

**HARVARD ELECTRICITY POLICY GROUP****VIRTUAL SESSION**  
**TUESDAY, OCTOBER 6, 2020****Rapporteur's Summary\*****Scandal: Are Changes in Markets Increasing Ethical Challenges?**

Political scandals such as bribery and influence peddling are nothing new. There are innumerable examples from many industries and interest groups. While all economic interests engage in lobbying, some industries, such as electricity, whose operations and economics are so closely intertwined with public policy and regulatory oversight, are engaged more intensively. The transition to greater competition and a lesser role for government intervention led many observers to believe that political scandal would be reduced, as reliance on lobbying for better economic performance would decline. Recent controversies suggest that competition and markets have not led to fewer ethical/criminal challenges. Indeed, perhaps, the change of regulatory oversight in an industry with extremely high capital stakes may have left the industry more exposed to the risks of corruption. Is that the case? Why or why not? Political scandals are typically handled by ethics bodies or the criminal justice system, but is there a role for utility regulators in both setting an environment in which corruption might be discouraged, if not prevented, and in reacting to cases where there are either credible allegations of corruptions and/or actual legal findings of such? If regulators do intervene, what tools should be at their disposal either prophylactically or responsively to deal with power sector enterprises alleged or proven to be engaged in unethical and/or unlawful activity?

*Introductory remarks and speaker introductions are missing from the recording.*

**Speaker 1.**

On this last point, I think I'm influencing consumer advocates. Speaker 2 may get to some recent developments in Illinois, on this one.

And as a native—we'll get to that in the Q&A—but one thing I will note from my experience in Indiana, while we're on Chatham House rules here, there was a particularly juicy case here a decade ago with an Edwardsport project approval that took down the chairman and the head of Duke Energy Indiana in the process.

But one thing that didn't go noticed was that actually the utility road—again, this is an appointed stat—so the utility lobbied the

governor's office then actually reached out to the consumer advocate, which, mind you, was the biggest consumer advocate, at least at the time, in the country.

And so, one would have thought it would be very robust, but they actually hand-selected who on staff would engage on the particular case. And so it was a team of yes men, if you will. And I think that's an interesting way to exert a sort of roundabout way of rent seeking, and of course the examples go on from there.

I won't get into some of the illegal and more periodic areas that can range from small infractions like *ex parte* violations, all the way up to headliner bribery cases and dark

\* HEPG sessions are off the record. The Rapporteur's Summary captures the ideas of the session without identifying the discussants. Participant comments have been edited for clarity and readability.

money on the legislator or electoral process side, but those are definitely happening.

So, of course, to this point, the initial response was competition will come to the rescue, we've seen this behavior in the past. So I think there's two critical elements to think about in terms of the quality of restructuring implementation that have really affected the nature of implied incentive structures, both of political actors and market participants. Of course, textbook restructuring calls for the separation of competitive and non-competitive functions. A lot of literature came up on the quarantine-the-distribution-monopoly concept and I've since been advised not to say quarantine, so I'll just say isolate the monopoly from here on out.

But there were two aspects that emerge in this space. [UNINTELLIGIBLE] More retail supply whatsoever. So what should that role be? Then, of course, on the issue of the untethered interest and the GenCo operations. The debate between, well, should we have corporate separation with a firewall versus divestiture? I think what we've since learned is that the discretions that were granted many institutions immediately resulted in an outcome.

I think that on these two particular points, some of the literature right out of the gate on restructuring wasn't necessarily clear and some of the legislative reforms that were enacted gave a lot of discretion to implementing agencies. I think there is the need to sort of update the blueprint and restructuring, a little bit.

Because we've learned that firewalls are porous, and we've learned that having a utility seemingly in the neutral default supply role actually leaves them tethered to certain

interests that can then be exploited as a rent-seeking conduit.

The other point I'll note is that there wasn't a lot of attention paid to the transition policies. A lot of notions were saying, "hey, there's a lot of sunk costs." But the recovery of those sunk cost is an issue of equity. It's not so much economic efficiency. So just address it however you want. I think what we've—

Got muted there. Sorry.

But I think one thing we'll get into, Ohio is an interesting case study in that transition policies actually enabled certain what we thought were temporary arrangements, especially a lot of riders that ended up sort of having a life extension beyond their original intent.

If you look along those two particular parameters, what you see is a clear distinction between what we call the fully restructured model here on the left and the quasi-restructured model on the right. And, in particular, I just flag what that means for the implied incentive structure of the utility holding company.

On the left, you're only kind of isolated and just distribution monopoly interest. On the right, you see a variety of different interests that that company has. What we've seen is that there's a lot of creative ways that you can organize affiliate behavior for the monopoly to benefit a competitive arm. And I think that's where it played out in a lot of areas.

Thus we make the distinction between Texas and the rest of the restructured states. Again, I think our categorization of this is pretty consistent with what's been out there to date. The one exception, maybe California. Our staff was all over the place on how to label California. But that's beside the point. We'll

drill down next on the next slide here to Illinois and Ohio.

The Illinois/Ohio case studies really provided excellent insight into different entangled monopoly implications. First off, there were a lot of cross-subsidy vehicles that were in the pre-existing policy landscape here. Getting back to the monopoly and the default supply role, which really is, in many ways, an implied subsidy and really is a form of shifting revenues within these different categorical corporate interests.

And then you had things, especially in Ohio, where you saw a lot of an initial rider purposes expanded to all sorts of justifications, like, oh, we need a retail rate rider to address concerns with the wholesale market. And immediately you start seeing this rent-seeking conduit can emerge. And this ended up being pretty clearly exploited in some cases, both deliberately, as well as changing the political culture in a way that justified using the monopoly arm and justified cross-subsidies within different silos that would otherwise be independent of one another. And then we also saw, going back to more of the structural application of this, it really amplified the motive of distribution monopolies and their parent companies to engage in rent-seeking behavior. The instrumental corporate interests of the holding company is very different within how Ohio and Illinois' half-baked competition model versus how the textbook on restructuring that Texas follows.

So, naturally, I think one of the fascinating elements is that you started to see a lot of the monopolies lobby for the interest that effectively benefited their affiliates within—apply the role of parent companies in engineering that. That's a fascinating takeaway, and I think it's interesting to watch, also, the behavior of Exelon and First Energy,

in particular recently here, to distance themselves from that sort of thing. Like we have one bad actor in our ranks, but it does not reflect upon the operations of any other affiliates or aspects of a holding company.

That quick defense also shows that there is in fact probably something worth digging into in greater detail there. In particular, I think Ohio presents a phenomenal case study. On one side, there's a great paper, I provided a link to it, it's at the bottom of these slides here, by some Ohio State researchers that showed that Duke Energy Ohio was the only utility that actually divested its GenCo in the footprint, and thus it was largely free of this monopoly entanglement concern. They had a very small interest in one facility.

But this both reflected in the way they engaged the PUC, through these cost-subsidy vehicles, and that's what this paper brought out to show that the degree of rent seeking and offsetting wholesale benefit gains through retail adjustments was heavily differentiated between Duke Energy's footprint and the rest of Ohio's footprint.

And then, lo and behold, it emerges that the lobbying behavior behind a House Bill 6 similarly followed that incentive structure. And so our paper brought out that application of it, which is fascinating. I think the big point here is that the quality of policy implementation is the large determinant of some of the rent-seeking applications and even just general economic outcomes of the space.

I'll just make this note. First off, we're not trying to say that doing electric competition properly is a perfect antidote. By no means does that solve all your problems. But one thing I will flag is that, even if you do restructure properly, you're still going to see interest from certain uneconomic merchants,

especially on the incumbent side that seek to have special treatment through the regulatory and legislative means.

The two trends that particularly concerned me on that front are that we've seen some evidence of institutional decay, both on legislative and regulatory fronts. Going back a few decades, there was a lot of lessons learned on risk socialization, etc., that led to a lot of this. Whereas, we've seen a lot of turnover in these ranks.

For example, in state legislatures, you've almost seen 100% turnover in many cases for the folks that initially were motivated to engage in restructuring and the early stages of implementation. So there's a lot of aspects of the brain drain there, and then you combine that with some pretty creative misinformation efforts that really lead to the kind of bogus arguments to second-guess market outcomes. I think you've had a perfect combination there of regulatory and legislative vulnerability that feeds into a greater propensity to succumb to rent seeking, even aside from potential side payments considerations.

I fed that into this model, which was largely adapted from the way PJM started to frame this issue a few years ago in a paper that I thought was particularly good.

If you recognize all of what's happened over the last decade and you combine this with projected trends in the industry, I think that you are going to see a lot of cause for concern, if the current institutional arrangements are just maintained.

For example, I think we see a few things. One is, we're seeing increased capital stock turnover. So anytime you to see a shift in competitive relationships between incumbents, the new entrance of that

naturally feeds into some concern here and desire for rent seeking if it's affected.

I also think that because the nature of the system, you look at the nature of demand and supply-side resources and group dynamics. They're becoming much more complex and, thus, we're seeing aspects of information asymmetries increasing and you combine that with some of the institutional decay and informational deficits, that's some cause for concern. I think that the interplay with how this reacts for climate and green industrial policy will be fascinating.

But then you also saw sort of the silver lining, if you will have any scandal format. And that's that there's an increased opportunity to address a lot of the structural deficiencies in the systems. I thought the Illinois governor's report on putting consumers and climate first had a nice summary point on this. As we see with the future of a lot of competitive arrangements, I think you're seeing a lot more pushes for incremental competition in this space, which does beg the question of how do we avoid those flaws of half-baked competition moving forward. And how do we make sure that we do it right from the get-go.

So I'll leave you with the policy implications that we conclude in the paper. And these are not meant to be exhaustive. But a conclusion you could probably reach for yourself is for our top line priority to be just restructure properly. And, updating the footprint, you're going to need third-gen generation divestiture, and that's the distinction between corporate versus functional separation is really big there.

And really the safest way to avoid some of the cost-subsidy conduits are just to not have the monopoly involved with it in the first place. And then the other aspect I think that we can talk about maybe later would be a

role, perhaps for the PUCs, to identify the instrumental interest of the different players in this space and rectify proactively cross-subsidies and identify these vestigial relationships that occur.

I think if you look at how Ohio, for example, instituted PPAs prior to HB 6 and then FERC, clearly, gave a shot across the bow on that front before it even reviewed those PPAs for fulfilling [UNINTELLIGIBLE] under Allegheny. That really shows how different types of regulatory oversight can really have a different outcome on behavior. That warrants a conversation.

I'll just conclude with the point on improving information and remaining disciplined is critical to build up some immunity to some of the specious arguments for subsidies in this space. One thing in particular I'd flag is, I'd like to see some work done on the social costs of subsidies. We saw a lot of debate on the social cost of environmental implications, but we didn't see anyone say, "Hey, once you start justifying subsidies for this set of folks, what is the effect on the overall political culture?"

And you start to see subsidies beget subsidies. There are ways to quantify that which I think would be interesting, too. And with that I'll turn it over.

**Speaker 2.**

I'm going to talk a little bit from my experience as a state regulator and someone who worked within government as well as now, on behalf of a merchant-generating and competitive retail company.

If we go to the next slide, it's worth spending just a minute to talk about the particular situation has that's led us to today. Those are a couple of the recent misdeeds that really constitute probably the largest scandals in the

sector for a couple decades, I'd say if they're taken together. In one, you have what are now, in essence, an established set of facts, or at least agreed to between the government and an entity, ComEd, that's agreed to a deferred prosecution agreement. In the other, in Ohio, it's still just a set of alleged facts. So keep that in mind.

