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This article explores issues associated with interest group activity in the context of agency decision making. In particular, I argue that the proper metric for evaluating whether agency decisions are in the public interest, in the most modest sense, is the extent to which they comport with statutory law. A number of factors drive agencies away from this ideal. Considering one federal agency in particular, the Bonneville Power Administration, to which the power of private groups is critically important, I argue that we need to move past the traditional solutions of constraining agency discretion and banishing interest groups from the decision making process. Instead, relying on the work of Jody Freeman, I conclude that the solution is to repeal the formal façade of discretion-constraining substantive law, and bring agency-stakeholder processes of collaborative governance into the open.

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I. INTRODUCTION

Interest group activity inspires in many today a basic distrust of governmental decisions, yet it is impossible to condemn a given level of interest group pressure without effectively evaluating the merits of the decision itself.[1] In the particular context of agency decision making, however, there exists an uncontroversial, yet modest, definition of the public interest that is analytically distinct from the merits of the decision itself: An agency acts in the public interest when it implements statutory directives and exercises its discretion in the service of congressional intent; it violates the public interest when its decisions are motivated by the demands of favored groups or the desires of executive or agency officials. To the extent that interest group activity casts a shadow on agency decisions, the path to trustworthy outcomes lies in either banishing interest group participation.

Following Jody Freeman's embrace of private power in agency decision making,[2] the path I advocate in this article is a hybrid of these alternatives. I propose cleansing interest group activity by unleashing the agencies, enabling them to work with private interests in the open. Through the example of decision making at the Bonneville Power Administration ("BPA"), a federal power marketing agency, I argue that the solution to problems of interest group pressure in agency governance is to repeal the formal façade of discretion-constraining substantive law, and bring agency-stakeholder processes of collaborative governance into the open.

There is a marked disconnect between the positive assumption that interest groups are active and selfish and the normative goal of inspiring agency decisions that comport with statutory directives (that is, decisions in the "public interest"). Part II justifies my definition of the public interest and explains why we cannot trust agency officials to defend the public interest on their own initiative. There are a number of factors that might distort control agency decisions, including direct interest group pressure, agency sympathy for the preferences of particular groups, the pre-existing ideological commitments of

1. *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 43 (1991).

2. *See generally* sources cited *infra* notes 3–5.

agency decision makers, and executive branch control. Meanwhile, congressional oversight is not sufficient to enforce the duly enacted preferences of prior congresses, and judicial review, at least in the BPA context, is similarly unreliable. As such, one obvious solution, decreasing agency discretion, is unsatisfying because it necessarily relies on political or judicial oversight; constraining agency discretion is pointless if no safeguard exists to force the agency to stay within the new bounds.

Abandoning the notion that imposing further constraints on agency discretion can vindicate the public interest, the next line of defense considered in Part II is banishing interest groups from the decision making process. This too proves to be an unsatisfying solution. Broad interest group participation provides a number of benefits, of which information is perhaps the most important. Under any regime, there will be an optimal level of interest group participation, based on the trade-off between information and other participation benefits, and capture and other deliberative costs, but an outright ban on participation is probably too high a price to pay in most circumstances. In addition, to the extent that interest group participation is not the only element driving agency decisions away from the public interest, this approach is insufficient; limiting participation may drive agencies towards executive, rather than congressional preferences. I test these conclusions in the BPA context in Part III.

Leaping past the tentative conclusion that some level of private participation is desirable, Jody Freeman argues that private power is in fact indispensable to agency governance. Noting that public and private parties make decisions in a "web of relationships,"[3] she has proposed an alternative to privatization, "publicitization," whereby private actors are permitted to take over governmental functions on condition that they adhere to or preserve certain democratic norms.[4]

Shot through with private power as it is, decision making at BPA provides a concrete example of the importance of private power to public governance. In practice, BPA's current approach to decision making—incremental, with a heavy reliance on contracts and extensive stakeholder participation—is already a form of what Freeman calls "collaborative governance."[5] In Part III, I summarize this model of agency decision making and explain how BPA can plead statutory directive while exercising broad discretion. In addition, I argue that the appropriate response to discretion masquerading as mandate is not publicitization, but rather to unleash the agency. If BPA were formally released from statutes mandating outcomes (as distinct from broad policy goals), it would have no choice but to justify its decisions explicitly in politically sustainable terms. Moreover,

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3. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) [hereinafter Freeman, *Public Governance*].

4. *See* Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003) [hereinafter Freeman, *Privatization*].

5. *See* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) [hereinafter Freeman, *Collaborative Governance*].

requiring BPA to adopt standards to guide the exercise of its own discretion might rehabilitate judicial review, enabling the judiciary to serve as a check on the institutional impulse to aggrandizement.

II. INTEREST GROUP THEORY AND THE PUBLIC INTEREST

Einer Elhauge suggests that interest group theory ought to inspire a basic distrust of outcomes because government decisions are apparently driven by self-interested rather than public-regarding motives. Elhauge writes:

> [T]he disproportionate influence of well-organized interest groups is disturbing. It suggests that legal change is likely to harm the general public when the benefits of the change are concentrated and the costs are diffuse. Similarly, it suggests that opposition to legal change (or to implementation of a change) is likely to harm the general public when the change confers diffuse benefits and concentrated costs. Not only do the regulatory outcomes in such situations seem suspect, but the "rent-seeking" activity encouraged by the political system seems socially wasteful.[6]

Elhauge may go too far in his willingness to equate service of diffuse interests with the public interest.[7] Nonetheless, short of tying the public interest to financial wherewithal, there is certainly no reason to assume that the public interest is met when well-moneyed groups pursuing narrow interests have their way with government policy. Elhauge focused on judicial review of congressional action, and concluded the courts are not in a good position to identify congressional decisions suffering from undue interest group influence. However, he elides over the question of whether Congress itself can throw up barriers to interest group influence, characterizing the public choice argument as, *whatever* methods are available, certain groups will be more effective than others in having their views heard and catered to.[8]

In the specific context of administrative law, the goal is to establish a regime wherein agency decisions are most likely to comport with congressional directives, thereby making case-by-case review for undue interest group pressure unnecessary. The extent to which agency officials cannot be expected to defend the public interest on their own initiative suggests that their discretion ought to be curtailed. The extent to which private participation, on balance, undermines public-interested deliberation might suggest that it too ought to be limited. As a threshold matter though, it is necessary to define the public interest.

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6. Elhauge, *supra* note 1, at 43.
7. *See infra* text accompanying notes 17-19.
8. *See* Elhauge, *supra* note 1, at 49.

A. A Modest Definition of the "Public Interest"

In the context of agency action, the "public interest" is a definable concept. Agencies are constrained by procedural and substantive law. As such, we may make the modest assumption that failing to adhere to the dictates of duly enacted law is contrary to the public interest. This same definition serves as a reasonable proxy for legitimacy—agency decisions that are not in the public interest, so defined, are also illegitimate.

Some might object that any program of reform that successfully forces or enables agencies to follow the law, rather than interest group pressure, is bound to inspire groups to turn their attention to Congress. Pressure on Congress may be troublesome (or, at least, trouble some), but it is a distinct problem. As far as administrative governance goes, lawlessness is a threshold point below which agency action is manifestly illegitimate. There may indeed be no room for a net gain in rent-seeking activity but, as discussed below, defining the public interest in more normative terms is suspect.[9] Moreover, there seems little point in waging such a battle if administrative agencies are not even adhering to my much less ambitious definition.

