference is that RTOs lack the same lines of democratic accountability that federal administrative agencies have. They are neither formally accountable, through elections or through any kind of hierarchical relationship with elected or unelected public officials, nor open to participation by all comers in the process of decision making.

This is not to say that RTOs are undemocratic; it is to say that they are democratic in a different way than other policymaking institutions. This Part argues that in design and purpose, RTOs are manifestations of a brand of

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87. Administrative law scholars have long debated how best to instantiate democratic features in decision-making processes in the administrative state, running from an interest-group, or pluralist, model, *see generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975), to a civic-republican model based on deliberative processes of notice-and-comment rulemaking and judicial review, *see generally* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992), to an “agonistic” model designed to foster contestation over regulatory policies, *see generally* Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1 (2022).

88. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 485–91 (2003) (laying out the contours of the so-called “presidential control model” of administrative law, which locates legitimacy in direct lines of accountability to elected officials).

89. *See generally* Stewart, *supra* note 87; Seidenfeld, *supra* note 87; Walters, *supra* note 87.

democratic institutionalization called “corporatism” in the academic literature.<sup>90</sup> Corporatism emphasizes a very different set of mechanisms for rendering policymaking accountable to the public than the ones we typically see in regulatory governance in the United States. We start by introducing the idea of corporatism and contrasting it with the much more familiar form of democracy in the United States, institutionalized in most administrative agencies, which can be termed “pluralism” for short.<sup>91</sup> After laying the conceptual groundwork, we then explain how RTOs fit the corporatist model. We reserve for Part III our discussion of the main implications of RTOs’ status as corporatist institutions. To preview, we do not make the argument that corporatism is more or less defensible than pluralism in the abstract. These are simply different means to an end. Instead, we argue that the corporatism of RTOs has been made obsolete by the emergence of the energy-trilemma era.

### A. The Corporatist Model

We start with an overview of the corporatist model. Like all academic constructs, corporatism has an elaborate intellectual history and a more practical side where theory meets practice. We briefly recount both of these sides, as they help present our thesis that RTOs are corporatist institutions.

#### 1. The Theory of Corporatism

Although corporatism may often be a chameleon of a concept in the larger comparative-political-theory literature, it is a simple concept with a basic definition at its root. According to Phillippe Schmitter’s classic essay:

Corporatism can be defined as a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, noncompetitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports.<sup>92</sup>

A few pieces of this definition are critical to unpack. First, Schmitter emphasizes the reduction of interest-group politics to discrete categories of

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90. See DAVID HELD, *MODELS OF DEMOCRACY* 189–93 (Stanford Univ. Press 3d ed. 2006) (1987) (identifying corporatism as a form of democratic theory opposed to pluralism).

91. Again, there are debates within administrative law over which democratic theory best describes and justifies how administrative law is structured, only one of which actually uses the label “pluralist.” See *supra* note 87 and accompanying text. But compared to corporatism, all of these theories are pluralist, as we define it. See *infra* notes 111–112 and accompanying text.

92. Phillippe C. Schmitter, *Still the Century of Corporatism?*, 36 *REV. POL.* 85, 93–94 (1974).

“constituent units” and “functionally differentiated categories.”<sup>93</sup> By this, Schmitter is referring to broad taxonomies of types of interests: a labor, or public, interest; a producer, or firm, interest; and finally, a state interest. For many corporatists, these “tripartite” interests—visible across many different policy domains in an industrialized capitalist state—are the core unit of analysis,<sup>94</sup> although the specific labels or characteristics of the groups of interests are less important so long as they are conceived as identifiably distinct—i.e., “functionally differentiated.”<sup>95</sup> Corporatists often view interest categories as sufficiently coherent and differentiated to facilitate the second part of Schmitter’s definition: the deliberate granting of a “representational monopoly” to the “peak” organizations from each category of interests.<sup>96</sup> In the classic model of corporatism, the state identifies the private-sector groups that will have this representational monopoly, effectively telling other groups or interests in civil society that they are adequately represented and need not have any seat at the table as policies are negotiated among the anointed participants.<sup>97</sup>

Second, although Schmitter’s definition above focuses on the characteristics of interest-group politics, corporatism is also a theory of how these monopoly interests are involved in policymaking. In the *lingua franca* of corporatism, the interests with a monopoly on representation engage in “concertation” with government to determine for themselves the policies that will govern a particular sector of the economy.<sup>98</sup> As Matto Mildenberger summarizes, the “peak associations” are not only recognized as representatives for the interests of various classes, but they also “enjoy institutionalized access to government actors” and can even “assume responsibility for regulating stakeholder compliance with government agreements.”<sup>99</sup> In other words, the

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93. *Id.* at 93.

94. See MATTO MILDENBERGER, CARBON CAPTURED: HOW BUSINESS AND LABOR CONTROL CLIMATE POLITICS 18 (2020); HELD, *supra* note 90, at 180.

95. See Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMP. L. 859, 885–86 (2011) (discussing how the “neo-corporatist accountability model” in Europe expanded beyond the paradigmatic categories of interests—i.e., producer groups, labor, and the state—in response to changing politics and nonmaterial interests, and now includes representational franchises for “environmental and consumer protection groups, human rights organizations, and other types of associations”).

96. HELD, *supra* note 90, at 180; Schmitter, *supra* note 92, at 93–94.

97. Omarova, *supra* note 15, at 635 & n.84 (citing IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 58 (1992); Mark Seidenfeld & Janna Satz Nugent, “*The Friendship of the People*”: *Citizen Participation in Environmental Enforcement*, 73 GEO. WASH. L. REV. 269, 310–311 (2005)) (distinguishing corporatism from models, such as that endorsed by Ian Ayres and John Braithwaite, that allow “contestability” about the adequacy of representation by the recipients of the monopoly).

98. Alexandre Afonso & Yannis Papadopoulos, *Europeanization or Party Politics? Explaining Government Choice for Corporatist Concertation*, 26 GOVERNANCE 5, 8 (2013) (defining concertation as an agreement among organized interests that is then adopted as public policy).

99. MILDENBERGER, *supra* note 94, at 18 (citing MARTIN J. SMITH, PRESSURE, POWER AND POLICY: POWER NETWORKS AND STATE AUTONOMY IN BRITAIN AND THE UNITED STATES (1993)).

reduction of interest-group politics to a limited set of representational monopolies is done in part to facilitate the sharing of governance by the state with those interest groups that have a “stake” in policy outcomes. The state, for its part, retains some role in “steering” these private-sector negotiations,<sup>100</sup> but the theories are sanguine about the possibility that private-sector negotiations will not require heavy-handed state direction.<sup>101</sup>

This leads to a third and final feature of corporatist arrangements. Corporatism is often associated with consensus in the exercise of shared governance.<sup>102</sup> This is not necessarily a strict requirement, but it is a goal served by the reduction of the universe of interest-group politics to a small set of institutionally enfranchised interests. While corporatists understand that there may be deep disagreements between interests—e.g., disputes between labor and producers—the explicit purpose of the delegation of power over policy is to relieve the state from the difficult task of mediating this relationship by itself and to instead empower the interests themselves to forge working agreements for their own self-governance.<sup>103</sup> According to Schmitter, “corporatists appeal to the functional adjustment of an organically interdependent whole.”<sup>104</sup> The peak interests need each other, as much as they may disagree on technical questions facing their shared interests. Corporatist arrangements build on this mutual interdependence to encourage bargaining and negotiation.

Corporatist democratic arrangements are most associated with continental Europe, where, throughout the middle of the twentieth century, many small democracies—Norway, Sweden, and Austria, for instance—closely approximated the ideal of consensus-oriented negotiation over national policy between stakeholders recognized as representatives of the interests in civil

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100. See HELD, *supra* note 90, at 180.

101. See Bignami, *supra* note 95, at 869–70 (“The task of public administration has been scaled back considerably—from commanding, to persuading and steering.”); see also Freeman, *supra* note 15, at 6 (describing the shift to “collaborative governance” in which “parties share responsibility” for decision making).

102. Peter Munk Christiansen et al., *Varieties of Democracy: Interest Groups and Corporatist Committees in Scandinavian Policy Making*, 21 VOLUNTAS: INT’L J. VOLUNTARY & NONPROFIT ORGS. 22, 26 (2010); see also AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 171 (1999).

103. It is on this dimension that corporatism is distinguishable from so-called “monism,” which is said to have been the governing theory in the Soviet Union. Schmitter, *supra* note 92, at 97. Monists, unlike corporatists, would merge the representational monopoly with “licens[ing] by a single party.” *Id.* In other words, the party rules, and the sector becomes deputized to act on behalf of the governing party.

104. *Id.*

society.<sup>105</sup> Corporatism is viewed as somewhat foreign to North America,<sup>106</sup> although it had a major influence on the push for “negotiated rulemaking” in the 1980s and 1990s.<sup>107</sup> Much as in the ideal-typical corporatist arrangements in Europe, negotiated rulemaking, or “reg neg,” aimed to bring a select group of representative interests to the negotiating table to hash out rulemaking proposals.<sup>108</sup> The idea was to use structured and mediated negotiations among a group of representative stakeholders to forge a consensus that would ultimately reduce litigation over rules promulgated by agencies, provide a foundation for easier enforcement of regulatory requirements, and bolster the legitimacy of the resultant policy outcomes.<sup>109</sup>

Corporatism is but one paradigmatic “system of interest and/or attitude representation, a particular modal or ideal-typical institutional arrangement for linking the associationally organized interests of civil society with the decisional structures of the state.”<sup>110</sup> Corporatism’s key features can perhaps be better understood by contrasting it with its natural foil “pluralism.”<sup>111</sup> Schmitter also provides a definition of pluralism:

[A] system of interest representation in which the constituent units are organized into an unspecified number of multiple, voluntary, competitive, nonhierarchically ordered and self-determined (as to type or scope of interest) categories which are not specially licensed, recognized, subsidized, created or otherwise controlled in leadership selection or interest articulation by the state and which do not exercise a monopoly of representational activity within their respective categories.<sup>112</sup>

The difference between corporatism and pluralism starts with, and builds on, a different evaluation of the possibility of a reduction of interest-group politics to a discrete set of peak interest groups. Pluralism views interests as

105. See Arend Lijphart & Markus M.L. Crepaz, *Corporatism and Consensus Democracy in Eighteen Countries: Conceptual and Empirical Linkages*, 21 BRIT. J. POL. SCI. 235, 238–44 (1991). Comparative democratic theorists have debated whether corporatism was in decline in Europe in the latter part of the twentieth century. See generally *id.*; LIJPHART, *supra* note 102; PerOla Öberg et al., *Disrupted Exchange and Declining Corporatism: Government Authority and Interest Group Capability in Scandinavia*, 46 GOV'T & OPPOSITION 365, 365 (2011). This question is somewhat irrelevant for our purposes, as we are focused more on whether RTOs fit the normative and conceptual model of corporatist democracy.

106. David Johnson argues that Canada has experimented with so-called “meso-corporatism,” which is limited to specific substantive areas of policymaking but does not generally describe the prevailing system of democracy or interest-group representation in the nation. See David Johnson, *The Canadian Regulatory System and Corporatism: Empirical Findings and Analytical Implications*, CAN. J.L. & SOC'Y, Spring 1993, at 95, 97–102.

107. Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1217 (1994) (linking the concepts of regulatory negotiation and corporatist democratic theory).

108. Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENV'T L.J. 60, 60 n.1 (2000).

109. *Id.* at 68–75.

110. Schmitter, *supra* note 92, at 86.

111. *Id.* (identifying “pluralism” as “perhaps the best-known and most frequently acknowledged alternative” to corporatism).

112. *Id.* at 96.

fundamentally diffuse, such that it is impossible to structure representation using such discrete and delimited categories.<sup>113</sup> This irreducibility of the terrain of interest-group politics limits the ability for groups to take over the task of regulation in place of the government. Instead, to the extent that interest groups influence policy, it is through a process of freewheeling competition among potentially innumerable participants for the attention of (typically) a state decision maker.<sup>114</sup> Federal administrative agencies in the United States are essentially pluralist in this sense. They are government institutions charged with making policy decisions, but they are also charged with taking account of unstructured interest-group participation in policymaking processes.<sup>115</sup> The practice of notice-and-comment rulemaking, for instance, is quintessentially pluralist. Agencies take the lead in developing a proposal, release it to the public, and allow for any and all comers to participate in a comment process designed to inform and influence the policy before it is implemented.<sup>116</sup> The key features of corporatism—the delegation of policy development to nonstate actors representing peak interest groups and the protection of that policy monopoly<sup>117</sup>—are completely absent in this process.

## 2. *The Practice of Corporatism*

There is a large literature on corporatist participatory structures, including negotiated rulemaking.<sup>118</sup> This literature suggests that corporatism can sometimes be a legitimate and effective way of structuring policy development,<sup>119</sup> but it is also clear that the conditions for successful corporatism are quite narrow.