In the first, in Illinois, "Public Official A," who is the Illinois Speaker of the House, apparently ran a patronage system through the local utility. Some of the facts are pretty remarkable. He managed essentially to get a crony appointed to the corporate board without conducting a search. ComEd shuffled money to a consultant closely associated with the speaker and that consultant then hired subcontractors who were paid for doing little or no work.

Over the years, the utility has admitted bribes then paid out in the form of two pieces of legislation that included everything from nuclear subsidies to a grid modernization package. I think my favorite detail of this whole scandal was that some of the patronage jobs in question where to employ meter readers, jobs and positions, of course, that would become redundant due to the capital investment in actual grid modernization. So there you go.

Then in Ohio, meanwhile, a little bit different politically flavored scandal on the Republican side. There, a Republican politician plotted to come back to the State House and the overthrow of a person who was then a conservative Republican speaker. He drew up a list of candidates who would back him, engineered their success in primaries, and became the GOP speaker with a combination of GOP and Democratic votes, the Labor Democrats holding behind this particular individual.

Pulling off that stunt obviously required a well-oiled political machine, and acting as that machine's "bank," according to the allegation, was First Energy, who topped up about \$60 million and change according to the criminal complaint.

Its reward was, of course, House Bill 6, now the subject of your political conversation is the state, the subsidy package mainly geared toward nuclear but also some coal, as well as decoupling. What's notable, why recite the sort of details of the allegations, is that I think they speak to what Speaker 1 talked about, which is you see regulated utilities using their political heft to accomplish the enactment of legislative packages that steer revenues to, ostensibly, competitive non-regulated businesses, who are functionally separate but corporately within the same container of interests.

As well, I recite some of the facts, just to indicate to you how deep the relationship between lawmakers and these entities seem to go. This was not a quid pro quo. It was an enduring relationship that really fused together these regulated utilities and their non-reg affiliate interests, together with state political machines.

Let's move to the next slide, where we can try to understand the policymaker-utility relationship. I think a few things are notable.

First, the return on investment to this particular mode of corruption seemed to be pretty good. Obviously, in Ohio, now they're talking about a repeal of House Bill 6. It may end up being a repeal and replace where some of the financial benefits that accrue to the entities who stood to benefit remain intact. In Illinois, ComEd suddenly had to pay a fine associated with the deferred prosecution agreement. But there's no contemplation on that, that these laws would be actively

repealed or that the moneys associated with them would be disgorged.

So it's hard to identify, in the first instance, an industry where so much revenue is tied up with governmental decision-making at the state level as the utility industry. To paraphrase a friend of mine: a good day in the market, you eat for a day; a good day at the legislature, you eat for a year. And that is so true, sadly, regardless of restructuring.

Second, related to Speaker 1's point, the more segments of that industry that are still in play and deeply affected by that type of state level decision-making, the larger the opportunity that exists for the style of, call it corruption, or, if non-criminal, rent-seeking political influence.

There is a lot of formal regulation that exists that tries to discipline this, the Edgar/Allegheny standard, for instance, that FERC adopts to try to protect consumers from self-dealing. But it wasn't enough in this case. It might be enough to stop power purchase agreements that are self-dealing through the regulatory process, but it wasn't enough to stop the kind of contamination of the political process through other means.

And, third, the utility is an incumbent in a political sense as much as it is in a business sense. Local utilities, now and certainly before, have vast networks of what in the 19<sup>th</sup> century would have been called "friends." I noticed, actually, when Speaker 1 was going through slides, one of the headlines that that he ripped from the past is about a former California PUC president who was said to be a "dear friend" of a particular regulated interest by the newspaper.

That term has been in use for, now, more than 100 years, and it really is there to connote people who are not necessarily connected by

quid pro quo bribery, but by an understanding of mutual interest and alliance that transcends a single act of quid pro quo. So we see utilities becoming embedded within the political machine of influential lawmakers. The bottom line here is that friends don't really need a colorable policy argument to win particular debates, they do so on the basis of friendship.

I've presented in my slide here a found artifact. I was busy in my Montana Public Service pushing a piece of legislation that would have required a regulated utility in that state to bear some financial responsibility for the success or failure of its energy trading strategy, rather than just having an automatic pass-through mechanism that it could avail itself of.

It was mostly supported by Democrats, as well as some Republicans, opposed by Labor Democrats who are typically in league with regulated utility interests and some sort of Main Street business interests on the Republican side. I thought this note that one of the Democratic friends of the bill and an opponent of the person who this note was authored to, was informative. And it just says, addressed to one of the Labor Democrats by a utility-lobbyist senator: "Please resist any blast motion of Representative Woods' Bill 193—important to stock price." That's all that needed to be said because they established a friendly relationship, and that's the way things often work in legislatures.

Again, I'm sure there was no bribery here. It was just understood to be a close friendly relationship between a policymaker and a commercial interest.

So this concept of "friends" has been really well excavated in a number of places. But perhaps nowhere better than in a work of

history written about 10 years ago. That was a Pulitzer finalist, by the Stanford historian Richard White, *Railroaded: The Transcontinentals and the Making of Modern America*. It really situates the American republic's fears about the corruptibility of its then more fragile, maybe still fragile, form of government by corporate interests, really linking it closely to what then and now would be called monopoly.

It's worth reading this statement: "Nineteenth-century Americans were not shocked by the corruption of the press; neither were they surprised that businessmen cheated, lied, and stole; what worried them was the corruption of the republic. In the Gilded Age, Americans feared that the republic had become corrupted—diseased, decaying, and dying. They identified the source of this corruption as monopoly, and they made monopoly synonymous with the corporation.

"The corporate monster—Monopoly—had appeared before the Civil War as the Bank of the United States and had been slain by Andrew Jackson, but it reincarnated as the transcontinental railroads. The monster moved into the halls of Congress, but instead of devouring a rotten republic as the Jacksonians had feared, it announced that it just wanted to be friends."

I think this summarizes the nature of the concern and the reality all too often. In this context, monopoly was defined less strictly than one might today. It really meant a business that was granted special privileges by law which had a tendency to suppress competition and whose line of business was hard for ordinary citizens to bypass in their ordinary economic life. So, periodically, you see these concerns resurrect a reformist spirit kind of come alive in the United States for some form of reform push back against it.

And then it seems to go away for a while to be reincarnated in another era. Obviously, the tech sector seems to be the focus actually of modern concerns of cultural corruption and the bigness of companies. But obviously here we could just as easily direct that concern for regulated utilities.

This has had a number of consequences, at least on the power side, which is that in a time where you're where people continue to try to figure out the line between federal decision-making and state decision-making, local monopolies that end up exercising influence on state politics often come to be seen by federal regulators as synonymous with state interests.

Which should really tell you something about the success of the phenomenon that Professor White identified about becoming “close friends” with state policymakers. I thought this, I assume a slip, was nevertheless telling—that there was a technical conference at FERC last week, there was a lot of criticism about state voices not being included, and one of the rebuttals was that state voices were included, Illinois was included because we included Exelon on the agenda.

So, again, basically identifying the interests of a regulated firm that's headquartered in a state with the political interest of the state has become commonplace, if you're, frankly, engaged in the federal regulation of these markets. It is, candidly, from my perspective, a bit frustrating not seeing lawmakers comprehend, talk about, much less do anything about some of the structural problems in the industry that have engendered the kind of behavior we're witnessing.

Instead of showing you the many people who I don't think get it, I'll show you one who

appears still to get it. I really don't know anything about Ohio representative Casey Weinstein, other than reading his Twitter feed, he and I disagree on most things except perhaps this. But this goes, I think, to the heart of the questions posted maybe in this panel description that I want to spend a little bit of time on, the idea that restructuring might have somehow heighten or aggravate these ethical problems and these scandals.

Two points on that. First, I think usually restructuring, if done well or if done poorly, usually serves to simply bring these problems out into the open. Vertically integrated states end up having fewer squeaky wheels and if a utility manages to accomplish through legal utility regulation what might be considered illegal bribery directed at the state legislature in a restructured market, I'm not sure that's a comment on restructuring so much as the conduct itself—whether it's in plain view and subject to allegations and scandal or whether it's embedded within a monopoly regulation paradigm.

Second, about what restructuring has caused. It has precipitated a stakeholder realignment that's changed what had been a more straightforward landscape in disputes involving utility rates. You'd expect in a monopoly state that, pardon me here, you would have a utility on one side of a lot of political debates and the consumer advocate on the other side.

In restructured states, however, you've seen a huge increase in the diversity of market participants: merchant generators, demand response aggregators, retailers. And everywhere, even in vertically integrated states, you see interests that are looking to bypass the utility in some way, like rooftop solar. Once you layer on environmental considerations, those can add up in both directions in any particular dispute. And if

your primary goal is chalking up decarbonization wins, there's a big temptation in politics to co-opt or be co-opted by the monopoly.

So others see that a decarbonized future relies on liberalization, but some might disagree with that. As I said before, restructuring usually involves more intensive FERC oversight. This creates another dynamic seen lately, where generators can be seen aligning with the decision of Trump's regulators and some ostensible consumer advocates realign and back plans to remonopolize.

This is an issue that came to the fore in Illinois recently as reporting emerged about the Citizens Utility Board, one of the consumer advocates there and its relationship with Exelon. So to quote Richard White again: "Reformers, too, became part of the networks that corporations created. Networks connected friends, and while a reformer might be one railroad's enemy, he could as a result become another railroad's friend."

Moving on to some ideas for reform, there's a temptation to punish the wrongdoers and then stop. I think the situation probably does call for structural and institutional reforms. I generally agree with Speaker 1 that restructuring done right will tend to remedy or eliminate certain opportunities for wrongdoing that do exist.

I think, at a federal level, it might be worth rethinking whether the Edgar/Allegheny standards are strict enough and whether someone with a rate-regulated default supply role should be, in essence, allowed to buy things from an affiliated generating company.

And then institutions have a lot of thinking to do. One thing that did happen in relation to PUCs when restructuring came about was

that I think people got a little too ambitious about how small these agencies could become and then reasonably function. The reality is there's always going to be in this industry, maybe not always but for the foreseeable future, there's going to be a monopoly there to regulate in this industry. PUCs still have to fulfill an investigative duty to inspect books and records and ask the relevant questions. Too often at PUCs today, the kind of revenue requirement and audit function basically just asks, do these numbers in this account add up to the line on the page, rather than really inquiring about the efficiency efficacy reasonableness of the expenses in question.

So that's an important consideration about the institutional talent of staff. There has been a trend, too, where PUCs have begun to see themselves somehow as partners in the business of electric and gas utilities, which I think is a really pernicious sort of psychological trend, that regulators stop thinking of themselves as regulators and start thinking of themselves as sort of junior utility managers.

Second, consumer advocates. It is really important to make sure that at least one consumer advocate in the state government is exclusively focused on monopolies, has secure funding, and really has that kind of laser-like focus. There's an awful lot of mission creep in consumer advocate organizations today, when in a well-functioning PUC, you really do need someone on the other side of the ledger consistently and aggressively challenging, playing devil's advocate to monopoly requests.

Third, investors. It's very popular to talk about ESG as an investment thesis today, but I think it's really important for them not to neglect G, governance, in that investment

thesis. This has been one of the results of these scandals and they've applied actually across the industry to regulated and non-regulated actors a requirement—not a requirement, but an expectation—on the part of investors that businesses disclose third-party organizations to the degree they are engaging and lobbying.

And finally the legislatures. I mean, my goodness, have a little modesty about what you would enact. I mean obviously to read HB 6, it was not a simple piece of legislation. More questions should have been raised about its necessity, its complexity. None of those questions really were raised and asked. Just like PUCs, legislatures have institutional staffs that should be informing their bosses of the pros and cons, and doing analysis, around different pieces of bills. But those offices are very uneven across the United States and sometimes just not empowered to do the job that they're there to do.

With that, I thank you for your time and I will turn it over to the next speaker.