An agency must, at a minimum, obey statutory law. By defining the minimum (and for my purposes, sufficient) requirement for a decision to be in the public interest, statutory law performs the same function for agencies as the constitution does for Congress. The bite, however, is in the corollary that an agency should not exercise its discretion with an eye to satisfying stakeholder preferences: "Although frequently employed, the concept of the 'public interest' evades rigorous definition in administrative law. At a minimum, however, pursuing the public interest must mean resisting pressure from third parties (who only have their narrow self-interest in mind)."[10] Sketched in such broad terms, this definition should not be particularly controversial. At the heart of it is a sense that interest group pressure should not be outcome determinative. Even when legislative directives are not dispositive, as is frequently the case, the agency should still be obligated to exercise its discretion in the service of congressional mandate, not interest group desire.[11]

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9. *See infra* text accompanying notes 17-19.

10. Freeman, *Public Governance, supra* note 3, at 558–59 (footnote omitted); *see also* Daniel A. Farber, *Democracy and Disgust: Reflections on Public Choice*, 65 CHI.-KENT L. REV. 161, 174 (1989) (focusing on expertise, rationality, and disinterest as characteristics of the public interest); Freeman, *Privatization, supra* note 4, at 1303 (noting that the public interest is "a notoriously ill-defined term, but one frequently invoked to convey a preference for deliberative, disinterested, and expert decision making that does not merely serve the interests of a special few").

11. *But see* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975). Stewart argues that "the application of legislative directives requires the agency to reweigh and reconcile the often nebulous or conflicting policies behind the directives in the context of a particular factual situation with a particular constellation of affected interests. The required balancing of policies is an inherently discretionary, ultimately political procedure." *Id.* at 1684.

Some might contend that this standard is equally applicable to congressional decision making. Cass Sunstein, for example, has argued that the Constitution prohibits government action on the basis of "naked preferences."[12] Government action must be based instead on "public values," defined as "anything but the exercise of raw political power."[13] In the congressional context, however, the case against naked preferences is not as open and shut as it is with agencies.

The hallmark of raw political power is taking resources from one group for distribution to another. An absolute ban on wealth redistribution is untenable as a normative theory of the public interest. Accepting this premise, the problem with Sunstein's naked preferences ban with respect to Congress is in distinguishing the good redistributions from the bad. Elhauge concludes it is impossible to do so without employing a theory of distributive justice, which is useful for evaluating outcomes but does not help one evaluate (independent of the conclusion on the merits) whether the level of interest group pressure involved was disproportionate.[14] In addition, one might simply embrace pluralism and reject the Madisonian vision of democracy to which Sunstein is attached, either as a matter of political theory or simple pragmatism.[15]

In the agency context, on the other hand, it should be uncontroversial to argue that agencies ought to make decisions based on the criteria contained in the governing statutes. That is, interest group pressure should not be outcome determinative precisely, and perhaps only, because Congress has already said what the factors should be. As such, this definition of the public interest has less traction the broader the formal discretion bestowed upon the agency.[16]

A more ambitious definition might define public-interested regulation as that which "promotes diffuse interests," as distinguished from regulation that delivers "rents to narrow [special interests]."[17] Such a definition ignores the fact that

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12. *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1693 (1984) [hereinafter Sunstein, *Naked Preferences*] ("When a naked preference is at work, one group or person is treated differently from another solely because of a raw exercise of political power; no broader or more general justification exists."); *see also* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter Sunstein, *Interest Groups*] (explaining roles of Madisonian theory, constitutional doctrine, and administrative law in controlling the influence of powerful private groups).

13. Sunstein, *Naked Preferences*, *supra* note 12, at 1694.

14. Elhauge, *supra* note 1, at 56.

15. *See* Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1339 (1994) ("The core of Madisonian resistance—the common weal to be found and implemented by virtuous legislators—turns out to be empty. . . . People of good will have no common ground around which to rally! They have their own conceptions of the public interest but no way to insist that the *collective* choice necessarily reflect their views. We are doomed by the logic of majority voting to aggregate private preferences rather than to find a common good.").

16. Even at the margin of constitutional delegations, however, Congress must be supplying at least an "intelligible principle." *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001); *but see* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1721 (2002) ("A statutory grant of authority to the executive branch or other agents never effects a delegation of legislative power.").

17. *See* Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 8 n.1 (2000).

agencies have no inherent mandate, no constitutional right to exist or act but for the grace of Congress. If the legislation authorizing agency action is an interest group deal in the first place, it cannot be legitimate for the agency to promote diffuse interests instead.[18] One might argue that the agency is acting in the "public interest" by defusing Congress's interest group giveaway, but a normative theory that embraces civil disobedience by agencies is problematic, to say the least. The fact that an agency might be satisfying an official's view, or even the President's view, of what decision best promotes the broadest interests does not make it any less lawless, if it violates duly enacted statutory directives, nor any more worthy of our approval if it does not.

Moreover, such a definition begs the question, not so much whether serving diffuse interests is in the public interest, but whether delivering rents to special interests is necessarily outside of it. It is hardly the case that every single regulation ought to satisfy diffuse interests. For example, Congress might reasonably require one regulation to benefit a narrow set of interests for the purpose of mitigating the redistributive or otherwise disproportionate impact on another set of interests. Thus, I reject a definition of the public interest based on a normative theory that holds government action furthers the "general welfare" *only* if it furthers diffuse, rather than concentrated interests. While such a definition might be useful for purposes of evaluating Congressional decision making, it is out of place at the agency level.[19] Agencies should follow the law, pursuing the goals Congress has told them to pursue. If an agency decides to comply with the relevant statutory law, its decision is both in the public interest and legitimate.

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18. Croley has concluded that public choice models of agency rulemaking would be vindicated if empirical study were to reveal that "narrow rent-seeking groups nearly always prevail over broad-based interests" in agency rulemaking processes. *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 165 (1998). The very real possibility that Congress passes laws directing an agency to effectively provide rents to special interests, however, means we cannot draw the conclusions Croley would like from the rate at which narrow interests prevail in agency rulemaking. If Congress tends to pass legislation that substantively favors particular interest groups, then agency decisions that distribute rents to such groups are precisely what the law demands. As such, an agency official that pursues the public interest, in my sense of just following the law, would appear to provide support to the public choice model, when in fact the determining factor is not the efficacy of a type of group under a particular procedural regime, but rather the content of the Congressional mandate.

19. An added problem raised by any definition more complicated or normative than the one I propose is how to class an outcome that arguably serves the so-called public interest, but is also consistent with the objectives of a narrow interest group. *See* Elizabeth Garrett, *Interest Groups and Public Interested Regulation*, 28 FLA. ST. U. L. REV. 137, 144 (2000) (raising the question and calling for Croley to refine his theory of the public interest).

B. Agency Self-Interest and the Motives of Bureaucrats

The working definition of the public interest as resistance to stakeholder pressure means that, regardless of the merits, if a desire to comply with the interests of a third party motivates the agency decision, it is illegitimate. By smuggling in an uncontroversial norm, that agencies should follow the law, the concept of the public interest (or legitimacy if one prefers) provides one way around the problem Elhauge raised—how to determine how much interest group pressure is too much without evaluating the merits of a given decision. This standard is not, however, very useful in practice unless it is easy to discern (and thus police) agency motives. As an empirical matter, it probably is not.[20] Thus, our modest public interest standard only suffices as an answer to the distrust of agency decisions with which we began if an agency can be trusted to resist third-party pressure and follow the law on its own initiative. If it cannot be trusted, as this section suggests, or an obvious solution is to reduce agency discretion.

