

C O M M E N T

THE ORGANIZED WHOLESALE MARKET IMPROVEMENT PARADOX

by Tom Hassenboehler

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Regional transmission organizations (RTOs), while imperfect, are the best method to facilitate the delivery of reliable, affordable, and clean electric power. However, after more than 20 years, and as the West and Southeast debate new market configurations, it is time to take a critical look and improve RTOs to ensure that they will continue to be a force in the U.S.'s electric system for the next 20 years. Despite oversight by the Federal Energy Regulatory Commission (FERC) and a growing judicial record of precedence in the courts, the U.S. Congress is the only place that can “fix” RTOs, and the political will must be developed to do so.

By way of background, I am a late appreciator of what markets have achieved over the last two decades. Despite having the privilege of participating in some of the biggest energy policy debates at the federal level over the last two decades, up until my second stint at the U.S. House of Representatives Energy and Commerce Committee, I could barely tell you what a regional transmission organization (RTO/ISO) is or does. This knowledge has been relegated to the FERC experts and electricity practitioners—and always viewed as overly cumbersome, complicated, and problematic. That was my perspective as a fairly informed policy professional—so imagine what members of Congress are like when you try to explain this complex architecture. However, this wasn't always the case. As many know, there was a robust history of congressional interest, oversight, and legislative development in the late 1990s and early 2000s. But then, for nearly 20 years at the federal legislative level, organized markets became relegated to the congressional sidelines. Why? Complexity. Underappreciation. Imperfection. Inconsistency throughout the country, all of which make it difficult to have a national narrative.

Due to lack of congressional involvement subsequent to facilitating the creation and debating the standardization of RTOs in the 1990s, RTOs have become necessarily and unnecessarily complex. Why? The electricity system is evolving in ways that were not considered during their origination, and they have become the default policy deci-

sionmakers for Congress. In 2015, however, Congress did take a look at wholesale markets and RTO governance through a legislative hearing series called “Powering America” that I helped to lead and organize. We held nearly 13 hearings that were completely bipartisan. The hearings and the development of the witness lists and topics were completely bipartisan. A two-part hearing that inspired my future work was called “Consumer Oriented Perspectives on Improving the Nation’s Organized Markets.” The hearing was one of the first to showcase the rise of the 21st-century electricity customer—and its big-tent evolution—from consumer advocates, to large industrial and tech customers, to the active, climate-conscious consumer who wants to secure clean and increasingly localized electrons. These customers were simply not part of the equation two decades ago, when RTOs evolved into their current stance.

Despite time passing, the record from these hearings has not evaporated. While many new members of Congress are now on the Committee, several members and their staff remain. There is now burgeoning interest in building from these prior hearings and tackling some of these challenging but necessary topics again—in particular, organized market governance and expansion.

Organized markets (both their governance and new formation) have recently become a key topic in states and in new regions where they don't exist such as the West and Southeast, due to the rise of the active electricity customer. As the electricity industry evolves, so too does the electricity customer. No longer content with the traditional model, today's electricity customers seek a more active role in accelerating the energy transition. New electricity customers expect options that fit their needs and their mission. Wholesale markets are again becoming intertwined in the policy narrative, because customers (both large and small) are becoming more engaged and seeking options.

Prof. Shelley Welton's article¹ correctly points out flaws in the current approach and challenges the reader to think comprehensively about ways to improve upon the existing structures. This “rethink” comes at a critical and opportune time as new configurations of RTOs are being consid-

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1. Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, 109 CAL. L. REV. 209, 257 (2021).

ered across the country and as existing RTOs face several existential crises. I offer three points to consider.

First, if reliability, affordability, and increasingly clean energy are the intended outcome of our evolving electricity system—organized markets have helped to get us on a path there—and more must be done. Remember, RTOs were founded with the desire to achieve greater efficiencies through scale, reserve-sharing, and joint dispatch of utility-owned generation. They were also formed, in part, to bring competition to the supply (generation) side of the business in response to expensive asset investments put to ratepayers under cost-of-service regulation, especially in the Northeast and Texas where utilities are unbundled.

The passage of time and the evolution of technology, as well as climate change and security needs, have caused this simple proposition to become much more complex. Many stakeholders are engaging in expanding the proven benefits of the basic functions of RTOs—including growing economies of scale and economic efficiency through joint dispatch to all regions of the country—in an effort to help replicate and accelerate the transition to the clean energy economy. At the same time, the continued refinement, improvement, and expansion of RTOs is being called into question because of lack of political will and policy guidance. This is a complex challenge that is playing out in different ways in various parts of the country, and as Professor Welton points out, can often run counter to the needs of the energy transition and particularly the needs of the electricity customer.