*Moderator:* The discussion you had mentioned you had of what happened at FERC earlier this week on where were the states reminded me of the debate over the 1990 Environmental Policy Act and particularly about emissions trading. One utility, which shall go nameless, vehemently objected when the Ohio commission intervened to say we supported emissions trading, when the utility admonished us, saying they were well representing the state, who were we to intervene? Goes with the point you were making. Next speaker, go ahead.

**Speaker 3.**

Well, thank you for inviting me here, although perhaps if you had told me that I would be charged with defending the robber

barons of the 19<sup>th</sup> century, I may have reconsidered my acceptance.

I'm not entirely sure that's fair and accurate, but I do want to spend a little bit of time trying to pull apart some of the things that Speakers 1 and 2, I think, conflated because, gosh, it fits their thesis, and I've never been on a panel with either one of them, where the punch line wasn't Texas and full restructuring and no more investor-owned electric companies with holding-company structure.

So I'm not entirely surprised at all that this is where they have landed. I guess I do want to start, however, with the one place where I really do agree with Speaker 2 and that is on governance. I think it would be wrong not to say that public corruption involving electric utility companies is wrong and it is illegal, and governance is where I think that a lot of attention should be paid.

I know that Speaker 4 is going to talk a lot about governance and transparency and transparency as electric companies participate in all facets of the regulatory process, both at the state level, before the public utility commissions, and at the legislator level, both federal and state, and at FERC. I believe my entire organization fully supports more transparency.

There are a lot of things that we get involved in, and we shouldn't be embarrassed when we are involved in them, and we should be clear that we're doing that. I'm going to go back and address some of that, but I've definitely seen movements from all of my members to think about how they disclose their involvement in the political space, and I think that's important. I know that Exelon has instituted several measures along these lines with respect to governance and how they engage with state and local regulators, as a result of what happened at ComEd. So I don't

want to discount that. I think it's hugely important.

But I also do want to note that, at times, when Speakers 1 and 2 talk about political participation, it almost seems like they're headed to a place in which they want to say that electric companies should not be allowed to participate at all. And I vehemently object to that. I know Speaker 2 was speaking as if he was still a regulator, but Speaker 2 also works for a company that is profit motivated and that participates very robustly at all levels in the political process. It would be naive to think that somehow restructuring would change that profit motivation for any participant in the market.

That is why markets have robust protections built into them to, like market monitors. I think it would be naive and completely academic to think that full restructuring and totally perfect markets would mean that monitoring wasn't needed or that you wouldn't need the FBI to engage in investigations when there is public corruption.

I do agree about transparency and I look forward to Speaker 4's conversation about that and I'm happy to answer questions about what I think transparency means. As a hilarious anecdote, or maybe it's only hilarious to me, I am routinely accused of being a dark money group by a couple other entities that won't disclose *their* funders.

But you can look at my 990 and you can look at all of my political compliance reports, you will see from whom I get money and where I spend it. One of my first actions when I took over my job about four years ago was to totally revisit our PAC compliance and our political compliance and to retrain all of our staff.

Because that's how important I think it is that people who participate in the political process do so transparently and that we do not violate rules that would make it look like we are trying to achieve outcomes in some sort of illegal or unfair way. That being said, I don't think the answer is to say that I shouldn't, or any of my members shouldn't be allowed to participate in conversations that deeply affect them and their businesses and their customers.

With that being said, I'm going to try to pick apart a couple of things. I always play a game with myself when I talk to Speaker 1 and 2, and that is I track the number of times one of them says "rent seeker." We're only up to five this go around, which I think is actually a low.

But, as I said before, any entity that is participating in electric markets is profit motivated. Speaker 2's company, too. To somehow imply that the only entities that would be motivated by profit are regulated electric companies and not independent power producers is a little bit absurd. Speaker 1 spent a lot of time talking about legal and illegal rent seeking, just to use their terminology, and, like I said, if the end result of that discussion is that somehow you shouldn't be allowed to participate in the political process at all or participate in stakeholder processes before state commissions, that's wrong.

But I think really what they mean is they just don't like the outcomes that they're getting, and they want different outcomes and they want different people to win market situations or different people to have legislation passed, and they want different things to happen. Those are important policy conversations. Should different outcomes be achieved? But to achieve it by limiting the political participation of one of the

competitors is fairly ironic coming from either of them.

So here's some things that I just want to point out, I guess I'll go backwards in my notes. The whole comment about Chris Crane adequately representing the states before FERC and the discussion about carbon pricing. First of all, we were not consulted in any way, shape, or form by the commission about who should be on those panels. We didn't tell them not to include states.

But, ironically, Chris Crane and Exelon had been credibly vocal for years that they support carbon pricing. I don't know why the chairman chose not to include other state actors in that conversation, but for purposes of that conversation, it's not crazy to say that their position with respect to carbon pricing is similar to that of many states that would like to see carbon pricing in those markets. We didn't direct that outcome. And we didn't seek that outcome. But that particular statement actually kind of makes a little bit of sense in that context and it requires a little bit of contextualization.

The other thing that I wanted to spend a moment talking about, Speaker 1 mentioned: the circumvention of PUCs and the politicization of stakeholder processes and rate-review processes. We're always going to be in a rate review because it's usually about us and, traditionally, the participants were the commission, commission staff, the consumer advocate, and that was it. But other people are in that process now and we didn't tell them to come there and make it more political, and we're not trying to keep them out.

But major decisions about the future of the electric industry and about climate change and about resilience are being decided in those processes. And I don't think there's

anything wrong with more stakeholders participating.

To just somehow imply that the increase in number of stakeholders is bad and indicates increased politicization at the direction of the electric companies is hilarious. Generally speaking, it was easier and we have fewer people to deal with and we have really had to think long and hard about how we engage with all stakeholders, I think, to the benefit of customers when we go into these processes. And I guess, as a side note, if you listen to Speakers 1 and 2 talk, you would assume that my members get everything they want, that their ROEs are in the high 19-20%, that no PUC has ever told us no when we asked for cost recovery for an investment, and then every piece of legislation we've ever forwarded has been passed, and that is manifestly not true.

Those proceedings are contested. They're on the record and commissions make decisions. And I think it's important that that continue. I guess in a non-restructured space, particularly when you're talking about generation decisions, there's at least some recourse if you think that the public utility commission made a decision that isn't reflective of their obligation to serve the public or to ensure that things are used and useful. In the market space. The market outcome is the market outcome.

With respect to ballot initiatives, the ballot initiatives Speaker 1 mentioned were Nevada and Florida. Neither one of my members put those ballot initiatives on the ballot. But his implication was that they shouldn't have responded to them. NV Energy, which responded to the Nevada ballot initiative, did so incredibly transparently. They spent a ton of money doing that and they were ultimately successful and maybe that's the thing you don't like is that they were successful. But

there wasn't anything wrong with them participating once someone else put it on the ballot. That's where I get to the point where, is this going to A place where we're somehow not allowed to participate at all in anything political?

I guess with respect to the Citizens Utility Board in Illinois, an important contextualization is that by law ComEd has to fund the Citizen Utility Board. They don't have any control over how it operates, but they are required to fund it.

I hate feeling defensive about this, but I guess I knew I was going to feel that way going in. But, to the extent that there's a conversation here, I think it's about transparency for every participant in the political process. I also think it's a little bit naive to think that perfect regulation—or at least your version of it, if you think it's Texas—is likely to happen anytime in the near future.

We are seeing states say that what they want is to have some opinion about generation and what happens in their state. That's largely a function of the fact that they don't see federal action on climate change. So we're not going to move to a world where people are going to deregulate more, we're going to see states involved in generation decisions more. And so the way that we need to address that is transparency for all participants in the process.

I am sure it's fun as an academic exercise to fantasize about a world in which there's perfect competition and everyone looks like Texas. But that's not the political reality we live in, and I think it'd be more productive for people much smarter than me, including those assembled here, to think about how we ensure that governance at all levels focuses on transparency. But anyway, those are my high-level thoughts. I appreciate the

opportunity to participate. And I'm happy to take any questions. Thank you.

*Moderator:* Thank you very much. Looking forward to hearing the next presentation. This is an interesting case study of a company that tried to move reforms to move towards more transparent involvement in the process.

**Speaker 4.**

Thank you, and great to see everyone. Good morning or good afternoon, depending on where you are. Still morning here in sunny Arizona.

This has been fascinating so far. And I'm really looking forward to the discussion that's going to happen once the presentations are completed. I have to say thank you to Speaker 3 for standing up for the vertically integrated monopoly utilities. I will say, as does Speaker 3, I agree with Speaker 2 on the governance piece of this. It's a critically important part of our story and a large part of what you're going to hear from me today.

I'm just going to share with you our story, and certainly look forward to participating in the conversation. It's really about our background and our history and it's been exciting. Let's just put it that way. We have been under some pretty intense scrutiny for our political participation, the past years.

Our actions are completely consistent by law and our own code of ethics, but the scrutiny has been pretty uncomfortable and I'm going to tell you how we ended up in the spotlight, and the steps that we're taking to avoid that situation on a going forward basis.

So, just like we've already been discussing, utilities have been engaged in issues of significance for their entire history. APS is no exception. We engage on issues that are important to our company, to our customers,

and to our state. But in the last decade we added a new element to that engagement that we had not participated in before. And that was very directly electioneering.

It really started with some specific issues and, ironically, the first issue that we engaged politically with electioneering tactics was retail competition in 2013. The state was once again considering moving forward in that respect. And we as a company believed the, as we still believe, that retail competition is not in the best interest of our customers. So that was the very beginning of our engagement with these types of tactics, including community engagement and media to make our case.

It was not strictly policy arguments at the PUC anymore. We took it outside of that venue seeking understanding of our issues in a different way. Also about that time period, we were really ramping into the net energy metering debate in Arizona, and that is an issue very specifically that I consider rent seeking by a third party.

This was the beginning, from our perspective, of what Speaker 3 was referring to with non-traditional stakeholders engaging in utility rate cases. We believed then and now that net metering is an unsustainable subsidy for rooftop solar customers, and it was critically important that we got our messages across, especially with the tactics that were being brought forward by the third parties.

The rooftop solar companies at the time, they were also engaging in these campaign-style tactics. That rolls right into the 2014 election. Arizona commissioners are elected, and these net metering companies, advocating for net metering, were engaging in supporting commission candidates during the election. And then some of the candidates were

actually running their campaigns almost exclusively on an anti-APS platform. We were very concerned with that.

There were other voices that were loud. They were certainly at the PUC, but they were also in the public arena. And we chose to engage ourselves, because we were concerned about that influence and we were concerned that it was a one-sided debate and discussion. So we actually got involved in both 2014 and 2016, specifically, supporting ACC candidates.

So fast forward to 2018. That's where we got into the ballot proposition issue. That was Proposition 127 in Arizona, which sought to require 50% renewable energy by the year 2030 and embed it in the Arizona constitution. And we believe very strongly that that is not where energy policy should be decided. So we engaged in that. Once again, as Speaker 3 indicated, we didn't put that on the ballot, but once it was on the ballot, we did engage in informing the public and we succeeded. That proposition went down 70% to 30% at the end of the day.

So we were often successful in our advocacy, but it was a bumpy road and we learned a number of lessons along the way. We're continuing to learn lessons every day. But I'm going to share with you three important lessons that we learned.

The first one was transparency. Speaker 3 was talking about that. I think we would all agree that transparency is critically important in any engagement. Following the *Citizens United* decision by the Supreme Court in 2010, we did begin to engage in independent expenditures during that time period that I just outlined for you, in support of candidates. While it's perfectly legal, we learned that, as a utility company, the public, our regulators, and our customers have

different expectations. They expect that we be transparent interactions.