As a threshold matter, agency officials presumably desire not to be overruled. The traditional public choice account has groups demanding favorable regulatory treatment from legislators, who in turn force agencies to cater to interest group preferences.[21] In addition, disgruntled groups may complain to the executive or judicial branches.[22] Thus, the most obvious tool that interest groups have for pressuring agency decision makers is the threat of reversal.[23]

Yet, if agency officials desire only not to be reversed, the easiest thing to do would be to comply with the law, which is to say, act in the public interest. There are a number of reasons why agencies are nonetheless motivated to violate the public interest. First, agencies are, quite simply, susceptible to stakeholder[24] pressure. This is the now-traditional point that representation before agencies is imbalanced towards organized, rent-seeking interests, and that such interests capture regulatory processes. The imbalance point, even if true,[25] is relevant only as a secondary matter, given our working definition of the public interest.[26]

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20. *See infra* Part III.G (explaining that either BPA has followed the law almost without fail for twenty years, or the Ninth Circuit is not capable of telling the difference).

21. *See* Croley, *supra* note 17, at 11–12 (explaining, prior to critiquing, this "legislative dominance claim").

22. *See* Garrett, *supra* note 19, at 150 (pointing out that "immediately after the rulemaking, it is premature to conclude that private interests have been vanquished by public-regarding regulators—the policy process has not concluded").

23. Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 771 (2001) (noting that agency officials must build support and blunt opposition to "obtain cooperation in program implementation and avoid appeals from the public to superior authorities").

24. That is, regulated groups. I use stakeholders because it is a more apt term in the BPA context.

25. *See, e.g.*, Croley, *supra* note 17, at 18 n.24 (collecting sources that suggest even the more diffuse interests are in fact represented).

26. If, by an agency following the law, the public interest is met, interest representation, balanced or not, is neither a necessary nor sufficient condition. An agency is not free to ignore the compromise reached in Congress (and embodied in statutory law) and craft a new compromise through an administrative proceeding.

Capture, though, is still important insofar as it may result in agency decisions that comport with the desires of stakeholders rather than the law.

Stakeholders have a vested interest in agency decisions and can thus be expected to put substantial resources into participation in formal processes and day-to-day governance. Summarizing the traditional model, Stewart identifies a number of reasons why the rate and level of stakeholder participation is likely to exert undue influence on agency decisions. First, stakeholders have standing to trigger judicial review of decisions that do not go their way. In addition to the threat of reversal, judicial review imposes litigation costs on the agency and other groups and may delay the effective date of the decision. Second, these groups provide the agency with information on which it, and other participating groups, can be expected to rely. Third, it taxes on agency resources to be adversarial all of the time. Compromise with regulated parties may be necessary for the agency to meaningfully administer a program or implement a regulation. Fourth, stakeholders may hold the agency responsible for economic dislocation in regulated industries. Fifth, other groups with more diffuse interests face significant collective action barriers to participating, for example, transaction costs of organizing and free rider problems.[27]

These factors may break the agency's will to resist. The agency is also likely to internalize the desires of regulated groups over time given the nature of the regulatory enterprise. "[T]he relationship between any agency and those whom it regulates goes far beyond anything that resembles either legislating or adjudicating. The agency is in direct and continuous contact with the regulated industry."[28] Thus, the relationships constructed in the agency's day-to-day business will have an effect on the dynamic involved in making high-level policy decisions.* More cynically, one might argue that rational, self-interested officials serve in government for the purpose of, or are at least swayed by the possibility of, getting high paying jobs from the regulated industries. At the least, agency officials "may be more sympathetic because of their experience, perspective, and training to the interests of economic groups rather than those of the diffuse public."[29]

Of course to the extent that the congressional directives do not answer a given question, we might prefer to have all interests sufficiently represented at the agency level to help the agency fill the gap. Even in this (admittedly common) case, however, interest representation is not an end in itself; it is a means to providing the agency with all relevant views for the purpose of making an informed decision about how best to further congressional mandate. For my purposes, the legitimate public interest in agency decisions always comes back to statutory directives.

27. *See* Stewart, *supra* note 11, at 1685–86, 1713–15.

28. Rubin, *supra* note 23, at 777; *see also* Freeman, *Public Governance*, *supra* note 3, at 571 (critiquing administrative law scholarship for marginalizing relatively low-order activities and relationships involved in the implementation and enforcement sides of agency governance).

29. Garrett, *supra* note 19, at 153.

This leads to the second reason why agencies may not simply follow the law: agency officials are motivated at least in part by the ideological commitments that led them to public service in the first place.[30] At the policy-setting levels, these commitments presumably would play a role in their appointment. Similarly, each agency is likely to develop its own particular culture. Part of this may well be a spirit of public service, though as noted above, serving a broad public interest may not always be what Congress has in mind. In any event, institutional norms are likely to play an important role in agency decision making.[31] Moreover, actors within an agency can be expected to act to maximize the power of the institution as a whole.[32]

The third reason that agencies cannot be expected to simply follow the law is executive control. The key decision makers at agencies are typically political appointees, in many cases serving solely at the pleasure of the President. Agency officials are thus much more likely to be faithful agents of the executive than of Congress. Where agencies have discretion bestowed by statutory law, being beholden to the executive is not problematic. To the extent that there is a disconnect between the goals and mechanisms favored by the executive and those contained in the governing law, however, the power of the executive threatens the public interest.

On this account, agencies should not be trusted to adhere to statutory directives except to the extent necessary to avoid being reversed by one of the three branches, and there is no reason to expect that reversal by the executive will be in the direction of the public interest. Thus, agencies can be expected to attempt to implement an agenda that may or may not track statutory law. This suggests an obvious strategy for driving agency decision making to produce trustworthy outcomes: reduce agency discretion.[33]

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30. *See* Croley, *supra* note 17, at 29 ("It hardly seems far-fetched, then, that administrators self-select into an employment pool consisting of individuals who share some kind of ideological commitment to a given agency's mission or, more generally, who believe that regulation can ameliorate difficult social and economic problems."); *see also* Cynthia R. Farina, *Faith, Hope, and Rationality or Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109, 110 (2000) (complaining that the assumption of wholly rational people motivated entirely by interest maximation is dangerously simplistic).

31. *See* Freeman, *Public Governance*, *supra* note 3, at 570–71 (critiquing public choice for a "methodological individualism" that ignores institutional norms); *see also* Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. 267, 280 (1990) (noting the "core general presumption" of positive political theory "that political behavior is to be explained as the outcome of rational (and often strategic) action by relevantly situated individuals within some set of defined institutionalized boundaries").

32. *See* Daniel J. Gifford, *Why Does a Conservative Court Rule in Favor of a Liberal Government? The Cohen-Spitzer Analysis and the Constitutional Scheme*, 28 FLA. ST. U. L. REV. 427, 432 (2000) (noting that PPT theorists typically make this assumption). *But see* Johanthan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 916 (1994) ("Where public choice posits that bureaucrats within administrative agencies seek to maximize the welfare of the institution according to criteria that are easy to measure externally (agency budgets, agency power, agency influence), organizational theory posits that the internal institutional biases described above provide the best criteria for predicting agency behavior.").

33. *See* Peter H. Schuck, *Controlling Administrative Discretion*, in FOUNDATIONS OF ADMINISTRATIVE

Reducing agency discretion, however, is an empty solution if the agency cannot be forced to stay within the new bounds. It may narrow the range of outcomes that fit within my definition of the public interest, but unless the agency is accountable for failing to adhere to statutory directives, a discretion-constraining approach will not help.[34] More detailed statutory directives that would ostensibly limit agency discretion may impose no more than a requirement to play out a charade, and in practice have no effect on the substance of agency decisions.