Start with the good. There is some weak evidence that corporatist arrangements are associated with better policy outcomes. Comparative analyses suggest that corporatist institutions improve macroeconomic performance across all sectors.<sup>120</sup> Perhaps more relevant for our focus on RTOs and the electric power sector, some studies have claimed to find a relationship between corporatism and progress on environmental issues.<sup>121</sup> Matthews explains one

113. *Id.*; VICTOR M. MUÑIZ-FRATICELLI, *THE STRUCTURE OF PLURALISM* 9 (2014).

114. Mary M. Matthews, *Cleaning Up Their Acts: Shifts of Environment and Energy Policies in Pluralist and Corporatist States*, 29 *POLY STUD. J.* 478, 483 (2001).

115. See Stewart, *supra* note 87.

116. MICHAEL SANT'AMBROGIO & GLEN STASZEWSKI, *ADMIN. CONF. OF THE U.S., PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING* 17–18 (2018), <https://www.acus.gov/sites/default/files/documents/Public%20Engagement%20in%20Rulemaking%20Final%20Report.pdf>.

117. Schmitter, *supra* note 92, at 93–94.

118. See, e.g., Freeman, *supra* note 15; Bignami, *supra* note 95.

119. See, e.g., Freeman & Langbein, *supra* note 108, at 61–68.

120. *Id.* at 62.

121. MILDENBERGER, *supra* note 94, at 18 (“On balance, pluralist institutions are viewed as complicating climate reforms. By contrast, corporatist institutions are viewed as facilitating climate

possible causal mechanism: the emphasis on “cooperation, consensual bargaining, and goal-oriented policy formation” as a characteristic of corporatism makes it easier for corporatist institutions to overcome the inherent collective action problems in the environmental domain.<sup>122</sup> Mildenberger pushes back on this finding in his study of clean-energy politics in the United States (and, indeed, his study accords with our Article in concluding that the energy sector bears some corporatist features),<sup>123</sup> but it is plausible that corporatism would dilute the power of entrenched minority interests and allow the state to act purposively and decisively once consensus emerges.<sup>124</sup> These potential advantages of corporatism, compared to the free-for-all of pluralistic interest-group competition, are worth considering for those who criticize RTOs’ corporatist structures.<sup>125</sup>

Despite these potential advantages, corporatism may not deliver any democratic benefits, or worse, it may lose the representational legitimacy that it depends on to justify limiting opportunities for participation. Take negotiated rulemaking, which, again, is a rare example of corporatism in American public administration. While there are strong proponents of negotiated rulemaking, it has never been as successful as proponents have promised. For instance, there is no evidence that negotiated rulemaking reduces litigation challenging “consensual” rules.<sup>126</sup> Part of the divergence between theory and reality might well be that it is extraordinarily difficult to ensure that all interests—potential litigants, every one of them—are represented in the formal negotiation of a consensus proposal, leaving the possibility that there will be residual disagreements that surface at a later time. Susan Rose-Ackerman, for instance, argues that a necessary condition for success in negotiated rulemaking is that “all interested parties are adequately represented”; “[a]greement among only the subset of interests that have organized advocates is not sufficient.”<sup>127</sup> Subsequent litigation over negotiated rules is an indicator that there is a remainder of interests that is not being adequately represented in the highly

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policymaking by nurturing trust between regulators and the regulated, focusing business attention on national rather than particularistic outcomes, and facilitating distributional loser compensation.” (citation omitted).

122. Matthews, *supra* note 114, at 483–84.

123. MILDENBERGER, *supra* note 94, at 21. Charles H. Koch, Jr. likewise emphasizes elements of “collaborative governance” in RTOs, although he does not use the term “corporatism” per se. *See generally* Charles H. Koch, Jr., *Collaborative Governance in the Restructured Electricity Industry*, 40 WAKE FOREST L.J. 589 (2005).

124. Freeman, *supra* note 15, at 5–6 (arguing that “efficacy” of government action is served by a collaborative governance framework opposed to pluralism).

125. As we will later argue, corporatism may nevertheless be unworkable in the present energy-trilemma era, even if it might be viewed as normatively better or instrumentally advantageous in addressing climate change in a more long-term sense. *See infra* Part III.

126. *See* Cary Coglianesi, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1259 (1997).

127. Rose-Ackerman, *supra* note 107, at 1210–11 (“[I]n negotiated rulemaking, t]he most important issue is selecting participants. All the interest groups participating must be well organized and similar in knowledge and bargaining skill. There also must not be too many distinct groups.”).

mediated proceedings in negotiated rulemaking; without the opportunity for litigation, this exclusion would potentially undermine the legitimacy of the mechanism. It may be that the opposite of corporatism, interest-group pluralism—essentially, “free-for-all competition” among diffuse interests through more open-access procedures—would be more appropriate where interests are less capable of representation in a formalized process of negotiation.

The case for corporatist participatory processes therefore turns, at least in part, on (1) whether the processes employed appropriately allocate power in the negotiations among the formal participants such that what results from negotiations is actually likely to resemble a consensus, and (2) whether the participants with a structural voice in the process adequately represent the true diversity of the spectrum of interests at play in an issue area such that there are no excluded perspectives with a legitimate claim to a seat at the table.<sup>128</sup> These conditions are likely to be rather fragile even when they exist.

This fragility of corporatism has major implications in the context of RTOs, as we argue below. In Part III, we argue that the emergent energy trilemma in the electric power sector has undermined the case for the legitimacy of corporatist, consensus-oriented processes in the RTO governance space. In Part IV, we also lay out a prescription for reform: RTOs must change the way that they design democratic participation to make them more pluralist than corporatist. For now, we focus on solidifying the case that RTOs are in fact corporatist by examining RTOs’ corporatist elements in practice.

### B. RTOs as Corporatist Institutions

Although any attempt to classify any particular institution according to the rather abstract distinction between corporatism and pluralism is bound to be contested, RTOs are clearly significantly wedded to the corporatist model. Below, we defend this assertion by examining the historical roots and the contemporary operations of RTOs.

#### 1. Historical Roots

RTOs emerged from several “tight power pools” that had emerged organically as utilities in certain regions banded together to build a larger and more efficient network. In 1996, CAISO and the PJM Interconnection (the latter of which was a tight power pool) separately had filings pending with FERC to form the first ISOs to take advantage of gains from trade.<sup>129</sup> That

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128. Öberg et al., *supra* note 105, at 383; *see also* Freeman, *supra* note 15, at 85 (noting that the fact that the “selection of certain interests to participate in decision making will always potentially empower some groups at the expense of others and will establish selected players as authorities” creates risks of “rigidity”).

129. *See* Vince et al., *supra* note 34, at 67.



same year, FERC issued Order No. 888, which ordered transmission-owning utilities to file nondiscriminatory, open-access transmission tariffs, which FERC believed would allow competitive wholesale power generation to emerge where cost-of-service regulation had prevailed in the past.<sup>130</sup> FERC saw great potential in the ISO model to coordinate nondiscriminatory transmission service, but it ultimately declined to force these power pools to adopt the ISO model emerging in California and PJM.<sup>131</sup> Instead, FERC in Order No. 888 encouraged the formation of ISOs in the other tight power pools and laid out eleven principles that any proposal to form an ISO should comply with.<sup>132</sup> Subsequently, several of the tight power pools did file tariffs forming independent grid operators. The New York Power Pool (NYPP) became the New York Independent System Operator (NYISO) and New England Power Pool (NEPOOL) created ISO-New England.<sup>133</sup> Some of the tight power pools, such as the Mid-American Power Pool (MAPP) in the Midwest, tried but failed to form an ISO.<sup>134</sup>

Both the origins of the RTOs in the tight power pool model and FERC's thinking in Order No. 888 link RTOs with a corporatist model of governance. The first, and most important, of FERC's principles for the formation of ISOs was that ISOs should "ensure fair and non-discriminatory access to transmission services and ancillary services<sup>135</sup> for all users of the system."<sup>136</sup> Note here that the focus was on "all *users* of the system," but FERC had a narrow definition of "user" in mind. Nearly everyone uses electricity in the sense of consuming it, but FERC's concern here was on the "users" of the bulk transmission grid—essentially limited to just the direct suppliers and purchasers of wholesale electric power. It left out by design any indirect users (mostly final consumers of electricity) as well as elements of civil society concerned with the broader social challenges that the use of electricity can create.

Among the privileged "users of the system" who would be recognized as members, FERC recognized that ISOs would need to have "rules of governance" to "prevent control, and appearance of control, of decision-making by any class of participants."<sup>137</sup> FERC understood, in other words, that the "functional unbundling" of formerly vertically integrated utilities in Order No. 888 would pit transmission interests against generation interests, and both of these interests against end-use-serving utilities' (and their customers')

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130. *Id.* at 66–67.

131. *See id.* at 67.

132. *Id.* at 67–68.

133. *Id.* at 78, 80.

134. Order No. 2000, 65 Fed. Reg. 810, 816 (Jan. 6, 2000) (codified at 18 C.F.R. pt. 35).

135. Ancillary services are essentially backup power for the grid that are used during supply or demand disruptions. *See* Yann G. Rebours et al., *A Survey of Frequency and Voltage Control Ancillary Services—Part I: Technical Features*, 22 IEEE TRANSACTIONS ON POWER SYS. 350, 350–51 (2007).

136. Order No. 888, 61 Fed. Reg. 21540, 21596 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385).

137. *Id.*

interests. It knew that the ISO model could be advantageous in coordinating nondiscriminatory operation of the grid and wholesale markets for electricity, which was the core policy behind Order No. 888, but only if it could manage to keep potential tensions between subsector interests in rough balance.

It bears noting that a concern about the operators of the electricity grid was an entirely new one for FERC. In the past, the tight power pools were not subject to strict FERC scrutiny outside of the individual tariff filings of constituent utilities.<sup>138</sup> Utilities could enter tight power pools if they saw an advantage to doing so, and the terms of the collaboration were a matter of contract. By branding ISOs as utilities that must file their own tariff and by mandating that ISOs remain truly independent from their constituent users, FERC created a brand new need for institutional machinery to facilitate governance of the relationship between the now-unbundled subsectors of the industry. The private contract of the tight power pool was replaced with the public contract of the ISO tariff, and with it came the need for regulatory oversight of the interest-group politics of grid operation.

In 1999, in its Order No. 2000, FERC considered but ultimately rejected the idea of making RTOs (as they were increasingly known) mandatory.<sup>139</sup> But more important for our purposes was FERC's continuing elaboration of its understanding of the exclusionary scope of the interest-group politics of the industry. FERC noted that there was "substantial disagreement among commenters about the proposed definition of market participant," with "[s]ome commenters argu[ing] that it should be expanded; others contend[ing] that it should be narrowed."<sup>140</sup> Some commenters argued, apparently on the basis that it would be absurd, that a literal application of the proposed definition "would make every single residential, commercial, industrial and wholesale electric customer (and all of their affiliates) market participants" and recommended narrowing the definition of market participant to "those entities that are active in wholesale and non-regulated retail power markets using transmission of the RTO."<sup>141</sup> FERC apparently partly agreed, stating in the final Order:

The overall purpose of the independence standard in the Final Rule is to ensure that an RTO will provide transmission service and operate the grid in a non-discriminatory manner. Equal access requires RTOs to be independent. Implementation of this standard then requires answering the question: independence from whom? Our logic in the [Notice of Proposed Rule], which we have adopted in the Final Rule, is to define a group of entities, referred to

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138. See Ari Peskoe, *Is the Utility Transmission Syndicate Forever?*, 42 ENERGY L.J. 1, 18–22 (2021).

139. See *id.* at 26.

140. Order No. 2000, 65 Fed. Reg. 810, 842 (Jan. 6, 2000) (codified at 18 C.F.R. pt. 35).

141. *Id.* at 843.

as market participants, whose economic or commercial interests are likely to be affected by an RTO's decisions and actions.<sup>142</sup>

This category of entities “whose economic or commercial interests are likely to be affected by an RTO's decisions and actions”<sup>143</sup> self-consciously limits the scope of relevant interest-group politics to industry participants. FERC did not make even a pretense of thinking that other non-economic or noncommercial interests were being inappropriately excluded, as FERC understood the only issue to be insulating RTO boards from dominance by one subsector of the industry or another. The broader politics of RTOs in a transitioning industry facing a trilemma was simply not on FERC's radar screen over two decades ago as it made the foundational choices about whose interests would be represented in RTOs. In 2008, FERC in Order No. 719 continued to adhere to this incipient corporatism, responding to a request from Constellation that FERC define “customer” to include actual retail customers.<sup>144</sup> FERC declined, saying: “[W]e clarify that we define ‘customer’ as is defined in the RTO's or ISO's tariff.”<sup>145</sup> Of course, RTO tariffs overwhelmingly adhere to more restrictive definitions of customer that do not give end users of the system any formal say in RTO governance.

Also clear from FERC's foundational orders on RTOs is a commitment to what corporatism calls “concertation.”<sup>146</sup> As early as Order No. 2000, FERC was touting the advantages of more-or-less wholesale delegation of policymaking authority to RTOs. As FERC explained, “One of the benefits of RTOs that we identified in the NOPR was that the existence of a properly structured RTO would reduce the need for Commission oversight and scrutiny, which would benefit both the Commission and the industry.”<sup>147</sup> They continued: “We stated that to the extent an RTO is independent of power marketing interests, there would be no need for the Commission to monitor and attempt to enforce compliance with the standards of conduct designed to unbundle a utility's transmission and generation functions.”<sup>148</sup> According to FERC, one of the many advantages of an RTO model is that “an independent RTO with an impartial dispute resolution mechanism could resolve disputes without resort to the Commission complaint process, and that it is generally more efficient for these organizations to resolve many disputes internally rather

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142. *Id.* at 850.