This led to our voluntary political participation policy that was adopted in 2015 and is published on our website and is updated annually, where we disclose all of our political contributions, going beyond any legally required disclosures.

The second lesson we learned was one you may think that we should have known before we engaged, but that was, engaging directly in the election of our regulator was not well received by anyone. We initially engaged as a defensive measure because other third parties that were rent seeking, no doubt, were engaged in trying to get their particular candidates elected.

But, as I said, the decision for the regulated utility to engage was not supported by our customers or the regulators. In fact, that decision led to lawsuits, one of which is still pending today involving our current ACC chairman.

Ultimately, that led to a commitment by our new CEO, Jeff Guldner, to refrain from participating in ACC elections in January of this year. So that was lesson number two, don't engage in regulator elections.

Lesson number three is to propose an alternative. And this is related to Proposition 127. APS has long supported clean energy. And in fact, we're greater than 50% clean today, carbon-free. Our opposition to Proposition 127 was not based on moving more quickly to a clean energy future. It was based on consumer protection and the fundamentals of good public policy.

But when we successfully defeated Proposition 127, our stakeholders wanted to know what we did support. If you didn't like

that, then what are you going to put forward for the benefit of Arizona and Arizonans? Ultimately, we announced our clean energy commitment of 100% clean energy by 2050. We announced that also in January of this year.

We needed to propose an alternative. If we didn't like proposition 127, what would we support? It's not enough to oppose proposed solutions without proposing an alternative. That was also a very important lesson for us. Also, this year we began the process of reexamining our purpose as a company and our role in the community. And that led to another element of our commitment that we're calling The APS Promise, and it was just introduced internally to the company last month. It will be introduced externally, rolled out here in the next few weeks.

So The APS Promise articulates our purpose. We are stewards of Arizona, and as such we do what's right for the people and the prosperity of our state. That's our commitment. Our vision is that we create a sustainable energy future for Arizona. And our mission is that we serve our customers with clean, reliable, and affordable energy.

Now, those words are certainly not a surprise to anyone on this call. This is what the utility industry has stood for, for a very long time. But it was important to us to take a step back and think about what we are trying to achieve and why, for the state of Arizona. We are a single-state utility. Also, in examining our purpose, we did take a hard, long look at our political engagement and we asked ourselves the question if we should disengage entirely, which Speaker 3 was talking about earlier, calling out Speakers 1 and 2, maybe that is the ultimate endgame is that utilities are not permitted to engage.

We thought about that because, frankly, we've just been in an uncomfortable spot for a long time, maybe it's better that we just do not engage at all. We talked about it a lot internally, we consulted with some external advisors. But at the end of the day, we decided that our company and our service were too significant in the community and state not to have a collective interest represented in the political process. We want to be participating, so that the best outcomes can develop along the way. But we want to be clear and transparent about why we're engaging and how we're engaging.

That led to another component, which is our public policy engagement strategy. And this is a work in process, but one that I wanted to share with this group, to illuminate the seriousness with which we're taking our examination of our engagement. It's really an articulation of why we engage. It's for our customers, for our stakeholders, our employees, on behalf of the communities and other stakeholders along the way, looking for sound, forward-looking public policy that creates shared value for our business and our community and a vibrant Arizona economy.

We're also going to articulate values that will hold ourselves accountable to. We are going to be public about those values, as well. The first value is transparency. Transparency in public policy advocacy, political spending, governance, and reporting.

The second value is authenticity. Authenticity, candor, and respect in our interactions with government, elected officials, regulatory bodies, customers, and other stakeholders.

The third value is dedication to building strategic relationships with all of our community partners, so that we can achieve more together.

The fourth value is consistency in advocating for our mission to deliver reliable clean and affordable energy to our customers.

The fifth value is a commitment to engage with employees on public policy issues and respect the diversity of employees in our company and the differences that go along with them.

And then the last one is back to governance again. It's integration of the ESG best practices, with an emphasis on governance throughout our enterprise in the state of Arizona.

So that is an articulation of how we're going to do business and why we're going to do business. And then the final component of our maturation to date that I wanted to share is a compliance plan. We have looked extensively at the issues, the clearly bad actor issues, the legal wrong, never to be repeated, in California, Ohio, South Carolina, Illinois, there's a number of them, we talked about a number of already on this call today. But we are putting together documented processes and procedures that will govern how we do business. It will govern the hiring and management of third-party consultants, lobbyists. It will govern the rules for handling referrals, recommendations, and requests from public officials, including nonprofit or community requests.

Specific rules for handling requests related to referrals by public officials for employment considerations. Part of the conversation today already. Rules related to our engagement with independent expenditures and regular reporting and authorizations, up to and including our board of directors.

So, in summary, we are committed to continuing to engage in the political process because we believe it's in the best interest of

our customers and our state. But we are also committed to being transparent and that engagement being rigorous in our approach, as well as honoring The APS Promise along the way.

I'll stop with that. That's our story. That was a little bit longer than I had intended, but I hope it will generate some dialogue and some discussion. With that, I'll turn it back over.

*Moderator:* Thank you very much. We've had four fortunately divergent points of view presented, multiple points of view. That should lead to a lively discussion. So let's take a 10-minute break.

### **Discussion.**

*Moderator:* Let's go to the first question.

**Question #1:** My question's for Speaker 3. I'll preface it with a statement that I didn't hear anybody, nor have I really ever heard of anybody seriously argue that regulated utilities ought not to be able to participate in the political process, whether it's before a commission or the legislature or even elections. Indeed, I think that would be unconstitutional.

But what I really didn't hear addressed is what I think is the bigger problem, and that is utilities being extorted, in effect, the regulated monopoly utilities, by politicians themselves. In other words, I'm not sure it's the utility that is corrupting the process as much as it is the elected officials, or regulators, for that matter, who view the utility as a piggy bank.

I always remember a comment that a now-retired CEO of a large regulated utility once told me, that the reason he enjoyed restructuring so much is that he quit getting calls from politicians asking that their sons-in-law or brothers-in-law get hired. So I don't

know if you have any comment in that regard to those observations.

*Respondent 1:* I'm sure you're shocked, I do. I'm glad you agree with me that ultimately stopping participation in the political process would violate the Constitution, because it would.

Given some of the rhetoric that I've seen, particularly in the last couple of years, I do think some people are reaching the conclusion that some forms of political participation should be off limits to regulated electric companies. Separate conversation for a separate day.

I've seen lots of people actually want to redefine lobbying to include things it doesn't include, so that it is more difficult for us to participate. But, like I said, separate conversation for a separate day. I often say that, in particular, the investor-owned electric companies are the greatest tools of public policy that states have ever seen. They make us do things all the time and they make us do them by raising private capital to get what they want done.

I think that's not exactly what you were talking about. But I think they do often see us as a state piggy bank. I say that with respect to California. California sets very aggressive goals and then tells the electric companies to go achieve them and often ops out all other market participants.

To date, those electric companies have been really successful doing that. Their model is under attack because of the way they look at fire liability in that state. I guess, anecdotally, I hear from members, particularly when it's time to renegotiate the franchise, that they want to renegotiate the franchise and they want a new public park.

I guess this is something that I'd wanted to say before is that, Speakers 1 and 2 characterize these as utility scandals. But what they really are public corruption scandals involving electric companies. It takes two to tango. Someone's got to ask for a bribe, and someone's got to give it.

And we have to think about what incentives there are for our public officials and in states that are chronically underfunded, they're going to continue to look for someone who has deep pockets to fund things they want done. So maybe that is a benefit of restructuring, but I'll tell you, I don't think that entities in restructured markets that still have the franchise, the local distribution company, just because they don't want generation doesn't mean that someone doesn't ask them to do things when it comes time to re-up their franchise.

*Questioner:* Well, in the answer, then, the road that Arizona Public Service is going down, which is real transparency. Because if, in fact, for example, you have to disclose almost all contacts with regulators or legislators, including what the request is. I mean, at some point, even most politicians, are not stupid and enough to make asks they can't justify in public.

*Respondent 1:* I think Arizona is—and I'll let Speaker 4 respond to that—made particularly complicated because it is a state where the regulators are elected. So there's greater opportunity for political participation in ways that require disclosure, but I think disclosure is really important. I would let Exelon speak for itself, but its response to what happened at ComEd is to disclose all contacts even above and beyond the requirements of law and then basically to take a position that if some politician asks them for something, for example, a job for someone's brother-in-law, they will, by definition, not give it to that

person. It will have the opposite of the intended effect.

*Respondent 2:* And I'll just add, I think that's an important observation and I do agree, just because, if we were to divest generation, it wouldn't make us less of a target for people who think we have deep pockets.

There's two categories of people in that respect. There are those who would be proud of the fact that they got their park in exchange for the franchise and would want to promote it accordingly, because that's doing their job. And those that would shy away from it. But I would suggest there's probably more the former than the latter, frankly,

And there's a number of constituents, I would say it certainly goes beyond public officials, but many of our stakeholders just view us as deep pockets and anything they can extract from us they will in that respect. That's part of the challenge of being in this space. We also happen to be in an industry where, if there's a another large, deep-pocketed company that is not being treated fairly by the community of the stakeholders, they can actually pull up stakes and leave and go somewhere else. We don't have that luxury. We are embedded where we are, in the community that we are, and we have to figure out a way to navigate those challenges.

It's a problem that exists. It's a very fair call out with respect to the two-way situation there and the demands that are made on us by many different types of stakeholders who just want their issue taken care of and view us as an endless source of money.

*Moderator:* Do you want to weigh in on this?

*Respondent 3:* Sure. First off, I only had one bullet that really was pertinent to that particular point. And that was the synergy of

this space with climate and clean industrial policy and I would really say market-based environmental policy instruments versus the mandates and subsidies vehicles. You have seen a lot of interesting, especially legislator and some regulatory, behavior with different stakeholders.

There have been cases that speak to the PowerPoints made. I know that there have been cases where some utilities have felt extremely pressured by the environmental groups directly or through a roundabout fashion. For example, say, go all-renewables in your next IRP or some iteration thereof. There is a sensitivity, even in-house, I think, as documented from the sort of counteractive effect of Averch-Johnson, of trying to avoid shocking the system there. And so I do think that there have been some pretty demanding situations, in some states, that utilities have been placed in.

A year ago when I was ELCON, I wrote a memo to membership and said, we've seen a big pivot in the last year here. As a former IRP guy, I wanted to jump out in front of it because we said, "Well, what we're seeing is the shift from third party PPAs in the renewal space to a lot of rate rate-basing of this." That feeds into that information asymmetry context that I was talking about, which is where the literature has historically flagged a lot of concerns for that type of role of government-firm interaction, under increasingly divergent conditions of information deficiencies.

So I think that's something, at least from a consumer perspective, that a lot of the real sophisticated loads have started to flag as a big concern going forward. And those are coming a lot from companies that want to meet their own corporate sustainability goals. So I think that's interesting.

And the last point will be on some conversations with some folks in the space about what the utility ESG movement means in a state regulatory context. And that does get into some of what we were talking about here. What type of considerations and prudence mechanisms come into play now that capital markets and other parameters are factoring in some considerations on cost of capital, even access to capital for different types of projected portfolio conditions? How does that affect Certificate of Need IRPs? Any rate cases? Any ROE considerations on the risk profile of this industry?

So I do think that some of the pressures that the integrated utilities are facing from those stakeholders ultimately are going to have some really difficult reconciliation pathways that all stakeholders are going to have to talk about under this kind of business-as-usual regulatory process.

*Respondent 4:* I would just add, very briefly, that my sole point really is that the structure and nature of the regulation of certain industries creates an opportunity or forecloses opportunities for political corruption.