Insofar as the desires of Congress (subject to presidential veto) define the public interest in this model, congressional oversight might be relied upon to counteract these forces and ensure substantive compliance with a discretion-constraining solution. Unfortunately, congressional oversight is not a sufficient check on an agency otherwise inclined to ignore the public interest. Congressional retaliation, for example decreasing an agency's appropriations, does not necessarily provide a direct incentive to follow the law. An attentive and interested group of current congressional members might have desires for agency action that are disconnected from the duly enacted desires of a past Congress.[35] Threats that are more severe, for example legislation mandating a particular result, are also harder to effect given the requirements of bicameralism and presentment.

Steven Croley has persuasively argued that Congress is not in fact able to dominate agencies and interest group demands on legislators for favorable regulatory treatment will not necessarily be met.[36] He directs his argument towards showing that administrative procedures enable agencies to reach public interested outcomes, and that the "iron triangle" theory (interest group pressure on Congress, and congressional pressure on agencies, inevitably producing the outcomes desired by interest groups) is wrong. As Elizabeth Garrett has pointed out, however, Croley's demonstration of agency autonomy shows "only that in some cases agencies can be manipulated by zealous leaders to implement policies consistent with their preferences," not that agencies necessarily prefer to reach outcomes worthy of being called public-interested.[37]

Though agency and executive motives are part of the problem and congressional oversight is misdirected and/or ineffective, there remains one institution that might force agencies to adhere to governing law: the judiciary.

LAW 155 (Peter H. Schuck, ed., 1994) (dubbing agency discretion the "most troubling" form of bureaucratic power).

34. *Cf.* Stewart, *supra* note 11, at 1701 ("Even if it were possible to constrain agency action by rules so that formal justice would be achieved, the implementation of such a program could not in itself solve the problem of asserted bias in agencies' discretionary policy choices.") (footnotes omitted).

35. *See* J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1446, 1500, 1516 (2003) (arguing that Congress is "a collection of rivals who vie for control over power delegated to agencies," and noting disjoint between preferences of an enacting majority and the members of committees responsible for oversight).

36. Croley, *supra* note 17.

37. Garrett, *supra* note 19, at 152.

Even if we are comfortable assuming that judicial reversal equals lawless action, the inverse is not necessarily true—just because the judiciary signs off on agency action does not mean that the agency has made a decision to adhere to statutory directives rather than simply bow to interest group pressure. At least in the BPA context, Part III.G suggests the Ninth Circuit cannot police agency motives. Agency decisions motivated by third-party pressure are still arbitrary as far as the public interest is concerned even if they survive judicial review.

C. *Civic Republicans: Deliberation Versus Participation*

The previous section shows that agency bureaucrats may not be trustworthy for a number of reasons. Perhaps the most significant is interest group pressure. At the same time, however, participation provides benefits that counteract some of the other factors undermining the public interest, like agency self-interest and executive control. Returning again to the starting assumption, that interest group activity inspires a fundamental distrust of agency decisions, it is necessary to consider at what level private participation in agency decision making is desirable.

Civic republican theories stress deliberation by expert, public-interested bureaucrats at the agency level, with Congress and the judiciary providing oversight.[38] They display a marked, Madisonian nervousness about faction, but nonetheless tend to advocate some level of participation in agency decision making. The basic concern "is that interest groups will co-opt the administrative process and exploit it to their advantage," and to the detriment of the public interest.[39] Nonetheless, civic republicanism calls into question reforms to constrain agency discretion, insofar as the agency must have the power to deliberate in order to identify and pursue the public interest. Thus, civic republicanism must fail as a model for reform unless interest group participation can be set at a level that does not destroy whatever confidence we can otherwise muster in support of agency deliberation.

The most extreme solution to interest group pressure is a wall—if the groups are kept on the sidelines, unable to participate at all, then naked preferences cannot dictate outcomes. Agencies would be able to deliberate internally and give effect to public-interested inclinations.[40] However, a number of positive effects of public participation are traditionally cited: (1) it increases accountability and oversight; (2) it reduces the likelihood of agency capture by a single group or set of groups; (3) it provides better information for decision makers and participants; (4) it inspires confidence in the legitimacy of agency decisions; and (5) it breeds

38. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512, 1515 (1992); Sunstein, *Interest Groups*, *supra* note 12, at 60–63.

39. Sunstein, *Interest Groups*, *supra* note 12, at 60.

40. But of course, as Professor Garrett has pointed out, the inclinations of agency officials have yet to be defined vis-à-vis the public interest. *See* Garrett, *supra* note 19, at 143.

better citizens.[41] Of course, one might challenge whether these benefits are actually obtained in practice, but their availability suggests that an absolute bar on public participation is probably undesirable.[42]

If a wall is untenable, we must determine the proper scope of participation. To this end, consider the relative costs and benefits of the information that participation provides. On the one hand, the information provided by broad participation may enhance deliberation and overcome at least some agency biases that might otherwise be outcome determinative.[43] On the other hand, so much information may be provided that it overloads the agency, leading to analysis that is superficial or generally sloppy.[44] In addition, it is not easy to permit participation without also enabling participants and decisionmakers to behave strategically.[45] An agency collecting substantial amounts of information from a number of sources, and pointing in a number of directions, may thereby have the tools to rationalize an undesirable or lawless outcome.

Less conventionally, Fitts argues that decreasing the amount of information collected could effectively place agency decision makers behind a veil of ignorance, making it impossible for self-interest or interest group preferences to drive outcomes.[46] If statutory directives are specific, however (or to the extent that judicial review requires a record justifying the decision) the veil cannot be sustained. Moreover, in situations where the agency revises an existing regime, for example making adjustments to last year's rates, agency and stakeholders alike will know which groups benefit by shifts in one direction or another.

On the other hand, a level of participation so high as to drive an agency away from deliberative decision making and into pluralism is problematic. Aggregating interests does not mean that agency decisions will comport with the public interest; it is bound to result in decisions that, on balance, please stakeholders and other participants. As such, we must reject a pluralist approach to agency decision making that would treat all perspectives equally, regardless of their merits[47] or the degree to which the position advocated tracks governing law.

> While the increase in information that is brought on by more participants may make expertise decision making a preferred format, it also provides greater opportunities for strategic behavior on behalf of participants—

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41. Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision Making*, 92 NW. U. L. REV. 173, 182-88 (1997).

42. One might even argue that participation is *necessary* to legitimate agency action: "To the extent that agency decisions involve competing values, decision making is political and must provide for and value some degree of nonexpert participation if it is to make claims to legitimate governance." *Id.* at 198.

43. *See* Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 935–36 (1990).

44. Rossi, *supra* note 42, at 216.

45. *Id.* at 214.

46. *See* Fitts, *supra* note 434, at 966–68.

47. *See* Rossi, *supra* note 42, at 199–203, 208 (characterizing pluralism).

> facilitating a shift away from communicative and towards instrumental speech acts. To the extent that decision makers perceive participants as acting strategically based on their pre-existing preferences, they are likely to find the pluralist model of decision making-as-conflict-resolution more attractive than the deliberative democratic model.[48]

An even more problematic situation arises if participation drives the agency into pluralist mode, yet the agency pretends that it is doing no more than exercising expert judgment. If science is a façade for interest aggregation, oversight is undermined and stakeholders are misled.[49] As a practical matter, "many agency decisions are not purely matters of scientific judgment that can be reduced to a concrete problem-solving calculus, but are inherently infused with value judgments."[50]

In short, interest group participation is useful, but slippery. One important benefit is softening the detrimental effects that other forces, especially agency self-interest and executive control, might have on the public interest. The goal then is to reap this benefit, as well as others like oversight, information, and legitimacy, by bringing interested groups into the decision making process, yet avoid pushing the agency to abandon rationality or call policy decisions science. To determine at the extent to which this is possible, it is useful to consider decision making in a concrete setting, a task to which I now turn.