143. *Id.*

144. Order No. 719, 73 Fed. Reg. 64100, 64155, 64158 (Oct. 17, 2008) (codified at 18 C.F.R. pt. 35).

145. *Id.* at 64158.

146. See Afonso & Papadopoulos, *supra* note 98, at 8 (defining “concertation” as the process of “negotiations with organized interests” and noting that it “implies compromises” that result in “an agreement that is fully supported by participating actors”).

147. Order No. 2000, 65 Fed. Reg. at 830.

148. *Id.*

than bringing every dispute to the Commission.”<sup>149</sup> FERC also showed corporatist impulses in encouraging that these “internal” dispute resolutions be as consensus-oriented as possible. In Order No. 2000, for instance, FERC described its preference for alternative dispute resolution (ADR) and its willingness to afford deference to any RTO decision arrived at through ADR or, more generally, “changes to an open access tariff by an ISO concerning a regional solution to an identified regional problem based on what we understand is a broad consensus.”<sup>150</sup> Together, with the narrowing of the set of interests deemed relevant for RTO governance, this preference for consensus-oriented decision making and willingness to forecast substantial deference for any decision representing the consensus of the industry imply a deeply corporatist mindset in the formation of the RTO concept. The idea for FERC appears to have been that the industry, if appropriately balanced across subsectors, could effectively govern itself.

## 2. *Contemporary Manifestations*

The Commission has always given RTOs fairly substantial discretion when it comes to the details of designing governance structures, provided that they adhere to broad (and somewhat conflicting) principles of independence from, and responsiveness to, stakeholders. In practice, most of the RTOs have used that discretion to craft governance processes that are just as corporatist as FERC envisioned them, and perhaps even more so.

The most prominent place we see this is in the stakeholder-engagement process. The structured deliberative institutions that RTOs have created, with their careful selection and limitation of the interests permitted to fully participate and their heavy emphasis on bargaining and consensus among them, are in essence a fleshed-out form of negotiated rulemaking and corporatism more generally.

Take, for instance, PJM’s stakeholder-engagement process, CBIR. This process clearly attempts to be true to the concept of consensus-based issue resolution, as its name suggests. The process begins with identification of issues in need of tariff modification, which can be done by both internal and external actors.<sup>151</sup> When PJM receives requests to initiate the CBIR process, PJM staff does initial screening and decides whether to continue the process by assigning the issue to a “parent” committee to develop a problem statement, an issue charge, and if necessary, a charter for new subcommittees or task forces who

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149. *Id.*

150. *Id.* at 831.

151. See DAVE ANDERS ET AL., PJM, PJM STAKEHOLDER PROCESS TRAINING: CBIR PROCESS 8 (2021), <https://www.pjm.com/-/media/committees-groups/forums/stakeholder-process/2021/20211112-part-ii-cbir/20211112-stakeholder-process-training-part-ii-cbir.ashx>.

will be charged with taking the first steps toward a consensus position.<sup>152</sup> From there, the subcommittee or task force charged with the assignment implements the CBIR process, which is essentially a form of negotiated rulemaking.<sup>153</sup> PJM's own literature describes the process as inspired by "Mutual Gains Theory," which builds on the observation that "parties typically have more than one goal or concern in mind and more than one issue that can be addressed in the agreement they reach."<sup>154</sup> Recognizing this "[a]llows parties to improve their chances of creating an agreement superior to existing alternatives."<sup>155</sup> Committees identify the interests of stakeholder participants and incorporate these findings in two matrices—an "options matrix" and a "proposal matrix."<sup>156</sup> With the options matrix, participants brainstorm solutions and "winnow" these solutions through deliberation.<sup>157</sup>

With the proposal matrix, participants take the set of winnowed solutions and develop proposal packages that can achieve significant buy-in among stakeholder participants. Once these matrices are developed, it is time for decision making, which aims to "[a]chieve consensus on a single proposal that all parties accept with no objections."<sup>158</sup> The subcommittee or task force uses "polling and voting to narrow and gauge support for options and proposals."<sup>159</sup> Where it is not possible to achieve consensus, the goal is to at least get support for a handful of alternatives. The subcommittee or task force then writes up for the parent committee a report that includes the matrices, any polling results, and a description of the interests of the participants as considered in deliberating over the matrices.<sup>160</sup> The standing committees consider the report and hold simple-majority votes to determine whether to advance the subcommittee's or task force's proposal package.<sup>161</sup>

After the package has advanced through the relevant parent standing committee, it makes a jump to the "senior" level, which involves both a Markets & Reliability Committee and a Members Committee.<sup>162</sup> At the senior level, the members of PJM vote on the package(s) approved by the standing committees.

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152. *See id.*

153. *See generally* Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133 (1985). Negotiated rulemaking was advanced in the 1980s as a possible cure for a variety of problems in administrative agencies' rulemaking efforts, *see* Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 8–18 (1982), and it is very much part and parcel of the "new public-management" movement that gave birth to RTOs, *see supra* notes 31–33.

154. ANDERS ET AL., *supra* note 151, at 12.

155. *Id.*

156. *Id.* at 17, 19.

157. *Id.* at 17.

158. *Id.* at 21.

159. *Id.*

160. *Id.* at 27.

161. *Id.* at 21.

162. SUSTAINABLE FERC PROJECT, UNDERSTANDING ENERGY: PJM EXPLAINED 4, [https://www.nrdc.org/sites/default/files/media-uploads/pjm\\_explainer\\_-\\_sustainableferc.pdf](https://www.nrdc.org/sites/default/files/media-uploads/pjm_explainer_-_sustainableferc.pdf).

This is done by sectoral-weighted voting. There are five different sectors which are each given twenty percent of the vote: generation owners, other suppliers, transmission owners, electric distributors, and end-use customers.<sup>163</sup> Only members are allowed to vote, unlike in the standing committees, where “affiliate voting” is permitted.<sup>164</sup> In order for a proposal to advance out of the Members Committee, a two-thirds vote in favor of the package is required.<sup>165</sup> If the vote is successful, the PJM board will file the proposal as a Section 205 filing with FERC, although it is important to note that PJM technically could make the same filing even if the Members Committee failed to clear the two-thirds voting threshold. This latter possibility rarely materializes, though, for two fundamental reasons: (1) PJM prefers to “work toward endorsement,” and (2) PJM injects itself in the CBIR process and helps to shape proposals in order to avoid any outward-facing conflict.<sup>166</sup> PJM insiders told us that PJM’s proposal often carries the day, and this is no doubt because of PJM staff’s active involvement in both the standing- and senior-committee deliberations.

A key design element in PJM’s process is the limitation on who can participate. Generally, voting members are allowed to participate at all levels and are the exclusive participants at the senior level. At the standing-committee level, affiliate members are allowed to participate and vote in addition to full voting members.<sup>167</sup> Other organizations, such as the OPJMS and PIEOUG, are allowed to participate in deliberation at this level but are not given a vote.<sup>168</sup> Below the standing-committee level, participation is technically open and voting is discouraged in favor of consensus, although where consensus is

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163. PJM, AMENDED AND RESTATED OPERATING AGREEMENT OF PJM INTERCONNECTION, L.L.C. § 8.1.1 (2011), <https://www.pjm.com/directory/merged-tariffs/oa.pdf> [hereinafter PJM, OPERATING AGREEMENT].

164. Affiliate voting allows members to submit votes for certain affiliate organizations or companies—for instance, a large utility that is a member may have several smaller subsidiaries that are considered affiliates. PJM, MEMBERSHIP IN PJM (2022), <https://www.pjm.com/-/media/about-pjm/newsroom/fact-sheets/pjm-membership-fact-sheet.ashx>.

165. For an example of how sector-weighted voting is calculated, see DAVE ANDERS ET AL., PJM, PJM STAKEHOLDER PROCESS TRAINING—GOVERNANCE 30 (2021), <https://www2.pjm.com/-/media/committees-groups/forums/stakeholder-process/2021/20210707-governance/20210707-stakeholder-process-training-governance.ashx>.

166. *Id.* at 12.

167. PJM, *supra* note 164.

168. OPJMS has had a memorandum of understanding with PJM since 2005 that entitles the organization to “participate, deliberate, give input and engage at all levels of PJM stakeholder groups” but which does not allow OPJMS to vote on proposals. See ANDERS ET AL., *supra* note 151, at 6; see also ANDERS ET AL., *supra* note 165, at 18 (describing “associate members” as having no market participation or voting rights but as being allowed to participate in stakeholder activities and PJM trainings). Likewise, PIEOUG is simply a user group and has no rights to vote and is granted limited time to meet with the PJM board at annual meetings. See PJM, PJM PUBLIC INTEREST ENVIRONMENTAL ORGANIZATION USERS GROUP CHARTER (2021), <https://pjm.com/-/media/committees-groups/user-groups/pieoug/postings/pieoug-charter.ashx> [hereinafter PJM, PIEOUG CHARTER].

impossible, a proposal is advanced if three voting members from two sectors approve of it.<sup>169</sup>

While we have focused on PJM to show the depth of the commitment to corporatist ideals in the stakeholder-engagement process, several other RTOs are quite similar. Although corporatism and pluralism exist on a continuum and few institutions fall completely on one end of the spectrum, we believe that most RTOs' engagement processes are clearly grounded in corporatist thinking. Of particularly decisive weight in the categorization is the limitation of membership to certain types of entities, the weighting of sectoral interests, and the structuring of sectoral vetoes, all of which depart substantially from the pluralist default of unfettered competition among all interests. This makes RTOs something of an anomaly in the United States, which has historically preferred to loosely structure interest-group interactions with government, if it structures them at all.

### III. RTO CORPORATISM IN THE TRILEMMA ERA

On some level, the corporatist processes in RTOs are doing what they set out to accomplish. A report conducted by the R Street Institute found that, on the whole, “a strong majority of diverse stakeholders believe that RTO stakeholder-governance processes provide benefits to the function of competitive wholesale markets” and that “these processes educate stakeholders on issues and market changes that affect the markets in which they participate, and help narrow differences and forge consensus, thereby reducing litigation before FERC and the courts.”<sup>170</sup> Yet, whether corporatism is working for the corporatists is not the question of the energy-trilemma era. Instead, it is whether corporatism is working for the broader set of stakeholders and citizens who increasingly have an interest in how the grid is being governed but who are excluded or inadequately represented.

In this Part, we show that there are reasons to doubt that corporatism is working for broader society. First, we show that RTOs' rules and regulations about who may participate and how they may participate in the corporatist quest for consensus are inadequate to bring all interests in the energy-trilemma era to the corporatist table. Second, we turn to two case studies to show how democratic-governance dysfunction arises from these imbalances in practice.

#### *A. Power Imbalances in Corporatist Structures*

Within RTOs, a serious threat to the corporatist framework is the way that the empowered stakeholders with a FERC-protected representational

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169. PJM, *supra* note 165, at 29.

170. JAMES ET AL., *supra* note 4851, at 11.

monopoly no longer have any plausible claim to represent the interests of outsiders (or even, in some cases, of all of the insiders). This is an endemic problem for corporatist institutions—the effort to induce consensus among stakeholders with divergent interests requires an almost superhuman ability to craft rules and processes that will be viewed as legitimate by the participants and nonparticipants alike.<sup>171</sup> Stressing even this naturally difficult task, the energy transition has rapidly scrambled the politics of the electric power sector, introducing a new social imperative to decarbonize that is in some tension with other traditional goals of the sector.<sup>172</sup> As a result, corporatist processes that once seemed justified are under significant stress both from within and from without. We will again focus our attention on PJM, in part because this is where our two case studies emerge from, but concerns about power imbalances have been alleged at other RTOs as well.<sup>173</sup>

### 1. *Imbalances Due to Voting and Membership Rules*

As discussed above, RTOs often have a tiered membership structure entitling various participants to certain rights to participate and influence RTO decisions.<sup>174</sup> These rigid rules serve the purpose of tightly controlling the scope of participation and inducing consensus,<sup>175</sup> but in practice, they show signs of obsolescence. At PJM, for example, there is a formal equality of each of the five traditional sectors,<sup>176</sup> with each receiving twenty percent of the vote on proposal packages at the senior-committee level.<sup>177</sup> Yet, this allocation of representational rights has broken down as the industry has evolved in response to new demands in the energy-trilemma era. Studies have shown that the “proliferation of certain types of stakeholders have [sic] diluted their voting power in sector-based voting regimes.”<sup>178</sup> This leads to the perverse consequence that as participation grows, the power of those sectors decreases. The membership of PJM has grown in the generator and other-supplier categories substantially in recent years, which has in turn given load-side sectors a stronger veto power at the senior-committee level.<sup>179</sup>

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171. See Freeman, *supra* note 15, at 84–85 (discussing weaknesses in corporatism that stem from the difficulty of being truly inclusive).