I think it's a pretty simple point that's well validated. There's a reason why the big money flowing through these scandals involved the companies in question and didn't involve, or at least not that we know of to any significant extent, with big telecom or something like that. So I think that's something to consider. I would say, as to whether to regulate political speech of regulated monopolies, that has been discussed in the history of the American Republic. But usually that is not a constitutional remedy.

Instead, the remedy is one that typically goes to structure, either dismantling institutions

that prove to have a deteriorative effect on the political process or structuring them to try to minimize the opportunity for that effect. That's happened many, many times since the Jacksonian Era. And it should continue to be something that policymakers should continue to think about here or in the tech space, wherever this problem may present itself.

**Question #2:** Let me use the Moderator's prerogative for a second to inject a question. The one area where we seem to have consensus from all the speakers is the role of good governance. And what I wanted to find out is, what's the role of the regulator where there's at least a *prima facie* demonstration that there has been a breakdown in governance?

You may not know all the facts, but at least on the surface questions are raised. What is the role in this? We read about the PUCs, although there may be circumstances where FERC would be involved. But what is the role of the regulator? When should they be intervening and how should they intervene? Or is your view that they shouldn't, where there's a *prima facie* case that the governance system is just not functional?

**Respondent 1:** I'll quickly kick that off. PUCs generally look at governance quite closely during certain occasions, like merger-and-acquisition proceedings. Then they set ring fencing, they set requirements about how the corporate board is constituted and selected.

But it is oftentimes a set-it-and-forget-it type approach. I don't know that there's probably as frequent sort of regulatory hygiene or talent that's applied to those kinds of questions. I do know a plug for a book I haven't yet read, which is always a dangerous thing to do, but I know Scott Hempling is coming out with a very long treatise on considerations for utility mergers and

governance as a topic within that later this month.

As to rate case review itself, I often find that in my experience the question is frequently asked about, what kind of spending is above the line and below the line? There is not a lot of inquiry in a lot of jurisdictions about third-party transactions and that type of thing. Those are just so my impressions.

**Moderator:** Everybody else in the panel?

**Respondent 2:** I was going to reference the article actually about audits, and I think that was just talked about. Audits, when you are regulated at the public utility commission level, can be appropriate if there's been a breakdown. But, at least in the cases that made this conversation come to the fore, that might be appropriate. But there's no sign—and I'm a lawyer, so I guess I have to say this—there's no sign that the traditional legal remedies have failed. People are being investigated, they're being charged, and people are going to go to jail.

So, I think that as long as the regulator role is confined to looking at that organization and what's consistent with their jurisdiction, that makes sense. But I don't think their jurisdiction should be expanded in any way.

**Moderator:** Do the other panelists want to comment?

**Question #3:** This has been an excellent panel. Kudos to HEPG for putting this together. Just one comment and I've got a series of very short questions here.

If we go back to regulation and the theories of regulation, there's two main drivers for regulation. One is to [UNINTELLIGIBLE] market failure. And that's something that Speaker 1 mentioned in his presentation,

although there's the false claim of market failure.

The other one is to engage in rent-seeking behavior. And I want to concentrate on the latter. Because if we think about the utility industry, historically, and how it's evolved—with my head nod, thank you. Speaker 2, my fellow traveling historian—we go back to Samuel Insull and we go back over 100 years. Originally, utility service was a competitive industry. It was competitive in generation, it was competitive on the wire side. Even in Cleveland, you've even got infrastructure for Cleveland Public Power and First Energy running down the same streets, in some cases, still to this day.

But Insull realized that this was not going to be sustainable for him and his investors, and lobbied to be regulated. So I think that that's the original sin that we're still talking about here more than 100 years later.

But with that being said, with that original sin in mind, I've got three really short questions. The first one is, what is the impact of seeing money as speech under *Citizens United*? And I bring this up in light of a written, just-two-days-old district court decision in Columbus, Ohio, where the attorney general in Ohio wanted to prevent First Energy from donating money to politicians, given everything that's happened in the Householder scandal and First Energy scandal in Ohio under House Bill 6. The judge ruled that he could not prevent that, that that would be free speech. To which my thinking is, well, now bribery is considered speech.

My second question is, and we hadn't really talked about this, but I think it's important in a competitive environment, and I think it's 800-pound gorilla in the room here. What about rent-seeking behavior at the ISO/RTO governance level that we see with market

design changes being pushed, especially where we have capacity markets, whether it be with New England, PJM, New York and so on? Something in Texas that we have to worry about.

And then the last question I have is the role of information asymmetries, which goes to the issue that Speaker 1 brought up. And that is, if I look at the Future Energy Jobs Act, and how quickly that was passed, and that nobody read it, and that there were these headline numbers about there's a cap on cost increases. But when you read the fine print, you can roll that all over and the ultimate cost increase was actually, rather than \$235 million, probably in the ballpark of \$330-350 million. So how do we prevent that information asymmetry? There's a lot to unpack there, but I appreciate your forbearance.

*Moderator:* Who wants to go first? Why don't you just reiterate the first question.

*Questioner:* Yeah, the first question is, what is the impact of money is speech under *Citizens United* and especially in light of the fact that even companies that have been accused or been involved in such scandals, such as First Energy, are not going to be prevented because money is considered speech. What kind of influences is that having on the issues that we're discussing today?

*Respondent 1:* On that one, I have a lot of personal views on that. But that's sort of outside of my wheelhouse. So without going outside of the scope of the paper, I will just clarify that, since it was implied that some of what we were saying in the paper was leading to limitations on utility speech, there's nothing in the paper or presentation that says that explicitly. So I confined this just to the auspices of electricity policy.

I do think that there's probably a very considerable synergy there within some of these other policy arenas, but I'll leave it to the industry players to talk about their observations on that one.

*Respondent 2:* I haven't read that decision and no lawyer will opine on a decision they haven't read. But what it sounds like you said, is because someone did a bad thing, one time they have somehow lose all their constitutional rights going forward. And I don't think we all want to live in a society like that. Obviously, laws were broken. There should be consequences for that. But does that mean that they lose all of their other rights going forward? I understand that you're concerned that they've done a bad thing. I mean, bribery is not a legitimate way to participate in the political process. Do we have to stipulate that? I don't think anyone's saying what they should be able to do is continue to bribe people, but should they be able to participate in discussions about what happens to them as a result of their bribery? I feel like we all would believe that our democracy would require that.

But, like I said, I can't really opine on that. But I don't think that decision says that bribery is a form of speech. I think what it's saying is that a person who violated the law doesn't lose all of their other constitutional rights.

*Moderator:* You know what's interesting, actually, with the First Energy situation, is that the facts were somewhat complicated. One, because it raises issues about, was this more extortion than bribery? And there's a there's a real debate about exactly what happened. The second is the speech involved here, it wasn't quite what we think about campaign contributions in the sense of public advocacy. Some of that money was involved in public advocacy. But rather specific

payments for specific people to get elected. So it's kind of a hybrid case. It doesn't fall clearly in any particular category here, which makes a little more complicated.

*Respondent 1:* I might say one more thing, and I certainly don't want to hog the floor, but the facts of that case are complicated, and I think we're going to learn more.

But one thing that might be worth talking about is they specifically used vehicles that promote anonymity in political giving. So they use 527s and C4s. Maybe a legitimate policy conversation is, should you be allowed to participate in an anonymous way? And that would probably require a revisitation of *Citizens United*.

But I know that, from my members' perspective, that, even if they're going to choose going forward to participate using those tools, that they're going to disclose, even though they're not required to. But those tools exist, and they encourage some of the behavior that we saw in Ohio.

*Moderator:* Your second question.

*Question #4:* I think the second question is related to RTO governance and that is, we've talked about rent-seeking behavior at the regulatory level but one thing that was explicitly avoided in the conversation is the issue of ISO/RTO governance and rent-seeking behavior. I can just tell you from my experiences being very close on the inside of PJM as the chief economist, -seeking behavior is everywhere. We were constantly being approached from all sides. I'm not going to throw stones at any particular sector because everybody was doing it.

But is there a sense in which, in the words of Orwell, all animals are equal, but some

animals are more equal than others in that process?

*Respondent 1:* I'll speak to that. I actually wrote a long paper on RTO governance last year that I would recommend. I've come around to the view that RTOs should be understood, to use the British terminology as quangos, quasi-administrative non-governmental organizations. I take inspiration from something that Michael Dworkin of Vermont Law School and Rachel Aslin Goldwasser, who used to be the NECPUC Executive Director, wrote when they said that RTOs "take a form that is between government and business, creating serious accountability problems."

And I think they can. I think the emergence of RTOs has been first necessary for the accomplishment of restructuring. A well-designed market promotes and achieves economic efficiencies. But are there concerns about how those organizations are governed, how they can be accountable, to the degree they wield government-like powers, albeit subject to regulation? Sure, absolutely.

I haven't seen, however, the type of scandal emerge from those institutions like the ones we see here. The rent seeking that does occur through those vehicles has not reached the kind of ostentatious proportion that you see in state legislative enactments, and I think frankly because it is cabined, at least on the basic level, by a prohibition on unduly discriminatory behavior.

Most of this kind of gets to a point that Speaker 3 made before. A lot of the problematic legal enactments that you see being at the center of these scandals really are special legislation in nature. They favor a particular market actor to the disadvantage of others. And this goes to your third question. You see laws that are increasing in their level

of complexity, but also becoming more specific in the direction of their perquisites that they dole out through the state legislative mechanism.

And this has been going on for a number of decades. It's not new, but you see it more and more throughout. I'll just give a personal example from Montana law that drives me crazy, and it exists in many states at this point. At some point, one utility decided it ought to be regulated differently and have different entitlements than another utility in the state. And that gave birth to a law that reads "A public utility currently doing business in Montana as part of a single integrated multi-state operation, no portion of which lies within the basin of the Columbia River, is exempt from the requirements of this chapter." As if that's an intelligible basis to create a distinction between one business that's subject to regulation and another. I would just humbly submit that if an RTO tried to concoct a distinction like that it would more likely than not get rejected, whereas that's just another day at the legislature for utilities' lobbying activity.

So that is at really the heart of what you've seen in Illinois and Ohio, the creation of special legislation that conveys an entitlement to a single-market participant to the exclusion of others, drowned in a lot of details that make it difficult for the public to really understand, and often passed without any real transparent level of process that, for better or worse, probably does exist at RTOs.

*Moderator:* You were the third question.

*Respondent 2:* Any chance I could provide a quick response on that one? First, I think it's a really interesting question. There's some parallels with the themes that we're talking about here and there are also some areas where it even dovetails.

One thing that's interesting. We've done a couple papers on this, and even looked into it pretty aggressively when I was with the industrials, as a concern area. I think when you look at the political economy of an RTO structure, it gets pretty interesting, too. I know we've had chats, as we've had with the market monitors, about exclusive implied incentive structure of different participants, as well as the RTO itself.

And one thing, where there's a parallel what we see with some of the legislative activity that we were talking about earlier, is the dispersion of costs and benefits of participating in a process. That goes back to a lot of just old Chicago School of Economics thought and what cultivates the development of regulation as a form of competitive moat. As the questioner likes to say, we've seen areas where, because market design is so complex in many areas, that, as some consultants like to say in our field, the information of barriers to entry are so high that the cost of representation and participation in the process become really high. And I think that that can sometimes exacerbate the representation of different stakeholder groups. Then you can see any implied rent-seeking capability go off kilter.

I think we have seen that with multiple stakeholder groups, and Speaker 3 will maybe be happy to hear me say that, yes, merchants do rent seek, too, of course. I'm not that there's not. But I think that that's something that was born out of the process. And I think that, to put a fine point on it, for example, one of the outcomes of market design we've seen is, why are reserve margins so far north of 20% even if there's no economic value incrementally of having them? And that's something that was a head scratcher. I bring it up because it was something where the industrials that pushed for restructuring in the first place, a lot of

times had frustrations with RTO processes later, because they saw certain similarities that they thought they had fully overcome in that.