III. BPA AND THE PUBLIC INTEREST

Decision making at BPA provides little reason to doubt the conclusions reached so far. The agency's officials cannot be expected to follow the law on their own initiative and stakeholder pressure may have pushed the agency into the worst sort of pluralism, interest aggregation masquerading as agency expertise.

Stakeholder participation does subject the agency to a rough sort of accountability as disgruntled groups can bring political pressure to bear. This pressure, however, does not incite, much less guarantee, compliance with pre-existing statutory orders. Given an apparent failure of judicial oversight, the perverse result of the current regime is that an agency saddled with detailed statutory directives for fulfilling a complex mission involving competing interests and the disbursement of billions of dollars in federal benefits cannot be forced to follow the law. If the courts are already at the margin, as the Ninth

48. *Id.* at 217.

49. *Id.* at 202. ("[T]o the extent that pluralist decision making operates under the guise of science, it raises serious problems for democratic legitimacy.").

50. *Id.* at 198; *see also* Rubin, *supra* note 23, at 751 ("The virtue of our modern governmental system is not that it displaces people's emotions with rationality, but that it displaces people's natural responses to those emotions, which is to kill each other, with an orderly governmental process. Fortunately for us, this does not demand that the citizens possess virtue, but only that they abjure egregious vices.").

Circuit seems to be with regard to BPA decision making at least, then a solution based on increased formal constraints seems destined for failure.

A. An Introduction to BPA

BPA is a self-financed federal power marketing agency within the United States Department of Energy.[51] BPA markets power and transmission services, primarily on a wholesale basis, to customers in the Pacific Northwest (Oregon, Washington, Idaho and Montana) and, to a lesser extent, customers in Canada, California and other Western states. BPA sells the power generated by thirty-one federally owned hydroelectric projects in the Pacific Northwest, one non-federal nuclear plant (located in Southern Washington), and several other non-federal resources.[52] BPA also owns and operates seventy-five percent of the region's high voltage transmission capacity, including high voltage transmission lines that move massive amounts of electricity between the Northwest and California.[53]

Customers in the Pacific Northwest have a statutory right of first refusal to BPA power.[54] There are three primary customer groups in the region, public utilities, private utilities, and industrial customers. The public utilities are the preference customers, each one has a right to BPA power sufficient to meet whatever part of its retail load that its own resources do not cover.[55] The private, or investor-owned utilities ("IOUs") have a statutory right to "exchange" the power they use to serve their own residential and small farm customers for BPA power. That is, BPA is obligated to purchase this piece of a given IOU's power supply at the IOU's cost of production, returning the same amount of power at a BPA rate established for just this purpose.[56] BPA has usually implemented this "residential exchange program" by writing checks, without any actual power changing hands. Finally, BPA may provide direct service to a fixed number of large industrial customers, known as Direct Service Industries ("DSIs").[57]

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51. There are four federal PMAs: BPA, the Southeastern Power Administration, the Southwestern Power Administration, and the Western Area Power Administration, all of which primarily market electricity generated by federal hydropower projects. (A fifth, the Alaska Power Administration, ceased to exist in 1998 after transferring all assets to the state of Alaska.) The Tennessee Valley Authority ("TVA") is also a federal utility but, unlike the PMAs, it is not within the Department of Energy. TVA also operates its own projects while PMA projects are operated by the United States Army Corps of Engineers and the Bureau of Reclamation. Energy Info. Admin., *Electric Power Industry Overview, at* http://www.eia.doe.gov/cneaf/electricity/age/prim2/chapter1.html (last modified May 27, 2003) (copy on file with the *McGeorge Law Review*).

52. *See* Bonneville Power Admin., *BPA Facts, at* http://www.bpa.gov/corporate/about-BPA_facts-2003.pdf (last modified Apr. 2004) (copy on file with the *McGeorge Law Review*). The Corps of Engineers owns and operates twenty-one of these federal hydro projects. *See id.*

53. *Id.*

54. *See* Pacific Northwest Consumer Power Preference Act, Pub. L. No. 88-552, 78 Stat. 756 (1964) (codified at 16 U.S.C.A. §§ 837–837h (West 2001)) [hereinafter Regional Preference Act].

55. *See* 16 U.S.C.A. § 839c(b) (West 2001).

56. *See id.* § 839c(c)(1) (stating generally that BPA is obligated to purchase utility power in exchange for BPA power).

57. *Id.* § 839c(d).

BPA sells its power and transmission services at cost. The agency periodically resets its rates, the basic rule being, they must cover the cost of the system, including a yearly payment to the United States Treasury.[58] Compared to power generation, setting the rates for transmission is relatively straightforward because the capacity of the basic infrastructure does not vary from year to year.[59] Since such a large percentage of BPA power generation comes from hydroelectric projects,[60] the amount of energy available to the agency to cover fixed costs varies from one year to the next with the region's precipitation levels. This variability adds a risk management component to setting power rates. In low water years, BPA must go to the market to buy power to make up the difference between what it can generate with its own resources and its contractual obligations. In higher water years, BPA has excess power beyond its contractual obligations that it can sell in the Western wholesale power markets.[61] In setting its rates to recover costs, the agency must not only consider the average system output as compared to its contractual obligations, but also the probability of having to buy or sell power, in what amounts, and at what prices.

According to BPA figures, almost half of the firm energy available to the region in an average year comes from BPA. More than two-thirds of BPA power is generated by federal hydroelectric projects.[62] The federal hydropower system provides some of the cheapest electricity, in terms of generation costs, available in the country. One reason for this is that the fuel is free. In addition, the capital costs of the dams were covered by long-term loans from the federal government. The government established the interest rates project by project, and capital improvements made to a given project, even decades after the original construction, may be funded at the original rate. Perhaps the single most significant factor in the low cost of the federal system, however, is its age. The two largest dams in the system, Grand Coulee—which alone makes up more than one-third of the entire system's capacity—and Bonneville Dam are both Depression Era projects. As such, these resources were built with 1940 dollars, which are nominally much cheaper than the dollars that were used to construct most other resources operating today.

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58. *Id.* § 839e(a)(1).

59. For this reason, this article largely ignores the transmission side of BPA's duties. Note also that as of 1996, the agency split into two distinct pieces for administrative purposes, to facilitate a closer fit between cost of service and rates for generation and transmission services, and also as part of BPA's voluntary compliance with the Federal Energy Regulatory Commission's open-access requirement for regulated transmission providers. *See* Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21,540 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385).

60. Eighty percent of BPA's power is hydroelectric, sixty-seven percent from federal projects, thirteen percent from non-federal resources under contract. *See BPA Facts*, *supra* note 52.

61. In actual practice, BPA is, as a matter of course, surplus in some parts of the year and deficit in others, because flows are not naturally even in the rivers all year round. On top of natural seasonal variation, the Federal Columbia River Power System is a managed resource. Power production needs are one consideration, but the government agencies also consider wildlife needs (especially fish migration) and recreational use.

62. *See BPA Facts*, *supra* note 53.

Despite the low baseline, two key factors drive up the rates for federal hydropower. First, BPA bundles these extremely low cost resources with the output from its nuclear plant and various contract resources, which are typically much more expensive.[63] Using regional resources as a proxy for regional demand,[64] federal hydropower alone can meet roughly one-third of the electricity needs of the Pacific Northwest. Although there is a line-drawing problem, Congress determined that it makes sense to allow the agency to bundle the low-cost hydroelectric power with other resources so as to create a larger, albeit somewhat more expensive, pie for BPA to divide.[65] The second factor driving up federal power rates is the cost of BPA's environmental obligations. These obligations include direct power reductions in the form of spilled water and other foregone generation at the power plants, as well as fish and wildlife programs that cost hundreds of millions of dollars each year subsidized by ratepayers. BPA's rates also subsidize conservation and the development of renewable resources in the region.