172. See Lenhart & Fox, *supra* note 58, at 1; see also Sharon B. Jacobs, *Agency Genesis and the Energy Transition*, 121 COLUM. L. REV. 835, 880–81, 890 (2021).

173. See Welton, *supra* note 10.

174. See *supra* Part II; Lenhart & Fox, *supra* note 58, at 6.

175. See *supra* Subpart III.B.

176. Again, other RTOs largely follow PJM in sectoral-weighted voting. See Lenhart & Fox, *supra* note 58, at 10.

177. *Id.*

178. Comments of RTOGov Researchers, *supra* note 70, at 1.

179. SIMEONE, *supra* note 72, at 33.



These kinds of imbalances among sectors that arise as the industry evolves can lead to one sector having an effective veto over any policy that would disadvantage it. At the standing-committee level in PJM, for instance, the introduction of “affiliate voting” drastically expands the power of the supply sectors (i.e., generators, other suppliers, and transmission owners).<sup>180</sup> These members have many more affiliates than the members on the load side do. For example, American Electric Power, a large transmission-owning utility, gets one vote at the senior-committee level, but in the planning committee, the committee responsible for advancing any proposal related to transmission planning, American Electric Power gets nineteen votes for each of its affiliates.<sup>181</sup> Altogether, transmission owners have over one hundred votes, which is almost always enough to carry a majority in the planning committee, making it necessary for PJM to accede to the demands of the transmission owners if it wants to do anything related to transmission planning.<sup>182</sup> Effectively, this gives a single sector the ability to veto any proposal that would threaten transmission owners’ interests. And it is not just particular committees that are captured by particular sectors—the standing committees as a whole are dominated by supply-side interests.<sup>183</sup> According to interviews that we conducted, load-side interests rarely have more than eight percent of the vote at the standing-committee level.<sup>184</sup>

Because of affiliate voting at the standing-committee level, transmission owners, in particular, and supply-side sectors, generally, exercise a veto on any policy they dislike. While they can use this same power to advance proposals that lack any support from load-side interests through the standing-committee level, load-side interests possess a similar veto power at the senior-committee level since they have forty percent of the vote at that level and any proposal needs two-thirds support to advance to the board.<sup>185</sup> Put simply, mutual veto rights do not guarantee that consensus will emerge; in some circumstances, gridlock simply means that nobody is remotely satisfied. RTOs like PJM may not have reached the point where consensus has completely broken down, but on select issues, the pressure is showing.<sup>186</sup> Scholars have begun to uncover features of the stakeholder-engagement processes that systemically skew outcomes toward certain subsectors and exclude new entrants and smaller entities from full participation.<sup>187</sup> This is likely only to get worse as the clean-

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180. Interview with PJM Participant (July 16, 2021).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *See infra* Subpart III.B.

187. *See, e.g.,* Zachary Teti, *By Show of (Which) Hands: An Empirical Analysis of Regional Transmission Organization Stakeholder Voting* (May 2021) (M.A. Thesis, Pennsylvania State University),

energy transition continues to change the politics of the electric power sector, altering the incentives of various subsectors.

Also unanticipated before the energy-trilemma era were the widespread demands for greater participatory rights for nonmembers in RTO processes. RTO rules, as discussed above, have traditionally starkly delimited the role of nonmembers in the process.<sup>188</sup> As others have pointed out, RTOs are essentially “private membership clubs in which incumbent industry members make the rules for electricity markets and the electricity grid through private mini-democracies—with voting privileges reserved for RTO members—under broad regulatory authority.”<sup>189</sup> As discussed above, this has roots in the historical development of RTOs from tight power pools to FERC-certified grid governors and a deep and abiding commitment to a corporatist model of democratic governance.<sup>190</sup> But what once made perfect sense now looks blatantly exclusionary. This can be seen in how RTOs (and by extension FERC) treat what most would consider critical stakeholder groups in the energy-trilemma era: ordinary ratepayers and environmental organizations.

In PJM, for example, the amorphous voting category of “end users” is supposed to capture the electric power consumer’s perspective, and to some degree it does. State offices of consumer advocates are permitted to serve as proxies for ratepayers’ interests as ex officio nonvoting members in the senior committees and do have voting rights in the standing committees as part of the “end use” sector.<sup>191</sup> Their activities are coordinated by an organization called Consumer Advocates of the PJM States (CAPS), which does not itself have a vote but does assist individual consumer advocates in their participation as ex officio members.<sup>192</sup> But the bulk of the “end use” sector is composed of large retail customers—that is, industrial facilities and the like.<sup>193</sup> As a whole, the voting members are generally market participants (three percent transmission owners and developers, twenty-three percent generation owners or independent power producers, and sixty-three percent power marketers and

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[https://etda.libraries.psu.edu/files/final\\_submissions/23865](https://etda.libraries.psu.edu/files/final_submissions/23865); Comments of RTOGov Researchers, *supra* note 70, at 8–9.

188. See *supra* notes 82–85 and accompanying text; Lenhart & Fox, *supra* note 58, at 7 (“Participants in RTO governance are largely professional stakeholders, representing private, public, or non-profit organizations, rather than members of the general public.”).

189. Welton, *supra* note 10, at 213.

190. See *supra* Subpart II.B.1.

191. PJM, OPERATING AGREEMENT, *supra* note 163, § 8.2.3.

192. CONSUMER ADVOCOS. OF THE PJM STATES, <http://pjm-advocates.org/home.html> (last visited Mar. 11, 2023).

193. See *Member List*, PJM, <https://www.pjm.com/about-pjm/member-services/member-list> (last visited Mar. 11, 2023) (listing forty-three current end-user members, such as the Trustees of the University of Pennsylvania and Pennsylvania Grain Processing LLC, but no individual customers); see also Lenhart & Fox, *supra* note 58, at 9 (showing that industrial and commercial users make up almost sixty percent of PJM’s end-use sector with statewide consumer advocates making up most of the rest, which is low compared to SPP and MISO, where the entire end-use sector is made up of industrial or commercial users).

suppliers),<sup>194</sup> meaning that they actually do business in the wholesale markets that PJM runs. Retail customers generally do not do business in the wholesale markets, except when they are so large that they are directly connected to the transmission grid and bypass electric distribution companies (a separate subsector in PJM's membership).<sup>195</sup> And while it may be technically possible for smaller retail customers or even individuals to join as part of the end use sector, or for small generators (think rooftop solar or small renewable facilities) to join as "other suppliers," the costs of membership are prohibitive: there is a \$2,000 application fee, a \$1,500 risk policy review fee, and a \$5,000 annual membership fee.<sup>196</sup> Together, it is clear that the average ratepayer is indirectly represented by electric distribution companies at best and not at all represented at worst. The working theory appears to be that the public interest is in low-cost electric power and that the efforts of electric distribution companies and other load-side intermediaries to counteract supply-side interests will redound to the benefit of all.

National interest groups could, in theory, represent the interests of various constituencies of ratepayers—both those interested in a greener grid and those interested primarily in lower bills. While environmental groups like the Natural Resources Defense Council and consumer protection groups like Public Citizen somewhat regularly participate informally in PJM's CBIR process,<sup>197</sup> they are seated at the children's table. PJM has allowed these groups that are excluded from PJM membership to form one so-called "user group" supported by PJM member fees.<sup>198</sup> This user group, PIEOUG, allows "bona fide" consumer-advocacy groups or environmental groups to organize participation in the CBIR process and communicate with the PJM board.<sup>199</sup> But, again, PIEOUG and the organizations it comprises do not have any formal power in PJM proceedings, and there is reason to believe that this heavily disadvantages these interests. One interviewee suggested that green interests, despite PIEOUG, are essentially cut out of the process at PJM.<sup>200</sup> Moreover, even to the extent that PIEOUG influences the process, it is not clear that these national environmental organizations are adequately representative of even the full range of views of individual consumers or environmental advocates.<sup>201</sup> The story is similar with respect to state regulatory commissions, which again are not voting members

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194. Lenhart & Fox, *supra* note 58, at 7.

195. *Id.*

196. *Membership Enrollment*, PJM, <https://www.pjm.com/about-pjm/member-services/membership-enrollment> (last visited Mar. 11, 2023).

197. Interview with PJM Participants (July 15 & 27, 2021).

198. See *supra* note 84 and accompanying text.

199. PJM, PIEOUJ CHARTER, *supra* note 168, at 1.

200. Interview with PJM Participant (July 16, 2021).

201. See generally Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300 (2016) (arguing that there is a gap between interest groups and their memberships that undermines theories premised on interest-group influence on decision-making).

and which rely on OPJMS to coordinate these nonmembers' participation in stakeholder deliberation.<sup>202</sup> Although OPJMS and the states could represent a broader set of interests (albeit without any formal power) in theory, there are reasons to doubt that states would be effective advocates for all citizens' interests.<sup>203</sup>

In short, PJM's formal membership structure and voting process exalts certain market participants' roles and systematically excludes the full participation of a variety of other constituencies, including consumer, environmental, and state interests, that are key players in the politics of the energy transition. Even where it does technically allow these interests to organize and participate informally through coordinating bodies like CAPS, PIEOUG, and OPJMS, it limits this participation to well-organized interest groups that may not be fully representative of the diversity of views in the public. These exclusions undermine the legitimacy of the corporatist structures of the RTO. It is difficult to imagine an argument that a representational monopoly that excludes these categories of interests from full and coequal participation could maintain legitimacy.

This deficiency has become even more important now that RTOs' decisions are so routinely delving into highly public questions about the clean-energy transition. While the corporatist model may have worked as long as the mandate was simply to coordinate the sector to provide reliable and inexpensive electric power, it buckles when political demand and market opportunities combine to introduce a third, and somewhat orthogonal, goal of the energy trilemma: that of replacing the incumbent stakeholders with new ones who will provide clean energy.

## 2. *Lack of Transparency*

RTOs' formal exclusion of certain interests is compounded by serious information asymmetries between insiders and outsiders. Unlike a state public-utility commission, RTOs generally do not build a formal record that is presumptively public information.<sup>204</sup> Instead, RTOs like PJM selectively release information, if they release information at all.<sup>205</sup> Consequently, it is difficult for outsiders to obtain basic data on how various entities voted, what was discussed at committee meetings, what was discussed at *ex parte* meetings, etc.<sup>206</sup> While

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202. SIMEONE, *supra* note 72, at 26.

203. Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 958 (2014) (arguing that state interest groups often take positions "where state constituents or even group members do not agree").

204. KAVULLA, *supra* note 31, at 11–12.

205. *Id.*; SIMEONE, *supra* note 72, at 2 (noting that "lower-level committee voting is not transparent and simple majority voting results are not presented by sector" in PJM).

206. KAVULLA, *supra* note 31, at 11–12.

lower-level committees are supposed to file a report with the senior committees on the stakeholder deliberations, this information is rarely made public.

In theory, nonmember participants in the CBIR stakeholder process could relay information to the broader public, at least when that information is observable by participants in the deliberation. Some interest-group participants do this to some extent. But this indirect method of transparency is limited by the fact that nonmember interest-group participation in committees is sporadic. Simply put, there is too much going on for even the largest national interest groups to report on everything that happens in committee deliberations, even if they were invited to take part. It is therefore inadequate to rely on nonmembers to fill in the gaps left by PJM's lack of record-building and disclosure.

On some level, the lack of transparency at PJM and other RTOs is entirely consistent with the corporatist underpinnings of the organizations. While sunlight may be the best disinfectant, it can also inhibit logrolling and other behaviors that allow compromise in negotiations. Shielding stakeholder processes from public scrutiny may be justified as a necessary evil to further the larger goal of a negotiated consensus among formal stakeholders.<sup>207</sup> However, this particular bargain becomes harder to defend when the consensus it enables is only a partial consensus. To the extent that representation is inadequate, transparency becomes all the more important.

### B. *Case Studies of Corporatist Dysfunction in the Energy-Trilemma Era*

The erosion of the legitimacy of the corporatist model in RTOs is more than an abstract concept. These dysfunctions have enormous consequences for how we navigate the energy transition. This may be seen best through case studies involving two issues that RTOs have waded through over the past several years: managing compensation for low-carbon generation in capacity markets and building new transmission lines to support utility-scale renewables. Both of these issues highlight the “polycentric” politics of the energy-trilemma era<sup>208</sup> and how RTOs have muddled their way through them with limited efficacy.

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207. See SIMEONE, *supra* note 72.

208. Polycentrism in the sense we invoke it is best associated with Lon L. Fuller's *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978) (“We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a ‘polycentric’ situation because it is ‘many centered’—each crossing of strands is a distinct center for distributing tensions.”).

### 1. *The Minimum Offer Price Rule*

Electricity capacity markets are designed to alleviate perceived “missing money” in the supply of electric power and protect the reliability of the grid.<sup>209</sup> In particular, missing money means that certain generators, such as “peaking plants” that are only used when demand is particularly high, are not guaranteed enough revenue in energy markets to cover their fixed costs, which may lead to premature retirement that hurts the operability of the grid.<sup>210</sup> Missing money may come about due to price caps in wholesale markets, where RTOs prevent generators from bidding into the market above certain levels even when power is short.<sup>211</sup> Concern about restrictions on bidding into capacity markets may deter socially valuable investment in generation capacity, which in turn may reduce the reliability of the grid.