I do think that when we get into this domain of complex institutions implementing competition, we do have to realize that there are some discrepancies in the cost-benefit alignment and the participation abilities, and that can lead to different types of outcomes.

*Moderator:* Thank you. Let's move on.

**Question #5:** Well, this is directed initially primarily to Speaker 3. I accept and agree with your characterization of the involvement of parties in the political process as inevitable and also desirable. So it's not something I think is going to, or should, change. And that's consistent with all of the usual arguments about sunshine and the marketplace of ideas and so on, that we can all compete.

My question is focused on the era of Facebook and Twitter and "fake news." The bogus arguments that I think Speaker 1 was talking about is one of the problems we have here, in that you see all kinds of things which are just bizarre, from my perspective, that seem to survive in these conversations.

Net metering is a perfectly good example of that, and high on my list, but I've got a longer list of things that we could talk about. I'm not sure whether this has gotten worse or gotten better, and I certainly think institutions like the Harvard Electricity Policy Group are trying to do what they can to help in this process. But I just lately am beginning to feel more and more like we're not winning.

I take Steve Huntoon as an exception. He's a great truth-teller, and the emperor has no clothes and he writes it well. But, broadly

speaking, there's so much nonsense out there that stands up, it's really just a proxy for that. I don't want to get into the rent-seeking account quota here, but I think the arguments are really proxies for that kind of behavior, and the system doesn't seem to be working very well dealing with it.

Not just in this sector; it's a problem across the country in many things. I'd be interested in your views on that.

*Respondent 1:* I agree. You see really interesting things, I was going to say, particularly in local politics, but that would imply that we see anything on the federal side right now. We don't. As an example, I find this fascinating and then I'll actually get to the point.

When California expanded its Community Choice Aggregation laws, they explicitly regulated that the utility company can't say anything about it to the customer. There's clearly a violation of the First Amendment. But they're not going to challenge it because the optics on that. Right? But I think the thing that we all have to kind of come to terms with is there's this undercurrent in this conversation, that there aren't going to be winners and losers. The fight isn't about who wins and who loses. It's about who chooses, and do we think that process is fair.

By definition, government is going to always pick winners and losers in this space, and you pretend that market structures aren't picking winners and losers. They just are. Some of you like that as the picker more than you like government. The government has a lot of opinions about these things and they might do things that you think seem crazy. And I might agree that some of them are crazy because that's what they want. It's not an accident that government is immune from antitrust litigation, including public utilities

commissions. They are picking winners and losers.

So I think there are more people participating in this process. There is more interest in—I often disagree with Speaker 2 when he talks about the politicization of electricity—but we have decided to provide a fundamental good that is essential to society in some ways that requires a lot of participation from a lot of different parties and they all have really different opinions about how we should go about doing that. Some people end up going to the legislature to get things that don't make any economic sense to some people. And some people will spend a lot of time trying to jury rig what seems to me like certain kinds of ISO and RTO rules to make sure that they win.

But this is about the fact that someone's going to win and someone's going to lose. I think you're going to see outcomes that not everyone agrees with. As a result of that, I don't know if that's just, fundamentally, a depressing statement. I often fear that this conversation is about, there's some sort of perfect elegant economic solution that we're just not arriving at, because we're all participating in this politically. That's not true.

It's not just about what makes economic sense. States have policy goals, or local communities want to achieve something different. That's the only response I have to that.

**Question #6:** Let me build on the question and your responses. One of the things—certainly seen in the Ohio controversy to some extent, maybe lesser extent in Illinois—but you also referred to the net metering which is another example where the Maine commission got bypassed the metering people to go to the legislature. The question

is, maybe Speaker 2 first directed to you because you were a regulator, is, the regulators were created in part to reform because it was presumed they would have expertise, they'd be more honest than legislators, which is a low bar.

Number one, that they would do that. But, number two, that they would really possess the expertise, and to some extent what you see in HB 6, what you see in some of these efforts to bypass regulatory lengths, what happened in Maine to bypass rules restricting net metering, would happen in the Nevada to some extent on the same issue.

What are regulators to be doing to defend the role of non-self-interested parties to look at some of these issues that require a lot of expertise? Certainly, if you're looking for expertise and knowledge and lack of self-interest, one would think that you want to go to the regulators before you go to the legislature, which is why bypassing it looks like an attractive option to a lot of people. So how do you defend the regulatory process against that sort of thing?

*Respondent 1:* The quality of state regulation across the United States is uneven. You do see a greater tendency, maybe actually it's not a greater tendency, but we've seen a lot of examples of it lately, where unfavorable regulatory decisions on particular dockets then drive utilities to the legislature, where, ironically, the utility will say, "I'm being regulated to death by the PUC that won't let me put this spending project into rate base. You need to pass a piece of special legislation to relieve me of this regulatory burden and require its insertion into rate base."

We see that a lot. And I think when that happens there's at least a selection of good truth-tellers out there about this phenomenon. One of them is the current nominee to FERC

on the Republican side, Judge Mark Christie of Virginia, who has hilarious and candid expositions in his written opinions about this phenomenon, when things like this have happened at the Virginia Assembly.

So part of it is truth-telling. And I think part of it is establishing in the legislature an expectation that the regulator's process is fair. The regulator is open to hearing from all parties, the regulator is not up to get this side or the other but is there to make equitable judgments. To another point I have in mind, I don't know that I want to put them on the spot, but there's one commissioner on this feed who knows exactly what I'm talking about, a situation in one of the states where the legislature did just this after an unfavorable IRP decision by the regulator, and ultimately ordained—this goes to a point in some of the comments—not just a particular gas plant, but a particular gas plant in a particular county owned by a particular company for construction. That type of thing should create headlines.

But I remember as it was happening, I did a lot of Googling and the press really wasn't writing about it. It was not a particularly remarkable scandal for them. So part of this is norm setting in public level, as well. I think a lot of this just gets treated as politics as usual, even though it really can be an actual unusual turn in the public sphere.

*Respondent 2:* I sometimes feel obligated when someone has examples that I have other examples. I promise not to do this throughout, but when the Nevada Public Service Commission decided to take a different position on net metering, the net metering advocates went to the legislature. So it's not just electric companies. They're the ones that put it on the ballot. They didn't like that outcome from the regulator, so they went somewhere else.

I have no idea of the details about the gas plant you're talking about, but I think we all have to admit that some of these decisions have more factors than you're willing to concede are relevant to a legislator. It is entirely possible that keeping that gas plant open—and I admit I've no details here—made sense because it was the only taxpayer in that jurisdiction. Other factors might be relevant. You might want an outcome that you would define as pure from your perspective as a competitor, as someone who wants to participate in a competitive market. But legislators get to consider more than one thing and more than one thing can be important to them and they might be making that decision because other things are important to them.

Things are complicated, and I think that's just a fact of life. You could want to keep a plant open or create a different glide path for a reason that didn't make market sense, but that makes sense for some other reason.

**Question #7:** I'd like to thank the panelists and HEPG, this was a really wonderful panel. I just had a couple of questions.

One comment really is about the one form of this *manus manam lavat* that we observe is regulators going to work for the regulated—boards or corporate executives or trade associations. And what seems particularly pernicious about this is that current regulators, of course, observe this phenomenon about their predecessors. Of course, there are some regulators who would have no interest in that possible future for themselves, but there are many others who do. It's also very difficult, so difficult I think I'm not aware of a simple example of someone viewed as a “tough regulator” who would have that opportunity for their future.

So, I wonder, maybe a question for the panelists would be to ask that if they consider that to be a problem. And is there a kind of a partial solution to say that a regulator can't go work for a regulated entity or one of its representatives for some period of time, say, five years or 10 years? I'll just stop and just ask that one question. Thanks.

*Moderator:* Actually, I think a lot of states have rules like that. We have a former regulator from Brazil. How long was your quarantine period?

*Commenter:* Four months.

*Respondent 1:* I had to track Phil Moeller's quarantine for two years.

*Moderator:* So there are various quarantine requirements in different states. I don't know that all states have them. Of course, the ultimate example what you're talking about was several years ago in Minnesota, where three of the five commissioners were negotiating with companies. Actually, in this case, I don't think they were electric. I think they were all negotiating with phone companies for jobs after they left regulation, while they were sitting on a rate case for the company. But that was an extraordinary circumstance. I don't know how many states may have quarantine requirements.

*Respondent 2:* That's a good question. I'm not sure if Michigan State still keeps track of that particular data point. The Institute of Public Utilities at one point had a compendium of some of those requirements, but it is pretty uneven.

To your point, often this is a phenomenon, number one. Number two, I guess I would point out, maybe on behalf of my erstwhile colleagues that a knowledge of utility regulation is somewhat specialized and

there's a limited field of practitioners of it. Number three, I'm sure I could think of examples of people who are known as tough regulators who did come aboard in those roles. Obviously, I take your point.

Candidly, when I was in NERUC leadership, obviously I've given access a number of times to talk to commissioners and just a closed-door format, and my consistent advice to people was just do what you think is right. Read the record, be a smart regulator, learn something while you're on the job. And if you make the correct decisions—not the correct decision, but if you make decisions on sort of a well-founded factual basis and you follow the law, then you're going to come out in the back end as a good candidate for some company, if that's what you choose to do, or some other organization. So, trying to get away from that dimension but, your prospects of employment are tied up with a regulated firm, or that's what you think, then I think your likelihood to cross them may diminish. But I like to think that isn't the case with most state regulators.

*Respondent 1:* I was just going to say, I don't have a list at my fingertips, but I find that to be the case in a lot of states. I can at least think of one recent person who left the California Public Utility Commission to go work for one of my members and no one ever said that she was easy on them in advance. That might actually be what attracted them to her.

*Moderator:* I did have a staff member once told me in the Ohio commission that if I took the position I was taking, I would never get a job working for the gas company. So I was admonished. I told him it was time for him to leave and go work for the gas company before he got us into some trouble.

*Respondent 2:* Before we move on, I do want to memorialize the fact that we now have agreed on something with her recent remark about the California example, who's a great example of a high-quality regulator going to work for an unlikely firm.

*Respondent 1:* We agree so infrequently. And, on purpose, I didn't make a comment about telecom quality when you said your internet went out. I want you to take note of that.

*Moderator:* All I can say is, if the two of you agree, you're both wrong. Let's go to the next question.

*Question #8:* I wanted to return to the point about bypassing the state commissions and public utility commissions, where we know that there are significant staff and a lot of resources to evaluate proposals and going directly to lobby the legislatures.

I feel like that has really increased recently. I don't feel like that was necessarily the norm previously. And I'm wondering, is there some reason for that? Obviously, not all of those cases involved bribery, but you see it in Connecticut, I think in Pennsylvania. Is there something about the current environment that is leading companies to go directly to legislators?

There was a lot of discussion about transparency and a lot of what-about-ism about that issue. And, obviously, some of these things have happened in the past, but I wonder if there's some distinction that can be used to make those processes maybe a little bit more transparent.

Then I also was wondering, as a second question, obviously bribery is an extreme form, but I think a lot of members felt like Order 2000—the HR 6 in Ohio probably

wouldn't have existed had Order 2000 gone through to subsidize all the coal and nuclear plants throughout the industry. I don't think HR 6 could have gotten through the Ohio commission. So they went directly to the legislature. But I think most of the people within this group, on the one hand, looked at Order 2000 as something that was not normal, especially once the letters from the chairman of Murray Energy to the White House were disclosed.

Yet many of the companies or people involved or even some consulting firms played the game and ended up going through “All right, let's see what we can get from this because this now has become sort of business as usual and it will go through the regular process.” Obviously, it was defeated at FERC, with the help of the late chairman. But I'm just curious to comment on those two topics, was there some change that happened around with Order 2000? And is there some reason we're seeing these things go more with the bypassing of the public utility commissions? Thanks.