B. Statutory Background: Defining the Public Interest

Not coincidentally, the factors driving up BPA's costs correspond to the primary concerns embodied in the statutory law governing the agency: allocating power and transmission benefits among competing groups, and balancing economic exploitation of the Columbia River Basin against environmental protection. While some of the statutory directives are broad purpose statements, others are highly technical. As the Ninth Circuit has observed, "[t]hese statutes subject BPA to a variety of detailed and potentially conflicting statutory directives."[66]

The most important BPA statute for rate-setting purposes is the Pacific Northwest Electric Power Planning and Conservation Act ("Northwest Power

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63. Though the cost of the nuclear power has fallen substantially in the past several years, relative to market prices for other resources. *See* Energy Facility Site Evaluation Council, *Nucelar Projects Under the Energy Facility Site Evaluation Council, at* http://www.efsec.wa.gov/nuclearproj.html (last visited May 17, 2004) (copy on file with the *McGeorge Law Review*) (noting that the cost of power from the Columbia Generating Station decreased from $251 million in 1994 to $171.6 million in 1997).

64. This should not, but unfortunately does work for the Pacific Northwest. For a number of reasons, the region has failed to develop resources sufficient to maintain a reasonable margin of reserves beyond demand. Drought notwithstanding, this shortage of reserves in both the Northwest and California was a key factor in the Western power crisis of 2000–2001.

65. *See* 16 U.S.C.A. § 839d(b) (West 2000) (authorizing BPA to acquire new resources). Federal law, obligates BPA to provide power to certain "preference customers" before selling to any one else. If the agency sold all of its low-cost hydropower to this class of retailers (public utilities) it would create a huge disparity in the costs paid by consumers in the region, based on whether they were served by a public utility receiving BPA power, or a private utility that was not. Moreover, if BPA did not meld the federal hydro with other resources, there would be nothing left for the DSIs. Thus, the agency uses its statutory authority to acquire these higher cost contract and thermal resources, which get bundled in with the low-cost federal hydropower.

66. Ass'n. of Pub. Agency Customers, Inc. v. Bonneville Power Admin., 126 F.3d 1158, 1164 (9th Cir. 1997).

Act" or "the Act").[67] The Northwest Power Act was enacted in 1980 as a solution to a brewing civil war in the region over BPA benefits. It codified a complex allocation scheme, explicitly in terms of customer class, including a requirement that the agency enter into long-term (which turned out to be twenty year) contracts with its customers. The Act also established a regional council, the Pacific Northwest Electric Power and Conservation Planning Council, and gave BPA the power to acquire resources. Both measures were intended to help deal with the primary problem that had triggered the legislation: a complete failure by the region to develop new resources efficiently caused by consumers relying entirely on getting a piece of the federal hydropower pie. This heavy reliance on BPA, and the reality that BPA did not have enough power to meet all of the demands put on it, forced Congress to act.

Congress established six purposes in section 2 of the Act:[68] (1) "to encourage . . . conservation and efficiency in the use of electric power, and the development of renewable resources in the Pacific Northwest;" (2) "to assure the Pacific Northwest of an adequate, efficient and reliable power supply;" (3) "to provide for the participation and consultation of" all stakeholders, including the state and local governments, state and federal environmental agencies, the Tribes, consumers, customers, and river users, in the development of plans for energy use and environmental protection;" (4) "to provide that the customers of the Bonneville Power Administration and their consumers continue to pay all costs necessary to produce, transmit, and conserve resources to meet the region's electric power requirements;" (5) to insure that the related responsibilities of other entities for energy and environmental management are maintained; (6) "to protect, mitigate and enhance the fish and wildlife . . . of the Columbia River and its tributaries, particularly anadromous fish [salmon]."

The rate-setting requirements of the Act are contained in section 7, which directs the Administrator to "establish, and periodically review and revise, rates" for power and transmission services.[69] BPA may be effectively a non-profit, but it is still to be operated as a business: "[BPA's] rates shall be established and, as appropriate, revised to recover, in accordance with sound business principles, the costs associated with the acquisition, conservation and transmission of electric

67. 16 U.S.C.A. §§ 839–839h (West 2000). The Northwest Power Act incorporates pre-existing statutory duties or requirements from a number of pre-existing statutes governing BPA. These include, the Bonneville Project Act, Pub. L. No. 75-329, 50 Stat. 731 (1937) (codified at 16 U.S.C.A. §§ 832–832m (West 2000)); the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 890 (codified at 16 U.S.C.A. § 825s (West 2000)); the Pacific Northwest Consumer Power Preference Act, Pub. L. No. 88-552, 78 Stat. 756 (1964) (codified at 16 U.S.C.A. §§ 837–837h (West 2000)); the Federal Columbia River Transmission System Act, Pub. L. No. 93-454, 88 Stat. 1376 (1974) (codified at 16 U.S.C.A. §§ 838–838l (West 2000)). Specific provisions of these acts will be referred to as necessary, but a full treatment of these detailed and highly technical statutory provisions is not necessary for purposes of this article.

68. *See* 16 U.S.C.A. § 839.

69. 16 U.S.C.A. § 839e(a)(1).

power."[70] The basic rule is that rates for different customers are to recover the cost of the resources used to serve their particular loads. The ratemaking requirements thus include a number of technical provisions about what loads are and are not eligible for service by BPA and how BPA ought to attribute costs to such loads. BPA nonetheless retains significant discretion not only because the required decisions are so technical as to make the agency tough to second-guess, but also because of the many trade-offs built into the directives.[71]

The ratemaking requirements impose strict procedural requirements, as well as strict substantive requirements that effectively allocate the costs of the federal hydropower system among the different classes of purchasers. In practice, BPA rates are highly susceptible to changes in underlying assumptions regarding, for example, market risks, annual snow pack (water in the river), and environmental costs.

The rates given most attention in the Act are those for service to BPA's utility and DSI customers. BPA is directed to establish a rate of general applicability for utility and public agency customers within the region, the so-called "Preference" or "PF" rate. The cost of federal resources determines the PF rate. When the agency runs out of federal resources, it must acquire other resources to meet Preference loads.[72] BPA must also establish a rate for its DSI customers, the "Industrial" or "IP" rate. The IP rate is essentially the same as the utilities' rate because it is keyed to cost of service. There is, however, also a statutory requirement that the Administrator add an "industrial margin" so that, taking into account the size and other characteristics of DSI loads that make them relatively cheap to serve megawatt for megawatt,[73] the DSI rate is "equitable in relation to the retail rates charged by [BPA's public utility customers] to their industrial consumers in the region."[74]

Specific provisions for cost recovery and service notwithstanding, BPA has broad rate design discretion: "Nothing in this Act prohibits the Administrator from establishing, in rate schedules of general application, a uniform rate or rates for sale of peaking capacity or from establishing time-of-day seasonal rates, or other rate forms."[75] At certain times of the day and in certain seasons, demand for electricity is relatively high. At these peak times the relatively expensive resources must be brought on line, whereas these marginal resources are not

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70. *Id.*

71. *See* BPA, *WP-02 Power Rate Cases, Administrator's Record of Decision (ROD), WP-02-A-02* § 1.2.3 *at* http://www.bpa.gov/power/prp/rates/RateCases/wpo2/index.shtml (last updated June 22, 2000 [hereinafter *ROD*] (copy on file with the *McGeorge Law Review*) ("The Administrator has broad discretion to interpret and implement statutory standards applicable to ratemaking. These standards focus on cost recovery and do not restrict the Administrator to any particular rate design methodology or theory.").