Capacity markets, however, suffer from a host of administrative difficulties.<sup>212</sup> Most basically, the regulator of the market needs to determine what specific prices will incentivize capacity investments and minimize the missing money problem. Inevitably, this involves making a guess about future demand. This administrative task has been fraught in recent years.<sup>213</sup> In order to regulate the supply of capacity in PJM and other RTOs, FERC issued its original “Minimum Offer Price Rule” (MOPR) in 2006 to set a minimum bid that would deter vertically integrated power companies (companies that supplied both power and distribution services) from artificially lowering the capacity market price to the point that other generators would never clear the market.<sup>214</sup> Over the period running from 2006 to 2019, however, the MOPR subtly shape-shifted. Concern began to grow that state-subsidized renewable generators were the primary culprit in lowering clearing prices in the capacity markets.<sup>215</sup> Over this period, PJM, with FERC’s approval, expanded the MOPR to offset the impact of state subsidies for renewable generators, which were thought to be part of the reason renewable generators were able to bid into capacity markets at such a low price.<sup>216</sup> The saga reached a climax in 2019, when the MOPR, approved by FERC, required new subsidized resources to bid into capacity markets at a price no greater than what their estimated cost of supplying capacity would be absent the state subsidies (which can be substantial

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209. See AAGAARD & KLEIT, *supra* note 19, at 37–51.

210. Joshua C. Macey & Jackson Salovaara, *Rate Regulation Redux*, 168 U. PA. L. REV. 1181, 1186–87 (2020).

211. *Id.*

212. Todd S. Aagaard & Andrew N. Kleit, *The Complexity Dilemma in Policy Market Design*, 30 DUKE ENV’T L. & POL’Y F. 1, 56–84 (2019).

213. See generally Danny Cullenward & Shelley Welton, *The Quiet Undoing: How Regional Electricity Market Reforms Threaten State Clean Energy Goals*, 36 YALE J. ON REG. 106 (2018).

214. PJM Interconnection, L.L.C., 117 FERC ¶ 61331 (2006).

215. Cullenward & Welton, *supra* note 213, at 112–13.

216. AAGAARD & KLEIT, *supra* note 19, at 205–29.

for renewables and nuclear power, depending on how subsidies are defined).<sup>217</sup> This would have had the likely practical effect of excluding many renewable generators from the market, effectively cutting off a revenue source for them and delivering a boost to fossil fuel-based sources of electric power.<sup>218</sup>

The newly augmented MOPR was subject to criticism from a long list of commentators. For example, implementation of the MOPR would essentially require consumers to pay twice for excess capacity in the market—once through the state subsidy and once through the capacity market—which would now require ratepayers to compensate future generators at a higher rate than they would if renewable generation had supplied the capacity.<sup>219</sup> The MOPR also appears to violate provisions of the Federal Power Act, which allowed states to set their own energy policies.<sup>220</sup> For our purposes, however, the most relevant critique of the MOPR as presented by then-Commissioner and now FERC Chairman Richard Glick<sup>221</sup> was that it seemed designed to make it more expensive for states to subsidize renewable electricity production. Implementation of the MOPR would deprive state-supported renewable generation sources of critical capacity market revenues. This in turn would make it more expensive to support such sources and therefore reduce the number of such generators sponsored by individual states.

The 2019 MOPR and its extreme stance against renewable generation in PJM was in large part a product of the PJM corporatist governance structure, and it reveals the fundamental weakness of that structure in the energy-trilemma era. As discussed above, generators are a designated sector, and generators can be expected to support any proposal that would increase their profits. Indeed, the apparent original impetus for the MOPR came from a complaint from Calpine, a natural gas generator with significant assets in the Mid-Atlantic region.<sup>222</sup> But due to the way membership and voting is structured in PJM, no represented sector really had a strong incentive to oppose the augmented MOPR despite its obvious flaws. Moreover, the exclusion of state regulators, environmental organizations, and consumer organizations from any part of the

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217. See Sonal Patel, *The Significance of FERC's Recent PJM MOPR Order Explained*, POWER MAG. (Dec. 26, 2019), <https://www.powermag.com/the-significance-of-fercs-recent-pjm-mopr-order-explained/>.

218. Kathryn Cleary, *What the Minimum Offer Price Rule (MOPR) Means for Clean Energy in PJM*, COMMON RES. (Jan. 21, 2020), <https://www.resources.org/common-resources/what-minimum-offer-price-rule-mopr-means-clean-energy-pjm/>. Not all renewables would have been excluded, as there were exemptions from the definition of “subsidy” for renewables mandated by Renewable Portfolio Standards, but even conservative estimates suggested some impact. *Id.*

219. Put another way, the MOPR violated the policy market goal of reaching the policy object (here, sufficient capacity for reliability) at the lowest possible cost. See Aagaard & Kleit, *supra* note 212, at 17.

220. See Todd S. Aagaard & Andrew N. Kleit, *A Road Paved with Good Intentions?: FERC's Illegal War on State Electricity Subsidies*, ELEC. J., June 2020, at 9–10; Joshua C. Macey & Robert Ward, *MOPR Madness*, 42 ENERGY L.J. 67, 89 (2021).

221. See, e.g., Calpine Corp., 163 FERC ¶ 61236 (2018) (Glick, Comm’r, dissenting).

222. See Complaint Requesting Fast Track Processing, Calpine Corp., 163 FERC ¶ 61236 (2018) (No. EL16-49-000). Calpine was joined in its request by other merchant generators with similar interests in raising capacity market prices.

formal process surrounding the MOPR meant that PJM had little incentive to grapple meaningfully with issues of the energy transition that, in retrospect, seem unavoidable.

While one cannot know precisely what would have occurred had the PJM MOPR procedure been subject to a more inclusive and transparent process, it is reasonable to believe that it would have induced filings by a variety of affected interests, including state governments and organizations interested in the energy transition. PJM would then have been forced to answer relevant questions: in particular, it would have had to answer questions about the impacts of the MOPR on consumer costs, the rights of states, and the energy transition. This in turn would have become part of the record before FERC and perhaps led to better decision-making in the process. Perhaps more importantly, such a procedure might well lead to better decisions in the future. We discuss all of these possibilities in Part IV and make the case that more pluralistic, inclusive procedures could help RTOs and FERC avoid missteps like the MOPR debacle.

With the election of a Democratic administration in November 2020 and the elevation to the FERC chairmanship of a commissioner who made his opposition to the augmented MOPR clear, the days of this policy were clearly numbered. In response to the change in FERC policy, in 2021, PJM created a “Critical Issue Fast Path” to scale back its MOPR.<sup>223</sup> After considering nine different MOPR proposals, the task force supposed a proposed rule from PJM staff that would essentially eliminate prohibitions on subsidized generators.<sup>224</sup> FERC would then allow this rule to go into effect.<sup>225</sup>

While the MOPR policy was therefore not permanent, its downfall was caused by an extraordinary coalition of interests who made the otherwise obscure rule into one of general interest. This is not likely to be a common occurrence. PJM rules are complex and often deal with issues of extremely limited interest to the general public. The public outcry from the MOPR rule may not likely be repeated, and we cannot rely on such an unusual political and legal mobilization to correct every misstep that PJM and other RTOs make because of faulty corporatist processes. A case in point is our next case study, which has not resulted in anything remotely comparable to the mobilization against the MOPR.

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223. Letter from Ake Almgren, Chairman of the Bd. of Managers, PJM, to PJM Stakeholders (April 6, 2021), <https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/20210406-board-letter-regarding-capacity-market-minimum-offer-price-rule-and-initiation-of-the-critical-issue-fast-path-process.ashx>.

224. Catherine Morehouse, *PJM Board Approves New MOPR Plan in Effort to Placate States*, FERC, UTIL. DIVE (July 9, 2021), <https://www.utilitydive.com/news/pjm-board-approves-new-mopr-plan-in-effort-to-placate-states-ferc/603053/>.

225. See Statement of Chairman Glick & Comm’r Clements, PJM Interconnection, L.L.C., No. ER21-2582-000 (FERC Oct. 19, 2021), [https://elibrary.ferc.gov/eLibrary/filelist?accession\\_number=20211019-4001&optimized=false](https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20211019-4001&optimized=false); see also Ethan Howland, *PJM’s ‘Focused’ MOPR Takes Effect, Boosting Renewables and Nuclear as FERC Commissioners Deadlock*, UTIL. DIVE (Sept. 30, 2021), <https://www.utilitydive.com/news/pjm-focused-mopr-takes-effect-ferc-capacity-market/607417/>.



## 2. *The SOO Energy Transfer Line*

The energy transition will require massive investments in transmission lines.<sup>226</sup> In particular, high-voltage direct current (HVDC) transmission lines will be required to link wind energy sources in the Midwest to electricity consumption centers in the eastern United States.<sup>227</sup> Transmission lines could be developed by conventional utilities, but increasingly, merchant transmission companies (essentially for-profit, unregulated enterprises) are trying to get in the game.<sup>228</sup> One such merchant transmission developer, SOO Green HVDC Link, has proposed to build a 350-mile HVDC line from Mason City, Iowa, to Plano, Illinois: a line capable of providing 2100 megawatts (MW) of wind power to PJM's western boundary.<sup>229</sup> This would be a \$2.5 billion private investment in merchant transmission. Essentially, the SOO Link would buy low-cost wind power in Iowa and transmit it to the PJM region, where the price of electricity is generally higher. The SOO Link would make money on the energy price differentials between Iowa and the PJM region and in the process would help unlock the potential of wind resources in the Midwest.

SOO, however, has run into difficulties with PJM gaining access for its transmission line to PJM's capacity market. Capacity market revenues, which generally account for more than twenty percent of total revenues in PJM,<sup>230</sup> can be crucial for a project's financial viability. Under current capacity market rules, imports into PJM for capacity regions are constrained by the potential existence of "pseudo-ties." Pseudo-ties are essentially firm transmission access from generators outside of PJM to send their power into PJM.<sup>231</sup> The crux of the problem with pseudo-ties is that PJM does not want its capacity market to accept bids from generators that, should the relevant flows occur, create congestion on the transmission lines into PJM and therefore limit the amount of power delivered.

The SOO HVDC Link, however, is different from conventional transmission lines. On traditional transmission lines, power flows according to

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226. See Daniel E. Walters, *Lumpy Social Goods in Energy Decarbonization: Why We Need More than Just Markets for the Clean Energy Transition*, 93 U. COLO. L. REV. 541, 585–90 (2022).

227. See, e.g., LIZA REED ET AL., NISKANEN CTR., HOW ARE WE GOING TO BUILD ALL THAT CLEAN ENERGY INFRASTRUCTURE? (2021), [https://www.niskanencenter.org/wp-content/uploads/2021/08/CATF\\_Niskanen\\_CleanEnergyInfrastructure\\_Report.pdf](https://www.niskanencenter.org/wp-content/uploads/2021/08/CATF_Niskanen_CleanEnergyInfrastructure_Report.pdf).

228. For background on merchant generators versus incumbents in planning for infrastructure planning, see Alexandra B. Klass, *The Electric Grid at a Crossroads: A Regional Approach to Siting Transmission Lines*, 48 U.C. DAVIS L. REV. 1895, 1925–43 (2015), and Peskoe, *supra* note 138, at 36–41.

229. *About*, SOO GREEN HVDC LINK, <https://soogreen.com/about/> (last visited Feb. 6, 2023).

230. PJM, PJM 2021 FINANCIAL REPORT 7 (2021), [https://services.pjm.com/annualreport2021/static/PJM\\_2021\\_Financials-459bef50884c5d15c587f2e101c91889.pdf](https://services.pjm.com/annualreport2021/static/PJM_2021_Financials-459bef50884c5d15c587f2e101c91889.pdf).

231. *Dynamic Transfers*, PJM, <https://www.pjm.com/about-pjm/member-services/dynamic-transfers> (last visited Feb. 6, 2023).

Kirchhoff's Law towards the region of lowest resistance.<sup>232</sup> Thus, transmission from one source can increase the resistance on a line, reducing the ability of a power from another source to reach the desired destination (here the PJM footprint). With conventional lines, the pseudo-tie restrictions on imports serve an important purpose of reducing congestion. The proposed SOO line, however, would be “controllable.” Essentially this means that power can be injected in Mason City, Iowa and delivered to PJM in Plano, Illinois without interfering with other power flows into PJM. This implies that the creation of pseudo-ties is not necessary to ensure the delivery of power across the SOO line during a shortage event (when PJM power would be scarce). In a very real sense, PJM's rules are not currently equipped to deal with the issues involved in dispatchable transmission. Thus, to gain capacity market rights for the transmission line, SOO would require a change in PJM rules.