*Moderator:* Anybody want to take that on?

*Respondent 1:* I think my charitable response is, as the entire energy ecosystem becomes orders of magnitude more complicated than it was just 10 years ago, I think often commissions themselves find that they might not have authority to address things. Like I said, this is the charitable interpretation.

They might feel constrained. There was a debate at the time of restructuring, could a commission do that on its own or was legislation required? As new technologies become relevant, as bidirectional flows of power become normal, there might be times where commissions feel that they're not empowered, they don't have the authority to take particular actions, and they might need

direction from the legislatures, who give them that authority to start with.

The uncharitable interpretation is forum shopping. I have a child. I'm sure many of you do, too. If you don't get the answer you want from somewhere else and you have another entity to which you can appeal, you will do that.

*Respondent 2:* I guess I've spoken to this a bit already, but I think there has been an increase in the toleration for special legislation in this country, which historically would have been regarded as unacceptable and a practice more closely associated with monarchical franchising of Great Britain. We're probably overdue for some kind of reaction relative to that.

One of the possible outcomes of the Ohio and Illinois scandals—and maybe it'll only be limited to those states, maybe it won't even take hold there—is for lawmakers to look at exceptionally complex pieces of energy legislation that seemed to benefit only one or a handful of parties and just say, “This has the wrong smell. This is too toxic. We're not going to touch this.”

That could be a possible outcome, now that we've seen the worst of the underbelly of this kind of activity. As to the Trump US Department of Energy's submission to FERC, I'll just call it The Coal and Nuclear Bailout, there were a lot of people invested in coal and nuclear, my company included, who opposed that as the wrong thing to do. And there certainly was not a wide array of supporters standing behind it. In any case, FERC unanimously rejected it, even after an assumption that at least one of the regulators—who came from a coal state, closely associated with coal from his former boss—even with an assumption that he might have gone along with it. And I thought that

was an act of political courage on the part of the federal regulator. I think it speaks well to the practice of administrative law in the United States government

There have been people out there, Cass Sunstein and Adrian Vermeule, an unlikely combo, are co-publishing a book about how administrative law is going to save the integrity of this country's democracy. I wouldn't go there, I don't think, but they have an interesting argument at least and, in general, I think its practice in front of the independent regulatory conditions of the United States is fairly robust. That's one of the reasons, I think after all of the stuff in Illinois and Ohio came to light, why we at NRG, at EPSA, felt a little vindicated by fighting the MOPR fight.

While the state subsidies were wrong in terms of market policy, we did not realize that they were the fruit of corruption. And it's good to have some kind of federal regulator there willing and able to push back against that occasion. Even if you disagree with the market sign up.

All told, there need to be more referees on the court for this type of thing. And there needs to be an institutional culture at the state level that doesn't permit special legislation to be jammed through the system so easily.

*Respondent 3:* One thing, too, maybe to the point that some are very familiar with, is the political culture around the appreciation of commodity markets. You see a very different state-by-state mindset on that front. And going back to the point of some signs of institutional decay by some of the governing institutions. You've seen this. I really wish we had Electricity Policy 101 literacy tests for some of these institutions, because I think you would have some interesting data points about what some of the majority's views are

on these things, as opposed to the crowd from 20 years ago, since a lot of folks have fizzled out.

But I think on the giving a lot of folks the benefit of the doubt, even on this, a lot of the arguments—whether it's the state-specific nuclear bailouts, or it's the Trump administration's front; we were involved in both those fronts—I think a lot of legislators, both Congress and at the state level. as well as certain regulatory actors, bought into a degree of the arguments of the rent-seeking. So that was something that I don't know necessarily would have been the case, earlier.

So things like even though PJM and its market monitor were coming out and saying, “You don't need to do this right, we have a liability backstop mechanism,” you still had a lot of folks that I think genuinely believe that, if these units retire, the lights are going to go out. That was a significant chunk of a lot of decision-makers' views. Or, for that matter, the idea of how markets handle risk.

So going back to a lot of the elements why we've been having these things in the first place, a lot of stuff that we were hearing from the Ohio legislature and side conversations I'd here on the Hill, it was, “If we don't keep these resources in the mix, what happens if natural gas prices go up?” Part of the reason we have market structure is because they'll interpret the incentive structures proper, they'll internalize this risk, and that just wasn't even like part of the default understanding of the space.

So I think a lot of the arguments where the evidence really wasn't ambiguous in some of these decision points, *was* ambiguous to the decision-makers. And so I think a lot of stuff, going forward, will be the need to repair these institutions by getting higher quality

information and better understanding of these contexts by decision-makers.

*Moderator:* Any other comments?

*Respondent 1:* I appreciate what was just said about education level. I will say that a part of my job is I see almost everything we file with any regulator and any administrative agency. One of the few rules that I have, in addition to never saying that our group feels anything is no one's ever allowed to make a reliability argument if we're not talking to NERC, because I feel those are often specious and I think they're they confuse things. So I just want to say that I agree with that.

*Moderator:* Anyone was not treated to seeing the ads that ran in Ohio about the Chinese taking over destroying the grid. You get some appreciation for that. Next question.

**Question #9:** Hi everyone, I am a research assistant here at Harvard. So I'm outside of this group, but thanks for having me. I've learned a ton from all of you guys on the panel.

My question is on the heels of what was just being discussed, talking about information that is available. My question is just around the access that utilities actually have to the PUC. That seems sort of one-sided, from just someone who's an observer at this at the researcher level.

So when I think of, how would you combat that in some sort of a way for, like, advocates of consumer environmental issues. You have these programs, like the Intervenor Compensation Program, I believe it's called, in California? Do you guys think in terms of transparency? We're talking a lot about transparency as the best way to see through these issues.

Will that muddy the waters or provide an incentive to utilities to actually provide some cost-benefit analysis? Something like that, involving the just average consumer at a level that they can participate in the conversation at that same level as utilities. I'd just be interested in everybody's takes on that one, especially from Speaker 4, who actually works for one of these things, where that would come. Thanks.

*Respondent 1:* I'm happy to respond to that. My reaction is, I think what it would do generally is just create another special interest to engage that has their own self-interest. We've had plenty of activist participants, in our cases who purport to have no specific interest beyond representing the consumer, their own individual interest.

And that's just rarely true. For good or for bad, keeping the lights on is not something that a traditional typical consumer wants to engage in. Usually, there's a different aspect of that that brings them to these conversations. So I'm not sure that helps the matter directly, but I will agree with you, certainly, that if there was a way to facilitate direct engagement by parties who are just interested in fair outcomes, then I think that would be fantastic. I'm not sure paying them to get involved in rate cases really is the right answer.

*Respondent 2:* I just might add, *ex parte* rules are actually pretty robust, and any rate review is on the record and those documents should be available to everyone. If your question is about the fact that those documents tend to be impenetrable to those of us who don't spend our time doing this, yeah, that's a problem.

But I guess I don't necessarily agree with the premise of your question, that we have better access. We do understand our own business, maybe better than other people. But anything

that consumers are interested in that's on the record at all, that material is available to anyone. I 100% agree with you that using state PSC websites is a nightmare.

And maybe there's more education we could do at the community level, but I do tend to agree that, as we poll customers and we do a lot of work with groups, looking at what customers need and, one, they usually don't want the details. That's usually our number one message. They don't want to know how we do what we do.

*Respondent 1:* I'll just add, I think that is primarily why the consumer advocates offices were created, was to represent the individual consumers. By and large, they take that incredibly seriously and do a great job in that respect. Our large customers are pretty sophisticated in engaging, the chronically underrepresented group in rate cases is small business. That is an issue that has yet to be solved and they often get the short end of the stick, because they're not there.

The special interest groups, in particular, environmental advocates that we've seen more and more are usually pretty typically well-funded, pretty sophisticated. They have a good knowledge and background in the space, and they engage very, very effectively. So from my viewpoint the folks who don't get represented are the small business organizations or the small businesses in the community.

*Moderator:* That comment actually raised a question in my mind about the *ex parte* rules. Regulators are a hybrid in the sense that they govern as if they were judicial officials, with *ex parte* rules, but they're also to some extent have legislative restrictions like sunshine laws, open meeting laws.

That sort of thing. And I'm wondering if one of the elements that contributes to more regulatory bypass are the procedural constraints that are put on regulators. So they're fairly limited in how they can go about making decisions.

*Respondent 2:* I might defer to Speaker 2 on this, because he lived that life. But a rate case isn't an adjudicatory proceeding, on the record. They are making a determination that has impact for one party. It's a little bit like a permit. They're saying this is what you get. So they are adjudicatory, and it is quasi-adjudicatory, quasi-legislative.

But when you're in that quasi-adjudicative role, we really do have a lot of rules about, who we can talk to and when and how documented that is. Those rules apply pretty equally to everyone.

*Respondent 3:* I'll agree. I would say, to that question, it's probably inevitable that it's a highly formalistic process, where experts on behalf of well-established parties contend in front of a body that you hope is equally expert.

And I think a better and more fruitful approach is, again, going back to how we structure the industry. Do we want decisions made in that context, or would we rather try to liberalize markets—so that you don't have to walk into this surreal government agency that no one's ever heard of before, and participate in trying to convince a group of people who might be called judges or the honorable or commissioner so-and-so, of your point? Or would you rather try to remove that type of decision-making from the equation and, instead, open up segments of the market that should be more bona fide genuinely competitive?

I'm afraid I'm reverting to my priors on this one. But I think the shoe fits pretty well in this.

*Respondent 2:* I'm not sure markets and market structures, particularly the markets that we have for these commodities, would be any more understandable to our customers, just because a market was providing the answer. They still would be just as clueless as to why these things are the way that they are. And there's actually fewer opportunities for participation once market rules are set.

*Respondent 3:* I think the difference is, ideally in a highly competitive wholesale retail market, you will eventually get more intermediaries who are interested in making it easier for customers in seeking mutual advantage. Does it always work out that way? No. But that is why we have adopted competition elsewhere, rather than allow government to fix the price of commodities in the sectors over the years.

*Moderator:* Next question.

**Question #10:** Thanks, everybody. This question is a bit tangential, but if we're thinking about biases and rent-seeking, what is our response to Standard and Poor's, which rates each state regulatory system for the risk it presents to investors' regulated utilities? And how does that fit into this scale from black to white, and where the gray is?

*Respondent 1:* This question, for those who don't follow this is, the S&P owns a business, Regulatory Research Associates, that rates all state regulators. They rate the regulators on whether they are a more constructive or less constructive [UNINTELLIGIBLE]. Those are euphemisms that pertain to whether they basically give regulated utilities what they want.

If you're more constructive, then you're very generous with the regulated utilities. Obviously, they have phrased that in a particular way to reflect a subjective outcome that probably does not align with the vindication of the public interest. Frankly, if your utility, has a double A rating, you're giving them too high of an ROE. If you're a very constructive state utility jurisdiction, you're probably not making equitable decisions at the state level. That's a rule of thumb, not necessarily the case.

This is, frankly, a common technique where either, be it an RRA-type group or one of the advocate groups that was talked about, will create some kind of a scorecard, to talk about how favorable a regulator, governmental decision-maker is being to their particular slice of the industry.

It's just something I think regulators need to walk into with eyes wide open. It certainly does create a feedback loop in states. I remember, I think I got like a notch down during my time at the Montana commission and that factoid ended up in circulation at the state legislature and precipitated a lot of explanations that actually led to a legislative loss for the utility. But, in any case, the purpose of that kind of scorecard, people should see through it—or not see through it but understand it for what it is. It's just one of the wrinkles that you have to encounter in this governmental decision-making process.