72. *See* 16 U.S.C.A. § 839e(b) (West 2000).

73. DSI loads are extremely large. In aggregate and operating at full capacity, they amount to almost as much as three Seattles.

74. 16 U.S.C.A. § 839e(c)(1)(B).

75. *Id.* § 839e(e).

needed, for example, in the middle of the night when the industrial loads are the only ones running. Rate design discretion allows BPA to target expensive loads that go on and off with less predictability or run during peak hours to bear their own costs. Alternatively, BPA may group those loads in with a broader set such that the higher cost group is in effect subsidized by the lower cost group.[76]

BPA must also recover certain costs that are not necessarily directly attributable to serving a specific customer. Most significantly, this includes fish and wildlife measures. The Act also specifically mentions conservation, uncontrollable events, reserves, experimental resources, renewable credits, operating services, and the sale or inability to sell excess electric power.[77] The Administrator is authorized to "equitably allocate [such costs] to power rates, in accordance with generally accepted ratemaking principles" and the other provisions of the Act.[78] BPA's rates must be confirmed by the Federal Energy Regulatory Commission ("FERC"), but this is not much of a hurdle.[79] After FERC approval, the rates are deemed final for purposes of judicial review.

The Ninth Circuit has exclusive jurisdiction to review final BPA actions.[80] Most BPA decisions are subject to typical APA review under 5 U.S.C. § 706, but the Northwest Power Act requires that rate determinations pursuant to section 7 "shall be supported by substantial evidence in the rulemaking record required by [section] 7(i) considered as a whole."[81] As explained in Part III.G, the Ninth Circuit has been extremely deferential to BPA since the Northwest Power Act was passed. The court has repeatedly stated that the BPA Administrator has broad discretion to interpret and implement the statutes that govern the agency, and particularly those governing ratemaking.[82] Not surprisingly, the agency has embraced this autonomy.[83] As explained further below, the result is that BPA, an agency subject to intense interest group and political pressure, faces judicial oversight that, if anything, actually empowers the agency.

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76. One area of rate design with a substantial dollar impact is in the difference between shaped and flat loads. It is more expensive for BPA to serve a customer's full requirements rather than providing the customer with a steady block of power. A customer putting steady demand on BPA is either consuming the power itself in a predictable and even flow, as in the case of a DSI, or it is dealing with load fluctuations from retail customers (who continually turn on and off lights, appliances, etc.) by starting and stopping its own resources.

77. *See* 16 U.S.C.A. § 839e(g).

78. *Id.*

79. The Act conditions FERC approval on three findings: the rates must be (1) sufficient to assure repayment of BPA's debt to the Treasury over a reasonable number of years, after other costs are met; (2) based on BPA's total system costs; and (3) for transmission rates, an equitable allocation of the costs of the grid between the transmission of federal and non-federal power. *See id.* § 839(a)(2)(A)-(C).

80. *Id.* § 839f(e)(5).

81. *Id.* § 839f(e)(2).

82. *See ROD, supra* note 71, at § 1.2.3 (citing several cases).

83. *See id.*

C. Stakeholder Pressure

Stakeholder demands are ubiquitous at BPA. They affect political oversight, agency culture, and the self-interest, ideology and sympathies of individual officials. Customers agitate primarily to increase their own slice of the federal pie. In effect this means decreasing the allocation of power or dollars to other groups and/or shifting system costs into other rates. Other stakeholders, in particular environmental groups and the region's Native American Tribes, have an interest in BPA's environmental spending (which is covered by rate revenues) and the river management decisions associated with hydropower generation.

As one would expect, BPA's regional customers (the public utilities, IOUs and DSIs) participate extensively in the agency's rate cases. BPA also has a number of out-of-region customers, including power marketers and utilities. In addition, since BPA is, DSIs notwithstanding, a wholesaler of power, the retail customers in the region (*i.e.*, the customers of the utilities served by BPA) tend to participate in BPA rate cases through representatives, for example, the Citizens Utility Board. Another example of a retail-level participant is the trade group Industrial Customers of Northwest Utilities ("ICNU"), which typically sponsors testimony regarding rate design because its members can capture the benefits if BPA provides certain rate structures to their utilities.

A number of other groups beyond BPA's customers participate in the agency's rate cases, including representatives of the Northwest Tribes and environmental groups.[84] Other groups, particularly state and local government bodies, may not be formal parties to the proceedings, but have an interest in the outcome. These include the state public utility commissions (which in fact, have to sign off on IOU-BPA contracts as part of their regulatory oversight of the IOUs), a number of federal agencies (discussed below), state environmental agencies, commercial fishermen, recreational users, and farmers with irrigation interests.

BPA is subject to political pressure from all sides. At the federal level, BPA is accountable to the administration (primarily through the Department of Energy), and subject to formal Congressional oversight. Federal and state officials are also attentive, particularly the Members of the Northwest Congressional Delegation ("the Northwest Delegation") and the Governors of Oregon, Washington, Idaho and Montana. While some individual politicians may have independent interest in the agency's decisions, others are primarily motivated to act by requests from interested parties, be it parties in the private sector or other governmental actors. Further, the United States Army Corps of Engineers, the Bureau of Reclamation, and the National Marine Fisheries Service all have an institutional interest in BPA decisions because the four agencies share responsibility for river governance. The decisions

84. On the politicization and propaganda endemic in the debates over salmon recovery and BPA funding, see generally JAMES L. BUCHAL, THE GREAT SALMON HOAX: AN EYEWITNESS ACCOUNT OF THE COLLAPSE OF SCIENCE AND LAW AND THE TRIUMPH OF POLITICS IN SALMON RECOVERY (1997).

made by one affect the decisions and options available to the rest. For example, BPA cannot sell power that it cannot produce due to decisions by the US Army Corps of Engineers, which actually operates the dams, or the National Marine Fisheries Service, which may impose river management requirements by way of Endangered Species Act decisions.[85]

Interested groups regularly seek support from outside BPA. Public opinion may be important, and Members of Congress and state governors are asked to weigh in as a matter of course. Since BPA is a federal agency and subject to Congressional oversight, groups may also attempt to bring pressure to bear from outside the region, though that of course runs the risk of irritating in-region players. For example, as the agency was moving to get the 2002 Wholesale Power Rate Case ("WP-02") underway, in the midst of the presidential campaign, a number of environmental groups launched a national public relations campaign in favor of dam breaching. The campaign provoked relatively unsophisticated editorials from East Coast newspapers like the New York Times,[86] which in turn provoked angry responses from within the region.

In the rate-setting context, political pressure is primarily important insofar as it drives corollary decisions that affect BPA's costs and end up as inputs in the rate case. BPA has broad authority to enter into contracts and to settle statutory rights. This means BPA can effectively put certain issues (most importantly, levels of service) out of reach for long periods of time. Taken to the extreme,[87] the settlement power means that the Administrator can agree with certain groups to settle their statutory rights for a sum certain and plug that payment into the rate case, even if it is more than the amount BPA staff believes is actually owed under the relevant provision.

D. BPA's Bureaucrats

BPA is decidedly not a "disinterested, expert agency operating above the political fray."[88] The Secretary of Energy appoints the Administrator, who is usually a member of the President's party. Recommendations from regional political players, including the Northwest Delegation, the Northwest Governors, and BPA customer groups drive the Secretary's decision.[89]

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85. *See infra* text accompanying notes 104-05.