To instigate such a change, SOO approached PJM in late 2019. Following several meetings and PJM staff suggestions, SOO brought a problem statement before the PJM Markets and Reliability Committee (MRC).<sup>233</sup> Perhaps SOO Energy's most important argument was that its proposed rules for PJM were similar to those already enacted by ISO-NE and NYISO.<sup>234</sup> Thus, at least under SOO Link's approach, PJM was required to either adopt similar rules to address a potentially critical infrastructure problem—the need to promote renewable energy to facilitate the energy transition—or explain why it was not appropriate for it to do so. In May 2020, the MRC approved the problem statement, and an HVDC Senior Task Force was formed in the MRC.<sup>235</sup> The HVDC Senior Task Force met four times from July 2020 to October 2020. At that point, a stalemate was apparently reached.<sup>236</sup> Indeed, as of March 2023, eighteen months after the SOO petition, FERC has not acted on the question.

In September 2021, SOO Green filed a Section 206 complaint with FERC, alleging that PJM's refusal to change its rules was not “just and reasonable.”<sup>237</sup> Here we can see some of the challenges of the corporatist governance scheme. There is no record available for any deliberations with PJM or the MRC. Other than the allegations in the complaint to FERC, there is no evidence that PJM even considered this matter. Thus, there is very little material available for

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232. See W.M. WARWICK, U.S. DEP'T OF ENERGY, A PRIMER ON ELECTRIC UTILITIES, DEREGULATION, AND RESTRUCTURING OF U.S. ELECTRICITY MARKETS 4.1 (2002), [https://www.pnnl.gov/main/publications/external/technical\\_reports/PNNL-13906.pdf](https://www.pnnl.gov/main/publications/external/technical_reports/PNNL-13906.pdf).

233. Complaint and Request for Relief at 24, SOO Green HVDC Link ProjectCo, LLC, No. EL21-103-000 (FERC Sept. 21, 2021), [https://elibrary.ferc.gov/eLibrary/filelist?accession\\_number=20210921-5137&optimized=false](https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20210921-5137&optimized=false).

234. *Id.* at 44–46.

235. *Id.* at 25. For a presentation by SOO Energy to PJM, see STEVE FRENKEL, SOO GREEN HVDC LINK: PJM MRC SPECIAL SESSION (2020), <https://www.pjm.com/-/media/committees-groups/committees/mrc/2020/20200522-hvdc/20200522-item-03-soo-green-hvdc-link-presentation.ashx>.

236. Complaint and Request for Relief, *supra* note 233, at 25.

237. *Id.* at 1.

FERC (and any subsequent appeals court reviewing FERC's response to the Section 206 complaint) to examine. Further, PJM is under no time constraint to deal with any request to change its rules, so FERC always has an easy out whenever a party like SOO complains about PJM inaction: FERC can simply let PJM dither a bit longer in hopes that a resolution will be reached.

This matter is highly technical, and thus any analyst must temper their conclusions in that light.<sup>238</sup> What is potentially disturbing, however is the quality of the arguments PJM made in its defense to the complaint to FERC and how easily they can be refuted. For example, PJM argued that SOO's petition "[i]gnores repeated Commission findings that PJM is entitled to require resources committed to ensure reliability to PJM loads to meet PJM deliverability standards."<sup>239</sup> This argument can only serve to obscure SOO's point. Any entitlement that PJM has to set its own rules is subject to the restriction that they must be "just and reasonable." In another argument, PJM asserted, "Ancillary Services are not available from physical generators on MISO system because PJM does not control external generators unless pseudo-tied."<sup>240</sup> Yet the ability to provide ancillary services (not energy) is not a requirement to being able to access PJM's capacity market. PJM summed up its argument by contending that "by removing the pseudo-tie requirement, SOO Green's proposal would eliminate PJM's ability to have necessary dispatch control over the external resources that use SOO Green's line for the final delivery into PJM."<sup>241</sup> Yet this argument abstracts from SOO's entire proposal. SOO proposed to build a deliverable transmission line with controls available to PJM at the western edge of PJM territory.

Most prominently, PJM never directly confronted SOO's main point—that in the face of an important policy concern with the desire to assist the energy transition, something like the rules of ISO-NE and NYISO needed to be adopted. Instead, PJM appears to have done its best to confuse the issue. Unfortunately, with the lack of ability to create a full record, such a tactic may be extremely rewarding. It is hard to see how SOO's arguments could have been evaded by the RTO in a governance process that was less corporatist and more pluralist. If the SOO saga, and for that matter the MOPR saga, are at all representative of some of the issues the energy trilemma has presented for corporatist RTOs (and we think they are), then it is high time to consider

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238. We note, however, that recent literature indicates that complexity can be used by vested interests to deter needed reforms. *See, e.g.*, Robert F. Weber, *Structural Regulation as Antidote to Complexity Capture*, 49 AM. BUS. L.J. 643 (2012); Nolan McCarty, *Complexity, Capacity, and Capture*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2013).

239. Answer of PJM Interconnection, L.L.C. at 5 tbl.1, SOO Green HVDC Link ProjectCo, L.L.C., No. EL21-103-000 (FERC Oct. 22, 2021), [https://elibrary.ferc.gov/eLibrary/filelist?accession\\_number=20211022-5133&optimized=false](https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20211022-5133&optimized=false).

240. *Id.* at 6 tbl.1.

241. *Id.* at 6.

reforms of RTO governance that would move things in a more pluralistic direction. It is to that case that we now turn.

#### IV. TOWARDS PLURALISM IN RTO GOVERNANCE

The corporatist model underpinning RTO governance arose in an era when the public-policy role of RTOs was limited to the twin goals of ensuring cheap and reliable electric power.<sup>242</sup> With two-dimensional politics relating entirely to markets and operations, it was originally defensible to assume, as RTO governance currently does, that balancing supply-side and load-side interests in the process of decision-making would induce a working consensus that realizes these goals. If these narrow goals are still taken to be the only goals, then a response to the lack of openness to other interests might be that their potential contributions are not necessary. To the extent that these other interests have perspectives about the price of electricity or the reliability of service, the market participants themselves can effectively represent them.

What makes the exclusions and closure of RTO processes troubling from a democratic governance perspective, though, is that these narrow goals no longer plausibly represent a societal consensus on the aims of the energy system. We live in an energy-trilemma era, at least for the time being.<sup>243</sup> Changes in the industry and societal pressure for action on climate change, among other pressures, have transformed the policy question facing RTOs from one of maximization of agreed-upon goods (cheap and reliable energy) to one of challenging trade-offs—one of how to balance the price and reliability of energy against other values. These trade-offs include the values of choice and flexibility made possible by distributed energy resources such as rooftop solar and battery storage as well as the values of hastening the transition to cleaner sources of electric power. While there may sometimes be win-win policies that further both the traditional and newer goals, it will not always, or perhaps even often, be possible to make all parties better off. Worse, there may be biases that result from allowing the original corporatist parties to make these choices, given that their own private interests do not necessarily align with the goals of sustainability.<sup>244</sup> As the case studies reviewed in the last Part revealed, several policy initiatives emerging from PJM highlight the tension.<sup>245</sup>

If it is true that RTOs are increasingly making trade-offs among different and incommensurable values with a legitimate claim to represent at least part of

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242. See *supra* Part II; see also Welton, *supra* note 10, at 214 (“RTOs have a myopic focus on grid reliability and growth in electricity supply that is at odds with public objectives for the sector.”).

243. Indeed, even RTOs recognize as much. See ISO/RTO COUNCIL, <https://isorto.org/> (last visited Feb. 17, 2023) (“The ultimate goal is to ensure access to affordable, reliable and sustainable power . . .”).

244. See Welton, *supra* note 10, at 211–12 (“[F]ossil fuel companies maintain dominance . . . by essentially running the United States’ electricity grid, writing its rules in ways that favor their private interests at the expense of public clean energy goals.”).

245. See *supra* Subpart III.B.

the public interest writ large and are arguably doing so in a slanted fashion, then it is past time for reforms that would open up participation by a broader array of interests and eliminate institutionalized disparities in the power of certain players. In short, it is worth considering a general reconstitution of the RTO governance model along pluralist lines rather than corporatist lines.

What would that look like? What would it change? How successful would such changes be at improving RTO efforts to govern the grid in the energy-trilemma era? This Part takes a first step in trying to answer these questions, offering several pluralistic reforms that we think could help address the concerns around corporatist RTO governance. It is important to keep in mind that this is not an on/off switch. Corporatism and pluralism are ideal types on a continuum, and reforms need not move all the way in either direction to address valid critiques like the one we laid out above. Our aim in this Part is to canvass the possibilities and leave hard questions about which specific reforms to package together for later discussions.

#### *A. Methods for Opening RTO Decision-making to Pluralistic Governance*

Given that the default in American public administration is more pluralistic than corporatist,<sup>246</sup> there is much experience to draw on to envision what pluralistic RTO decision-making might look like. In what follows, we talk through some of the pros and cons of different pluralistic mechanisms, both generally and in the specific context of grid governance. We draw substantially on a recent inventory of public-participation mechanisms used by regulatory agencies in the federal government compiled for the Administrative Conference of the United States (ACUS). In their report for ACUS, Michael Sant’Ambrogio and Glen Staszewski “surveyed forty-three federal agencies to identify the institutional structures, procedures, and practices used to engage the public with their regulatory work.”<sup>247</sup> They found that “there are many existing tools that agencies can use to engage absent stakeholders and unaffiliated experts in agenda setting and rule development” and that, surprisingly, “agencies *already use* many of these existing tools.”<sup>248</sup>

From our perspective, many of these methods could also be used by RTOs to help address the democratic deficit in the corporatist model by significantly opening RTOs to all comers. In essence, our proposal accords with Shelley Welton’s: there needs to be more that is genuinely public about RTOs.<sup>249</sup> We differ in that Welton would simply make RTOs formally public and

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246. See Stewart, *supra* note 87; Freeman, *supra* note 15.

247. Michael Sant’Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 817 (2021).

248. *Id.*

249. See Welton, *supra* note 10, at 215 (“[T]he Article’s preferred solution is to restructure regional grid governance, reclaiming it for public control rather than abandoning it.”).

presumptively governed by ordinary administrative law. We think there is no need for that if RTOs simply become more *like* administrative agencies.

### 1. *Broadening Access to RTO Proceedings*

Right now, RTO processes like the one at PJM privilege intensive deliberations with a relatively small cast of members that represent only a sliver of all the people with a stake in the future of the electric power sector.<sup>250</sup> The general public is essentially entirely absent in these deliberations, and indeed, they cannot rely on NGOs to represent them since those NGOs are not given much, or any, power in most RTOs.<sup>251</sup> In structuring decision-making this way, FERC and the RTOs have overlooked what some have called “the greatest invention[] of modern government”: the process of notice and comment.<sup>252</sup> Notice and comment involves a decision maker issuing a notice of a proposed action to the general public, taking comments from any interested party or individual, and committing itself to responding to any salient comments.<sup>253</sup> Although this process is sometimes criticized as insufficiently deliberative,<sup>254</sup> it has clear advantages that address the democratic deficit in RTOs’ corporatist framework—namely, it makes what deliberation does occur more transparent, and it reduces barriers to participation among a more diffuse group of stakeholders. Essentially, notice and comment embraces the idea that participation should be open to all,<sup>255</sup> and it makes appropriate institutional trade-offs on the depth of deliberation to ensure that the full breadth of opinion and perspectives can be heard by the decision maker. This is precisely what RTOs need.<sup>256</sup> Notice-and-comment procedures would, we believe, be a particularly apt tool for RTOs because they would break down artificial barriers to participation, create a paper record that could assist FERC in reviewing RTO filings (as well as assist in judicial review of FERC’s resolution of disputes over

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250. Lenhart & Fox, *supra* note 58, at 7 (“The ratio of voting-eligible members to the number of market participants ranges from about 20% to 84% . . .”).

251. *Id.*

252. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 65 (1969).

253. CORNELIUS M. KERWIN & SCOTT R. FURLONG, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 50–54 (5th ed. 2017) (ebook).

254. STEVEN J. BALLA & SUSAN E. DUDLEY, *GEO. WASH. UNIV. REGUL. STUD. CTR., STAKEHOLDER PARTICIPATION AND REGULATORY POLICYMAKING IN THE UNITED STATES* 22 (2014).

255. Sant’Ambrogio & Staszewski, *supra* note 247, at 804 n.48.

256. To be sure, RTOs’ Section 205 filings *are* ultimately subject to notice-and-comment procedures once it is time for FERC to decide whether to approve a tariff change, *see* 18 C.F.R. § 375.203(b)(1)(ii) (2015); *Id.* § 375.302(o) (1978), so some critics of our proposal might argue that it would be duplicative for RTOs to conduct their own parallel notice-and-comment procedure. This criticism ignores the fact that it is often too late to make changes to an RTO proposal by the time it goes to FERC for approval. To be meaningful at all, the opportunity for notice and comment must come earlier when it is still possible for RTOs to consider the full range of views on a proposal and make changes accordingly.

RTO filings), and generally make RTOs more responsive to a broader range of interests than the usual cast of characters.