*Moderator:* I remember one of my colleagues when I was a regulator telling me his biggest fear politically was that he would get an A rating. That was big concern.

*Respondent 2:* I think there's a whole separate conversation about the participation of the investor community in these processes that would be interesting to have, because you invest in electric companies because you're

interested in stable returns that are probably lower than other returns.

And yet their breathless anticipation about every single rate decision has a tendency to drive weird outcomes. And I often wish that they would just sit down and be quiet. But they get very ginned up about particular decisions from particular commissions. And I think sometimes drive distractions. That is an incredibly personal opinion.

*Respondent 3:* I think it's really interesting to see the sensitivity of different commissioners to that rating. When I was at the Indiana Commission, four out of the five commissioners would actually explicitly talk to staff about what could this decision do to how constructive our rating is. And one of the other commissioners, that tended to think things through a little bit more thoroughly in my opinion, would a lot of time say, "How much weight should we be putting on this?"

It's a fair question, too, because there is no legit feedback loop, but a lot of times it wasn't really quantified in terms of, if we set a higher bar for prudency reviews, does that mean that the cost of capital is going to be affected in the states or something? It wasn't really drawn out too formally in that regard. But it did affect that commission and, in conversations with other staff, other commissions, it was quite common.

*Moderator:* There's a lot of discussion in the chat room. If I could, there were raised some questions about the subsidies.

*Comment:* I was just trying to take up the challenge from the Montana example, to try to identify something in an RTO that seemingly is tailored to a very specific interest, and I was quickly shot down by the EPSA folks. And I don't think we need to debate this point any further. I very much

enjoyed the conversation. Apologies for the distraction in the chat.

*Moderator:* But it was an interesting question. Obviously, there were divergent opinions.

*Commenter:* I've been doing a lot of writing recently about RTO oversight of transition planning, how it may benefit the RTOs to the detriment of other entities that are trying to get into that space. So I think there are examples, perhaps. I think the panelists would largely agree with it, but the RTO/ISOs are not [UNINTELLIGIBLE] well. Whenever you're trying to create some sort of market structure, you're going to have market overseer, and we're going to have distortions or certain rules that benefit particular types of market actors or even very seasoned actors in the market. So anyway, I was just trying to respond to that challenge there.

*Question #11:* OK, thanks. Let's go back to the question that we kind of started with because I'm not sure we've totally completed the circle of addressing it. And that is the question, how has competition, if at all, changed the nature of the political decision-making around or where decisions are made and the degree of politicization, either legal politicization or non-legal politicization? How has competition really altered? Has it brought more players? Created countervailing forces? Has it forced people to go to seek non-regulatory bypass of the regulatory process? And what has been the overall effect of competition on the political economy of the power sector?

*Comment:* Can I address that? I think based on the conversation here and also reflecting on it, the answer to that question is that competition has largely worked. It's, as Speaker 3 would say, you have to face the

fact that it has created winners and losers. And when we have gone through certain phases of this conversation, particularly when there was an overinvestment in natural gas, the people who overinvested in natural gas generators didn't go to the regulators—successfully, anyhow—and say, “Bail us out.” They had to eat the cost associated with it. But that discipline seems to be disappearing and what you have is, Joe Bowring would in his discussions about PJM and Secretary Perry and all that said, “Look, some of these plants are going to retire, they should retire. That's a good thing.”

Then when they do, that will have an impact on the market, and then the process will stop at some more sensible equilibrium. But what we had was people rushing off in various ways in order to get all of these subsidies through legislatures. Then the same thing is going on with the renewables, which is: they're uneconomic, but they're great so we need them. But they're uneconomic and it can't make money in the marketplace. So we have to subsidize it.

I think the real problem has been the lack of the ability to enforce the discipline that markets require. You say, “Look, it's working just fine. So we should stop doing that right, because it's working too well.” I think it's disheartening, frankly, from my point of view. The political system hasn't been able to see that because it's been making decisions, in a large part, which are going to raise costs and then there's going to be a backlash against those increased costs to the bills come home in the future.

*Respondent 1:* I would say there's a couple ways to dig into this. Part of it was making the distinction between the quality of the manner in which competition was implemented, which was we were trying to add a contribution. But to those points, even

if you do have a state that's done the structural aspect, by the book, you still need a political culture that's going to let the paradigm work.

What we've clearly seen over the last decade or so is a stronger sense of interest for either second-guessing market outcomes for a variety of reasons, or steering markets more towards preconceived notions of what outcome should be. That's resulted in a variety of different behaviors in this space. One of the things that has made Texas really special—everyone gets excited about the energy-only construct—it's really that they do the structural aspect, but they built a very unique political culture down there.

So the conversations that come up with the legislature or the PUC, when I say what's the reserve margin going to be etc., any other conversations, there's a totally different literacy level for those sets of actors when they weigh future conditions there. I think a big question going forward is, if we're going to realize the benefits of competition going forward, are we going to have the political commitment to let these markets work?

That's not to say that there's no role for any form of mandates and subsidies. I don't think that's the case at all. In fact, there's evidence that RPS compliance costs, for example, go down in competitive markets. But I think there is a big distinction between portfolio requirements or broad technology intervention as opposed to project-specific intervention. The project-specific stuff seems to have a much stronger relationship with a lot of the political behavior that we've identified as a little bit more testy.

*Moderator:* The other panelists?

*Respondent 2:* I say this at HEPG advisedly, but the market answers this single question: What does security-constrained economic

dispatch look like? A theme I always pick up from Speakers 1 and 2 is that there is some sort of platonic ideal market outcome and we're just messing it up constantly. But the thing is, the market is being asked to answer many questions. And people have more than one question.

I think the political process is reflecting—if you put aside, I'll use the word rent-seeking behavior that is illegal in nature—people are asking the market to do more than one thing. And it's not designed to answer all of those questions, and that is why it is not working right. To use a highly technical term.

That isn't the only question. That was the only thing it was designed to answer, but that is by far not the only question that that citizens, that companies, and that governments have. I'm happy that Speaker 1 acknowledged that we can do something other than let the market work and produce the outcomes it produces. That government has some sort of role, to say, “What do we want here?” As a society, we get to see what we want. And we're not bound by “the only thing we can have is the results of security-constrained economic dispatch.” We get to say that more things are important than that.

And that is why people participate in the process, and that is why you see market reform let new technologies participate. It's just not the only question or it's not the only important question.

*Commenter:* So let me respond to that, since it's so wrong.

I agree with you that people want many different things. And when they say, “I would like solar energy, because it's clean and renewable and it's going to substitute for carbon.” Then what they lobby for is net energy metering which, based on the analysis

of its impact on carbon policies and so on, there is no way to justify the cost associated with doing that and it clearly is misrepresenting the facts in order to provide rent-seeking support for particular kinds of industries. That's the kind of thing that I think is really problematic.

I don't have any problem at all with having carbon pricing, because we want to deal with carbon pricing. I don't have any problem at all with having strict environmental regulations for siting transmission, because we want to have strict environmental regulations for siting transmission.

But the arguments that people are making in all of these things are disingenuous, they're not actually describing what's going to happen and who's benefiting from it. And that's part of the process that I'm feeling. So I think you're oversimplifying what the markets were designed to do and can do. They can incorporate lots of things that are associated with the green agenda, but not everything.

And that's the point. Some things are not a good idea.

*Respondent 2:* I don't disagree with you on that, sir. But we haven't gotten to the point where we're asking the market to do those things. So until we ask the market to do more than one thing, we're going to have people maybe using policy tools that might not comport perfectly with how a market should be operated.

*Respondent 3:* Can I jump in here? This whole conversation is really fascinating to me, because to answer a direct question, retail competition doesn't solve the issues that we have with the way the political system works, with the way our government works. And that's what's been discussed today. We're not

happy with the way the system works. Set aside the bad actors, every situation that has been discussed today is people using the system as it exists, the government or political, to further their cause.

I also suggest that not everyone sees the world as we do, and the lament that there's not rational dialogue, that there's misrepresentation of bogus arguments is absolutely true from a perspective of pure economics and market, that's for sure. But I can guarantee you, the people who went to Maine to the legislature to override the net metering issue believe that rooftop solar, or at least many of them, is the answer to everything. They genuinely believe that. The gas plant example that was discussed, as well—I guarantee people involved in that process believed that the existence of that gas plant was necessary to keep the lights on or protect some other interest, the tax base in that area, etc.

So the issue here that I hear being discussed is, we're not happy with the government and the political process, and retail competition is not going to fix that.

*Respondent 1:* So one point I might bring up, just because a lot of this does dovetail with what people want, especially with the clean energy and green agenda. I think one thing that we need to look at as we look in decarbonizing the system, especially with the renewables up heavy context, is the heterogeneity of customer preferences.

If all customers wanted exact, same thing, and we could estimate it really well, then a central planning approach can at least provide an opportunity to perhaps be a bit more accurate representation. What we're finding, though, and I think the last study that I saw on this was the recent EPSA piece, is

you're seeing a great deal of variance between customer preferences.

A couple areas where you look at that, there's the classic risk preferences and fixed versus variable terms, of course. But the premium by which different consumer subsets are willing to pay to go green, and to what extent, is a large variance. You're also seeing a large implied value of lost-load variants. And if you're ever going to have any hope of integrating really high levels of renewables on the system, I think actually giving consumers more choice to express their preferences, and doing that in a market system that actually has the proper incentive structure to capture and represent those preferences up through the ecosystem and into bundle wholesale context, is absolutely the way to go.

So I think that there is an opportunity, actually, with what's happened and there's some silver lining here. There's still hope. Some of the reports that we've seen come out of a few of the states in response to what's happened here recently present that opportunity to make that market case, I think.

*Respondent 4:* I was just going to chime in and say, I think I agree that you can design a market to try to find the premium that clean energy in certain areas of the country would need to be paid in order to meet the defined state standard on decarbonization.

But there has to be a line somewhere, I'll just euphemistically say, where people's policy preferences can't be solved by market. If that's specifying the technology or giving my friend's son John a job as a meter reader, that's not going to be tolerated within the market. And so I think the goal needs to be to setup market structures that try to price the premium of what you want to attain, that of sort of basic commodities that are being

traded. I ultimately identify the sort of excess that really is the result of things that maybe should be less tolerated as a legitimate object of state political processes.

*Moderator:* How do you distinguish, for purposes of this discussion, between dissatisfaction with a market outcome and something a market can't accomplish? Carbon pricing a market in itself can't accomplish. But if you're dissatisfied with your particular resource isn't being benefited by market outcome, you're losing in the marketplace.

How do you distinguish between those two problems? Because either one of them leads to somebody running to the legislature for help. In some cases, it's because some additional legislation probably *is* required, carbon pricing being an example. But another case of, "I just can't compete but, gee, it's nice to have my power plant, because 25 people work there," I go run to the legislature. How do you distinguish between those things?

*Respondent 4:* I think you've distinguished between it pretty well. And I think another way to distinguish it is, and I disagree with Speaker 4 here, is by having a competitive retail construct that actually allows customers to pay if there is a legitimate end that consumers want beyond what society might identify as a recognizable public good. Let them buy it. I'm sure there would be a lot of people who are willing to pay for some kind of local benefit, big tech, whatever. But I do think you need to be pretty clear on product definition and what's actually a genuine end or you quickly get down to this kind of logrolling phenomenon that you end up seeing in the jurisdictions in question here, where you have roll-together small-ball, illegitimate policy ends that ultimately, if the public actually understood what they were, would not approve of them.

*Moderator:* Unless somebody else has comments, we've reached the end. Please join me in thanking all the panelists for their participation. It's been a very good discussion. The next HEPG session will be October 20. We'll be looking at several international experiences and lessons to be learned for the US.