Second, the role of the customer is the new wildcard. Exacerbating these developments is the pace of technology change that has outstripped the pace of regulatory and institutional adaptation. Instead of abolishing RTOs or their fundamental principles, we should improve and build upon them. The customers of RTOs were never supposed to be customers in the traditional sense (large and small), but rather transmission owners. However, the rise of the active-not-passive customer via the forces of technology and the enhanced climate consciousness across customer classes has created a new paradigm—one in which all customers are increasingly concerned about how (and even where) their electrons are generated. Climate and national security concerns, including the ability to self-generate and access local power, will only continue to exacerbate this in the years ahead. These forces together create an extremely difficult confluence of challenges to harness and govern, even in the best functioning market systems. This further necessitates the need to build consensus and need for Congress to address the challenges and break the logjams. Professor Welton's points about complexity, adherence to governance principles, and needed attention to comprehensive solutions are overdue and needed in order to update a system that was never intended to function this way. Many of the themes from the article fit the paradox.

Third, in order to fundamentally improve RTOs, ultimately, Congress must enact legislation and provide the political will to FERC to fix the problem. Congress can use the power vested in it to regulate interstate commerce to initiate comprehensive reform that addresses grid gover-

nance challenges. This must be done with states as partners, however, it is important to take into account the regional sandboxes created by the status quo, due to the physics of the grid, but more often due to state versus state and regional conflicts. Accordingly, we must think more about how to maximize the grid, which was built in a different era, to run more like the highway system—with the free flow of electrons across state lines and that are increasingly being generated behind the meter and across traditional jurisdictional boundaries.

In addition, Congress needs to empower FERC and provide political will to improve RTOs, including supporting the items outlined in Professor Welton's article. As Professor Welton explains, "there is rising support for the idea of eliminating mandatory capacity markets from eastern RTOs."² She notes that "[already] there are controversies over how RTOs determine 'price formation' in energy markets and ancillary service markets" but, ultimately, the issue "comes down to *who writes these rules* within the RTO context."³ Professor Welton further observes: "To ensure that pricing in these basic markets remains just and reasonable under changing conditions, FERC may need to take a heavier hand. . . ."⁴ Specifically, she posits the following:

The ideal solution here would be for Congress to create a special category of review for RTO tariff filings within the Federal Power Act, providing FERC with the ability to amend portions of RTO filings and to reject solutions that it finds plausible but inferior. These changes would recalibrate FERC's authority over RTOs to align it with the authority of other federal agencies engaged in policymaking, which operate under the benefit of *Chevron* deference to preferred agency solutions.⁵

Furthermore, according to Professor Welton, FERC could "increase scrutiny of corporate mergers and their impact on electricity governance . . . by drawing upon . . . [its] statutory charge . . . to ensure that proposed mergers are 'consistent with the public interest.'"⁶ The Commission's "current practice is governed by a Merger Policy Statement,"⁷ which FERC could amend.

Congress can improve RTOs but, in order to do so, we must recognize that there will be compromises and, depending on your perspective, gains, and losses. Many argue Congress should be the last place any of this gets done, and I would usually agree. At this point, however, we are running out of options. We have black boxes that we were left to be filled, as Professor Welton says, because we punted these issues 20 years ago. Now, it is all coming back to roost.

2. *Id.* at 266.

3. *Id.* at 266-67.

4. *Id.* at 267.

5. *Id.* at 270.

6. *Id.* at 271 (citing 16 U.S.C. §791a, Chapter 12, Subchapter 1, Section 203(a)(4)).

7. *Id.* at 271 (citing 18 C.F.R. Part 2, (Order 592), available at https://www.ferc.gov/sites/default/files/2020-04/rm96-6_0.pdf).

I am not suggesting that Congress take on the role of RTOs, but it does need to create bipartisan political will for the sake of climate change, reliability, security, and resiliency. One way to do that is via an Advisory Committee. While Federal Advisory Committees often get criticized for pushing paperwork and holding meetings for meetings sake, in this case, we have enough entrenched interests on all sides that we need to establish an objective process that includes both incumbent and new voices,

in order to make the necessary recommendations to guide Congress and give political cover to FERC—including to both Republicans and Democrats and in all regions of the country. The hope is that in the coming years many more bills and efforts will be developed, as the challenges and plight of consumers operating in this complex system and different regions increasingly is documented and the political momentum for change grows.