Although some critics of notice-and-comment rulemaking argue that it is so shallow as to be tantamount to “Kabuki theater,”<sup>257</sup> there is ample evidence that open comment periods (and their close analogs, public hearings) promote public learning and perceptions of legitimacy, and many of the dysfunctions that can arise in notice and comment can be addressed through creative approaches pioneered by administrative agencies.<sup>258</sup> For instance, one possible concern about notice-and-comment processes is that their formal accessibility is belied by actual participation rates, which tend to be heavily skewed in favor of well-represented parties.<sup>259</sup> Administrative agencies in the federal government have addressed these concerns in a variety of ways, from targeted solicitation of comments<sup>260</sup> from underrepresented groups to uses of “visual rulemaking” to flatten the learning curve for lay participants.<sup>261</sup> And while the rise of mass commenting and “spam” comments has complicated some high-profile rulemakings, such as the FCC’s net neutrality rulemaking, agencies are becoming more adept at using available machine learning technologies to sift through masses of comments and pull out the salient threads.<sup>262</sup> Notably, most of these criticisms of notice-and-comment processes take aim at the quality of the deliberation that occurs in the exchange of papers, but that is not the chief problem that RTOs face. Deliberation is hardly lacking in RTO decision-making; it is a lack of accessibility and responsiveness to a broad range of potentially affected interests and perspectives that should be addressed. Notice-and-comment processes, particularly if they are supplemented and informed by the state-of-the-art methods of increasing representativeness,<sup>263</sup> could be an effective way of broadening the base of participation.

Beyond notice and comment, Sant’Ambrogio and Staszewski highlight a host of supplemental procedures that have proven highly effective in improving the flow of information from the diffuse public to agencies and back. Agencies have, for instance, experimented with suggestion boxes and hotlines,<sup>264</sup> listening

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257. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

258. Sant’Ambrogio & Staszewski, *supra* note 247; JENNIFER NASH & DANIEL E. WALTERS, PENN PROGRAM ON REGUL., PUBLIC ENGAGEMENT AND TRANSPARENCY IN REGULATION: A FIELD GUIDE TO REGULATORY EXCELLENCE 15–24 (2015).

259. Sant’Ambrogio & Staszewski, *supra* note 247, at 804–05.

260. *Id.*

261. Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183 (2016).

262. See STEVE BALLA ET AL., ADMIN. CONF. OF THE U.S., MASS, COMPUTER-GENERATED, AND FRAUDULENT COMMENTS 24–26 (June 1, 2021), [https://www.acus.gov/sites/default/files/documents/Final%20Report%20on%20Mass%2C%20Computer-Generated%2C%20and%20Fraudulent%20Comments%20%28Final%2006-01-2021%29\\_0.pdf](https://www.acus.gov/sites/default/files/documents/Final%20Report%20on%20Mass%2C%20Computer-Generated%2C%20and%20Fraudulent%20Comments%20%28Final%2006-01-2021%29_0.pdf); Bridget C.E. Dooling & Mark Febrizio, *Robotic Rulemaking*, BROOKINGS (Apr. 4, 2023), <https://www.brookings.edu/research/robotic-rulemaking/>.

263. See generally Brian D. Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, 90 GEO. WASH. L. REV. 1 (2022); Sant’Ambrogio & Staszewski, *supra* note 247.

264. Sant’Ambrogio & Staszewski, *supra* note 247, at 819, 824.

sessions or requests for information,<sup>265</sup> focus groups with random or targeted recruitment,<sup>266</sup> and “enhanced deliberative methods” such as citizen juries and deliberative polls.<sup>267</sup> These methods can be more difficult to manage effectively and are more costly to administer than simple notice and comment, but they pack a significant punch in warding off allegations that simple notice-and-comment proceedings effectively, if not formally, privilege informed, motivated, and well-represented parties. Many of these procedures—particularly the more open-ended ones such as requests for information—may be particularly useful at the agenda-setting and early policy-development stage when RTOs might be able to improve on initial proposals by consulting more and more diverse information as early as possible in the process.<sup>268</sup>

In short, if the goal is to make RTO decision-making processes less corporatist and more pluralistic, decades of experience in the formal administrative process provide a number of promising avenues for reform. The norm in the administrative process, at least since the 1960s, has been to favor broad participation through open-access processes that transparently recreate a paper dialogue that holds decision makers accountable to all of the diverse stakeholders in civil society.<sup>269</sup> Arguably, this can go overboard,<sup>270</sup> but there is no plausible argument that this will be a danger for RTOs any time soon.

## 2. *Better Accounting and Tracking of RTO Agendas*

Another area where RTOs could take their cue from administrative agencies is in providing more easily digestible information about what the RTO is considering doing at any given time. In fact, this area of reform may be essential for the open-access reforms above to be effective.

A frequent criticism of RTO stakeholder processes, even among those select entities and groups that do participate in deliberations, is that it is extremely difficult to keep track of the proceedings. PJM’s committee processes, for example, are byzantine. The CBIR process is by and large a years-long process. Committees often meet in person with sparse minutes simply summarizing who attended. It is rare for these minutes to discuss in any detail what topics were covered in the deliberation or what the next steps in the process will be. The price of missing a meeting can therefore result in being

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265. *Id.* at 819, 824.

266. *Id.* at 820, 824–25.

267. *Id.* at 821 n.124.

268. *See id.* at 822.

269. *See* Stewart, *supra* note 87; *see also* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 33 (1985).

270. *See generally* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019) (arguing that administrative law prizes participatory procedures at the expense of effective regulation); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995) (discussing the ossification thesis, which claims that administrative procedures grind regulation to a halt).



permanently behind the curve. There are benefits to this freewheeling approach for the committed deliberators who can afford to stay on top of every development: such a setup makes it easier for the interlocutors to maneuver within the decision space to find potential opportunities for consensus. The trade-off, though, is that it can be next to impossible for outsiders to meaningfully contribute when they cannot tell what is on the agenda or how the RTO got to where it is at any given moment in time.

Moreover, PJM's practice of advancing any proposal with at least three voting members' support sometimes results in dizzyingly complex deliberations and votes that can confuse even when participants manage to keep on top of every twist and turn in the deliberations. For instance, when PJM considered a MOPR replacement, the Members Committee ultimately voted on nine separate proposals, each of which had emerged from a committee process that considered an even broader range of alternatives.<sup>271</sup> PJM's proposal prevailed in this vote, as it often does, but suffice it to say that the barriers to participation in such a complex decision space are exponentially higher than they would be if PJM simply endorsed its proposal, noted possible alternatives, and solicited comment from the broader public.<sup>272</sup> It is already difficult to generate broad public input on a single proposal, and it may well be impossible for the diffuse public to participate if there is too much going on and no clear sense of which of the possible proposals is the favorite.

Providing an up-to-date snapshot of what is being considered at any particular time is thus one of the greatest challenges that RTOs face. To some degree, the notice-and-comment process addresses these concerns by reducing agency action to a predictable sequence—notice and proposal, comment period, then agency response—and limiting participation to that one discrete action. In fact, administrative agencies make many important decisions about alternatives (including the alternative of doing nothing) well before issuing a notice of proposed rulemaking.<sup>273</sup> It would not be desirable for RTOs to cut off participation over agendas and alternatives, just as it is not desirable for agencies to do so. The challenge is finding ways to make these earlier discussions more accessible, and the best solution is to make a record of them and disclose them as part of a publicly accessible docket.

Here, RTOs could draw on very substantial progress in administrative agencies over the past few decades in bringing real-time information to the public about rulemaking dockets, even in the earliest stages of proposal

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271. *PJM Members Vote on MOPR Proposals*, PJM INSIDE LINES (June 30, 2021), <https://insidelines.pjm.com/pjm-members-vote-on-mopr-proposals/>.

272. Social choice theory shows that such multidimensional voting leads to no stable or rational outcomes. See generally Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990) (discussing the basics of social choice theory (but also critiquing it)).

273. See William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC'Y 576 (2009).

development. Under executive order, administrative agencies produce the Semi-Annual Unified Agenda of Regulatory and Deregulatory Actions (the “Unified Agenda”).<sup>274</sup> The Unified Agenda contains information about rules in all stages of development. Each entry contains critical information about a rulemaking initiative, including a plain-language description of the action, expected timelines for promulgation, and relevant links to the regulatory dockets. In addition, the E-Government Act of 2002 called on the federal government to develop a trans-agency regulatory docketing system which would collect all relevant materials under consideration by agencies on particular actions and allow the public to submit comments.<sup>275</sup> The federal government in turn created Regulations.gov to fulfill this mandate.<sup>276</sup> These are not perfect systems by any means,<sup>277</sup> but together, they ensure that a member of the public, wondering what an administrative agency is doing and looking for an opportunity to contribute something, can—with relative ease—learn most everything that has happened and communicate with the agency in a one-stop shop. Agencies have often gone above and beyond this bare minimum to ensure not only that information in the docket is updated and formally accessible but also that it is practically accessible to lay participants. For instance, Sant’Ambrogio and Staszewski report on the Department of Transportation’s use of “status reports” and “effects reports” which keep people who sign up apprised of developments and translate them into more easily understood language.<sup>278</sup> These efforts to translate what is happening for a lay audience could be adapted to the RTO context, which would in turn improve the ability to make use of a comment period.

To be sure, it is not possible to have a truly complete administrative record available in real time. Ex parte contacts and background materials inevitably slip into the consideration of any institution engaging in complex decision-making, and administrative law has (somewhat controversially, but solidly) rejected the idea that these influences must be excised from notice-and-comment

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274. MAEVE P. CAREY & KATHRYN A. FRANCIS, CONG. RSCH. SERV., R45032, THE TRUMP ADMINISTRATION AND THE UNIFIED AGENDA OF FEDERAL REGULATORY AND DEREGULATORY ACTIONS (2017), <https://crsreports.congress.gov/product/pdf/R/R45032/4> (providing background on the Unified Agenda).

275. See E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915–16 (2002) (codified in scattered sections of Title 44 of the United States Code).

276. Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 ADMIN. L. REV. 893, 896 (2011) (noting that the E-Government Act “[has] helped ensure that over 90% of agencies post regulatory material on Regulations.gov”).

277. See CURTIS W. COPELAND, ADMIN. CONF. OF THE U.S., THE UNIFIED AGENDA: PROPOSALS FOR REFORM (2015), <https://www.acus.gov/sites/default/files/documents/Unified%20Agenda%20Report%20031015.pdf> (reviewing criticisms of the Unified Agenda and how it has been (or has not been) populated by agencies); Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943 (2006) (reviewing disappointing experiences in the rollout of e-rulemaking and Regulations.gov).

278. MICHAEL SANT’AMBROGIO & GLEN STASZEWSKI, ADMIN. CONF. OF THE U.S., PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING 71 (2018) (discussing these challenges).

procedures.<sup>279</sup> But there is a reason that many agencies nevertheless commit to very inclusive dockets and take great steps to ensure the practical accessibility of the information therein. Our own interviews with PJM participants suggest that more systematic information would be useful even for the most sophisticated participants. Several suggested that RTOs would do well to develop a more formal record of decision, much as state public utilities commissions do. If even sophisticated players would benefit from a more defined and transparent accounting of RTO actions deliberations, then it is plain to see how the broader public would benefit even more.

### 3. *Improving FERC Review and Judicial Review*

A central problem with the corporatist framework that currently prevails in RTOs is that it does not result in anything resembling a real record that could support subsequent review by oversight institutions. The SOO Link case study is a case in point.<sup>280</sup> The lack of a record that could support review of RTO decisions in turn leads both FERC and the courts to be more deferential than they should be. This is frequently a problem whenever we have “self-regulatory organizations.”<sup>281</sup> Such organizations frequently end up benefiting from substantial deference from the oversight agencies charged with ensuring that self-regulation is not self-serving, and this in turn leads courts to review the oversight agencies’ decisions with substantial deference. The result is what Hammond calls “double deference”—a perverse situation in which self-regulatory organizations are effectively exempted from even the kind of light-touch judicial review that courts ordinarily perform on administrative agencies’ actions.<sup>282</sup> The root of the problem, at least with RTOs, is that there need not be, and often there is not, any formal decision or record about many matters that are before the RTO. Once that original sin is committed, every subsequent attempt by an oversight agency or a court to evaluate the decision (or nondecision) for compliance with laws governing the self-regulatory organization is bound to be extremely limited. FERC and the courts can only guess about weaknesses in the RTO’s proposal, given systemic information asymmetries between them and the sophisticated market participants and

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279. See *Sierra Club v. Costle*, 657 F.2d 298, 396–397 (D.C. Cir. 1981) (refusing to find that ex parte contacts are barred under the Administrative Procedure Act). *But see* Sidney A. Shapiro, *Two Cheers for HBO: The Problem of the Nonpublic Record*, 54 ADMIN. L. REV. 853 (2002) (taking up a scholarly defense of the D.C. Circuit’s ill-fated holding in *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), that ex parte contacts were barred in informal rulemaking).

280. See *supra* Subpart III.B.

281. Hammond, *supra* note 31, at 1705.

282. *Id.* at 1711 (describing double deference as a phenomenon where “administrative law ignores the SROs’ role in the administrative state, blindly equates SROs with their oversight agencies, and countenances even greater deference than usual owing to the fact of the SROs’ presence” and opining that “[c]ombining this judicial deference with the oversight agency’s deference obscures the many participatory, deliberative, and transparency-related shortcomings of the overall scheme”).

insiders who drive RTO decision-making, and the lack of a “fire alarm” mechanism for parties to tee up issues and force RTO responses makes the matter worse.<sup>283</sup>

It is highly unlikely that FERC or the courts would impose greater stringency of review unless and until RTOs change their process to make meaningful review possible. Changing the process, however, could lead to better judicial review that in turn encourages more pluralistic process. For instance, if RTOs were to produce a formal record documenting the evidence they considered, the comments they received, their interactions and answers to the concerns raised by commenters if they reject them, and other standard features of the administrative process in agencies, that would make it simpler for FERC to reconstruct RTOs’ thought process and take a “hard look” at whether the RTO was arbitrary in any important respect.<sup>284</sup> A Section 206 petitioner need do nothing else than point to the RTO’s response to its comments and explain why the RTO’s response is inadequate—the brief writes itself. It would not be nearly as effective for the RTO, when pushed as it was in the SOO Link case, to simply say there are technical matters at issue that make what the petitioner is asking for impossible. The reforms discussed above are therefore not only valuable in that they might well lead to better decision-making in an environment of policy trade-offs but also because they can start a virtuous circle of more constructive FERC review and judicial review.

### B. Pathways for Reform

Although our framing of the problem in terms of the corporatist–pluralist continuum is novel, we are hardly the first to express concerns about RTO governance.<sup>285</sup> Concerns about the democratic bona fides of RTO processes have been growing for some time now.<sup>286</sup> But recently, those concerns have given rise to the prospect of concrete actions to improve the process. The impetus for action has come in the form of a new office at FERC—the Office of Public Participation (OPP)—that, among other things, is supposed to “coordinate assistance to the public with respect to authorities exercised by the Commission” and “coordinate assistance available to persons intervening or

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283. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (laying out a theory of “fire alarm” oversight, in which Congress relies on stakeholders to sound the alarm when bureaucratic agents take actions inconsistent with legislative expectations rather than directly “police patrolling” agencies itself).

284. See generally Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753 (2006) (discussing “hard look” judicial review and its virtues in encouraging agency effort in well-supported policies).

285. See, e.g., Welton, *supra* note 10.

286. Dworkin & Goldwasser, *supra* note 29, at 546 (noting in 2007 that critiques had existed for about a decade).

participating or proposing to intervene or participate in proceedings before the Commission.”<sup>287</sup>

To date, FERC has only begun to move forward with creating and staffing the OPP.<sup>288</sup> As of January 2023, OPP reported that it had conducted 148 outreach meetings with “OPP constituents that have traditionally been under-represented in or largely unfamiliar with FERC processes.”<sup>289</sup> It also reported having addressed 578 inquiries from the public.<sup>290</sup> Many details about the precise role that the OPP may play in reforming public participation in the RTOs remain to be determined. OPP’s energies so far seem to be mostly directed toward an active role in natural gas infrastructure disputes, as well as a secondary educative role with respect to RTO governance and electricity regulation.<sup>291</sup> Yet the interest in using the OPP to more actively remedy democratic deficits in the RTO policy development process, evinced by the several comments submitted to FERC regarding public participation in RTO proceedings, suggests that the issue may be ripe to be addressed by the OPP, by FERC, or by the RTOs themselves in the near future. In this Subpart, we canvass some of the possibilities that have been floated and offer some analysis and ideas of our own.

Congress first tasked FERC with creating the OPP in the Public Utility Regulatory Purposes Act of 1978, but FERC did not take any action until Congress, as part of its Energy Act of 2020, gave FERC 180 days to produce a report outlining steps to establish the OPP by 2022.<sup>292</sup> FERC responded by holding a series of workshops and taking comment on possible structures and tasks for the OPP.<sup>293</sup> Summarizing the feedback, FERC concluded that part of the OPP’s mission would be to provide assistance to the public to “help place

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287. 16 U.S.C. § 825q-1(b)(1).

288. Press Release, Fed. Energy Regul. Comm’n, FERC Establishes Office of Public Participation (June 24, 2021), <https://www.ferc.gov/news-events/news/ferc-establishes-office-public-participation>. FERC appointed Elin Katz as Director in 2021 and has since added Nicole Sitaraman as Deputy Director. Press Release, Fed. Energy Regul. Comm’n, Glick Announces Appointment of Elin Katz as Director of FERC’s New Office of Public Participation (Oct. 12, 2021), <https://www.ferc.gov/Elin-Katz-Director-Of-OPP>.

289. FED. ENERGY REGUL. COMM’N, OFF. OF PUB. PARTICIPATION, 2022 OUTREACH AND EDUCATION REPORT 3 (2023), <https://www.ferc.gov/media/opp-2022-outreach-and-education-annual-report>.

290. *Id.* at 4.

291. *Id.* (discussing OPP’s activities on specific natural gas infrastructure dockets as well as its development of “explainers” on certain electricity sector topics, such as the transmission planning notice of proposed rulemaking and ways to participate in CAISO proceedings).

292. Zack Hale, *Congress Urges FERC to Act on Transmission and Fund Public Participation*, S&P GLOBAL (Dec. 22, 2020), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/congress-urges-ferc-to-act-on-transmission-and-fund-public-participation-61861221>.

293. *Workshop Regarding the Creation of the Office of Public Participation*, FERC, <https://www.ferc.gov/news-events/events/workshop-regarding-creation-office-public-participation-04162021> (June 23, 2021).

communities on equal footing with well-resourced industry stakeholders.”<sup>294</sup> While much of the discussion centered on FERC’s authority to approve natural gas pipelines, liquified natural gas terminals, and other related infrastructural projects, a distinct subset of commentary focused on democratic deficits in the RTO and ISO stakeholder engagement processes.<sup>295</sup> As the Harvard Electricity Law Initiative put it in a comment to FERC, “[t]he public has a significant interest in RTO/ISO (RTO) stakeholder and planning processes. While many RTO processes are open to the public, as a practical matter they are inaccessible.”<sup>296</sup>

Several themes emerge in the portion of the OPP docket focused on RTOs, many of which we have discussed above. First, commenters expressed concern about the complexity and technicality of RTO decision-making processes and the barriers that this creates for effective participation, especially for less sophisticated parties.<sup>297</sup> A comment filed by RTOGov researchers, for instance, argued that “RTO decision processes appear convoluted and opaque for those not recognized as formal stakeholders or who do not regularly engage in these processes.”<sup>298</sup> Second, commenters highlighted the ways that the design of stakeholder-engagement processes contributed to systematic disparities in representation.<sup>299</sup> For instance, limiting participation to members excludes individuals and small interest groups from participating at all, and formal rules about participation in sectoral committees often dilute certain voices by grouping them with “interests that diverge from their own,” as is the case with environmental nonprofits that are “included in the end-use sector for ISO-NE and ERCOT.”<sup>300</sup>

The OPP docket contains many goals for reform and some concrete suggestions for how to achieve meaningful changes on these fronts. For instance, commentators saw “RTO literacy” as an important goal and advocated for the OPP to play a role in “facilitat[ing] the sharing of public information about RTOs['] decision-making processes,” including “host[ing] an electronic bulletin board for RTO public meeting notices, and minutes from public meetings.”<sup>301</sup> The Harvard Electricity Law Initiative noted that there is no public record of RTO proceedings, and it encouraged FERC to give the

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294. FERC, THE OFFICE OF PUBLIC PARTICIPATION, at i (June 24, 2021), <https://www.ferc.gov/media/ferc-report-office-public-participation>.

295. See, e.g., Comments of RTOGov Researchers, *supra* note 70; Harvard Electricity Law Initiative, Comment Letter on the Office of Public Participation (May 7, 2021), [https://elibrary.ferc.gov/eLibrary/filelist?accession\\_number=20210507-5096&optimized=false](https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20210507-5096&optimized=false) [hereinafter Comment of Harvard Electricity Law Project].

296. Comment of Harvard Electricity Law Project, *supra* note 295, at 3.

297. Comments of RTOGov Researchers, *supra* note 70, at 9.

298. *Id.*

299. *Id.* at 9–13.

300. *Id.* at 12.

301. *Id.* at 16.

OPP authority to monitor and summarize RTO decisions and proceedings with an eye to increasing the information available to the public.<sup>302</sup> Another reform goal discussed in the proceeding involved redressing disparate opportunities for formal participation in RTO stakeholder processes. On this front, some commenters proposed the creation of an ombudsperson who would “assess the markets’ ability to balance diverse stakeholder interests over time” in much the “same way independent market monitors boost RTO accountability by assessing the economic operation of the bulk power markets.”<sup>303</sup> Others simply asked for the OPP to develop recommendations for best practices for stakeholder engagement.

The OPP’s statutory mandate is limited to “coordinat[ing] assistance to the public.”<sup>304</sup> This does not seem to contemplate a direct role for the OPP in regulating RTO procedures. On top of this, it seems unlikely that FERC will subdelegate any of its regulatory authority to the OPP. So while the OPP docket is, so far, serving as a fertile ground for thinking about the limitations in RTO governance and the opportunities for reform, any concrete action is likely to come directly from FERC or from new legislation. Yet the OPP may be able to act as a catalyst to bring about important reforms at the RTOs.

FERC, for its part, may well have all the authority it needs to mandate that RTOs institute pluralist reforms. Orders No. 719 and No. 2000 would seem to provide the key precedent for FERC’s authority to structure RTOs.<sup>305</sup> In both instances, FERC declined to go as far as it could theoretically have gone in specifying how RTOs should operate but nevertheless did provide some important minimum standards for RTOs. There would therefore seem to be a straightforward argument that FERC does have the authority to specify matters of internal governance so long as it pertains to the larger “just and reasonable” standard that governs FERC’s approval of RTO operating agreements.<sup>306</sup>

However, the courts have more narrowly construed FERC’s authority over RTOs and cast some doubt on whether the agency could direct RTOs to implement a certain vision of energy democracy.<sup>307</sup> On this line of thinking, RTOs are less like subagencies of the government and more like traditional utilities, and FERC has never had authority to tell utilities how they must operate in terms of internal governance. This argument has not been tested directly, but it has some facial appeal due to the ambiguous status of RTOs.<sup>308</sup> It would have difficulty, however, in explaining why FERC had authority to issue minimum standards for the governance of RTOs in Orders No. 719 and

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302. Comment of Harvard Electricity Law Project, *supra* note 295, at 3–4.

303. Comments of RTOGov Researchers, *supra* note 70, at 16.

304. 16 U.S.C. § 825q–1(b)(1).

305. See *supra* notes 70–72 and accompanying text.

306. 16 U.S.C. § 824d(a).

307. See *NRG Power Mktg. v. FERC*, 862 F.3d 108, 110 (D.C. Cir. 2017).

308. See Dworkin & Goldwasser, *supra* note 29, at 533–34.

No. 2000. At a minimum, the line between matters that cannot be micromanaged by FERC and those that can be broadly prescribed is a hazy one.

Ultimately, due to the uncertainties surrounding both the OPP's existing delegation of authority and FERC's oversight authority over RTO governance, the kinds of reforms that need to be made to make RTO governance less corporatist and more pluralist may have to come from congressional action. Congress, of course, has the authority to clarify FERC's power to mandate certain governance features in the RTOs, and it can do this by simply amending the Federal Power Act to make it clear that RTOs are not utilities, or that if they are, they are nevertheless subject to pluralist processes that typically apply to public agencies.

However the issue is addressed, it is clear that the time is nigh. RTO decision-making is not going to get less controversial as we progress through the energy-trilemma era. As clamoring for democratic reforms gets louder, something will have to give. Perhaps the simplest resolution to this conundrum is for RTOs to self-regulate by voluntarily abandoning the corporatist framework that increasingly obscures RTOs' fundamentally public role in managing the energy transition for the nation.

#### CONCLUSION

In this Article, we have clarified much about one of the most ambiguous and mystifying institutions in American governance: regional transmission organizations (RTOs). Drawing on concepts from comparative democratic theory, we have shown that RTOs are, and have always been, examples of "corporatism" in practice. We have also shown that while this arrangement might have made sense in the past, when RTOs essentially were engaged in the technocratic exercise of balancing electric power subsectors against one other to protect consumers from overly high prices and to promote reliable service, it makes little sense in the energy-trilemma era. In the energy-trilemma era, incommensurable trade-offs must be made between the traditional concerns of RTOs and the new concern of sustainability and the clean-energy transition. Corporatist RTOs are constitutionally incapable of managing this trilemma well, and indeed the only kind of governance arrangements that could work well would be pluralist ones (i.e., the opposite of corporatist), where interest-group participation is not artificially structured and regulated in a partnership between industry players and government.

Building on this dichotomy between corporatism and pluralism, we have sketched out a vision of more pluralist governance of RTOs. Reforms are needed to address fundamental shortcomings in the corporatist foundations of traditional RTO governance in light of the cross-cutting pressures of the energy transition. More pluralist procedures can be transplanted relatively seamlessly from administrative law to these institutions, and doing so would solve many



of the governance problems scholars have documented. While we believe that there are plausible arguments that federal regulators have the authority (and perhaps the willingness) to see through the necessary reforms, it is even clearer that RTOs have the authority to self-regulate. However it occurs, it is high time to take the necessary steps to update RTO governance for the energy-trilemma era.