86. *See, e.g.*, Editorial, *Saving the Snake River Salmon*, N.Y. TIMES, Apr. 2, 2000.

87. *See infra* text accompanying notes 92-95.

88. Freeman, *Public Governance*, *supra* note 3, at 562 (characterizing the "public interest and civic republican accounts" as "attached to [that relatively] romantic notion").

89. *See* Joel Connelly, *Energy Exec Johansen To Become First Woman To Run BPA*, SEATTLE P-I, May 2, 1998, at A4 (discussing "six-month selection battle" among regional interests and political representatives over the appointment of Judi Johansen as BPA Administrator).

Beneath the Administrator, the agency is stocked primarily with professional bureaucrats. BPA is, essentially, a very large utility. As such, agency officials typically have the same sort of education, training and experience as their counterparts in the private sector. As is generally the case with administrative agencies, "the politically appointed heads have most power over general interpretations of statutes and least power over compiling and presenting the technical data to support the rules. The long-term career technical bureaucrats in the agencies have most control over the technical support."[90] The technical staff is vital to providing the policy makers with accurate information and the General Counsel's office is vital to defending the policy decisions and making them look like they comply with the statutory directives. Thus, in addition to her own career interests and ideological preferences, the Administrator's decisions can be expected to reflect an institutional preference to, for example, avoid blame for declining salmon stocks. Nonetheless, the agency's discretion, however, is exercised by a few policymakers and legally vested entirely in the BPA Administrator.

One particularly jarring example of policymaker sympathies shifting benefits to one group at the expense of the rest was the 2001 settlement of the IOUs' residential exchange rights. By statute, BPA is obligated to exchange power with the IOUs such that the IOUs' small farm and residential customer loads are effectively served at BPA rates. In the subscription process, run outside of the rate case, BPA decided to implement a settlement of these rights. The DSIs (among others) attacked BPA's proposal as unduly and indeed unlawfully generous. The DSIs' expert witnesses calculated that implementing the residential exchange program as per the statute should have cost about $240 million, while settling the program would cost BPA almost $740 million over the 2002–2006 rate period (an amount that BPA would necessarily have to recover from its other customers).[91] Although the DSIs' precise figures may not be particularly trustworthy, BPA admitted in a publication regarding its rate case initial proposal, "BPA's proposed settlement would provide the IOUs with greater access to low-cost federal power than they would otherwise receive under the expected implementation of the existing program."[92] In the record of decision adopting the settlement, BPA rejected the DSI attack, noting at the outset of its

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90. MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION 125 (1988) (discussing the ability of courts to control agency action by interpreting statutes in lieu of the agency heads and demanding "technologically complete and correct decision making").

91. *See* BPA, *Residential Exchange Program Settlements Agreements with Pacific Northwest Investor-Owneed Utilities, Administrator's Record of Decision* 1, 49 (Oct. 4, 2000), *at* http://www.bpa.gov/Power/PL/Subscription/REP_Settlement_Agreements_ROD.pdf [hereinafter *Settlement ROD*] (copy on file with the *McGeorge Law Review*). The IOUs meanwhile claimed that the statutory program was worth $1.4 billion. *See id.* at 52. This calculation notwithstanding, every single IOU settled rather than pursuing its statutory rights.

92. *See* BPA, *Sharing the Benefits: BPA's Initial Proposal for the 2002 Power Rate Case*, KEEPING CURRENT (Aug. 1999), *at* http://www.bpa.gov/Corporate/KC/home/keeping/99kc/rates.pdf [hereinafter *Sharing the Benefits*] (copy on file with the *McGeorge Law Review*).

discussion of the issue that the DSIs simply wanted for themselves the money and power that would be freed up if BPA abandoned the settlement.[93]

There are a number of problems with this decision. First, BPA decided outside of the rate case to spend hundreds of millions of dollars that would have to be recovered in its rates. Second, BPA settled statutory rights at a level it explicitly acknowledged to be higher than that provided by statute—by definition then, departing from the congressionally-mandated allocation of federal benefits. Third, the stated rationale for rejecting the DSI argument is no rationale at all. Dividing BPA benefits is a zero sum game. If the DSIs were right then they were not being opportunistic; they had a legitimate claim to the federal benefits that would be freed up by not over-compensating the IOUs. Fourth, six weeks after signing the record of decision that settled the residential exchange for ten years, the BPA Administrator left the agency to take a job as executive vice president with PacifiCorp, the largest of the IOUs.[94]

The IOU settlement can perhaps be understood as a manifestation of the particular Administrator's sympathy for the situation of private utilities. More generally, as BPA's current Administrator acknowledged, "BPA's culture is one in which we seek to find ways to say 'yes' to a variety of requests from our stakeholders while also seeking to avoid rate increases."[95]

E. Agency and Executive Interests Manifest

In addition to the pressure of interest group lobbying and the sympathies and ideological predispositions agency bureaucrats bring with them to the job, the interests of BPA as an institution and the desires of the executive may also drive it away from the public interest. BPA must go through certain statutorily required motions to set its rates. The agency, however, is content to make important decisions about how federal benefits will be distributed largely before or outside the rate case. This narrowing of the possibilities that can be produced by the rate case itself suggests that the formal proceeding is a process of rationalization and testing for political backlash. For all of its sound and fury and despite the requirements of the Northwest Power Act, the rate case is not the decision making forum except in form.

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93. *See Settlement ROD*, *supra* note 91, at 48; *see also infra* text accompanying notes 125-26 (describing further BPA's implementation of the residential exchange in the current rate period).

94. *See* Thomas Lee, *BPA Chief Steps Down as Agency Struggles*, SEATTLE TIMES , Nov. 17, 2000, at E4. This runs contrary to Croley's suggestion that "regulated interests might well seek to hire those administrators who were most aggressive against them," based on regulators' experience with certain issues, rather than the content of particular decisions. *See* Croley, *supra* note 17, at 30.

95. Letter from Stephen J. Wright, Administrator and Chief Executive Officer, BPA, to Customers at Northwest Citizens (Apr. 18, 2003), *enclosing* BPA, *What Led to the Current BPA Financial Crisis?: A BPA Report to the Region* (Apr. 2003), *at* http://www.bpa.gov/corporate/kc/home/docs/2003/Report_to_region.pdf (copy on file with the *McGeorge Law Review*).

BPA's most fundamental institutional interest is to operate in the black. By statute, it needs to set its rates to at least cover operating costs and pay the Treasury, but those rates need to be low enough that its customers will continue purchasing from the agency. When BPA's costs are just at or in danger of creeping above market, there is little risk that rates will be inflated. The only real risk of lawless behavior is in the allocation of power and costs across competing groups. When BPA's costs are below market, however, there is an added danger of illegal rate inflation. The margin between actual costs and a rate that will drive its customers elsewhere will be tempting to agency and executive officials because it represents a source of funds for purchasing political support. This tension can be seen in a number of policy decisions BPA made in the years leading up to the 2002 rate case.

1. Pre-Rate Case: Decisions In Fact

In the Federal Register Notice initiating the rate-making proceedings,[96] BPA stated that it would be implementing, without revisiting, the decisions reached in four prior policy-making proceedings. First, through a public process in 1995, BPA prepared a Business Plan, including an Environmental Impact Statement (per NEPA requirements). The Business Plan was BPA's response to a "changing market," when for the first time in its history BPA found its costs driving its rates above the market and causing customers to consider shifting load off BPA. The DSIs in particular were showing signs of abandoning the agency to cut their costs.[97] As BPA characterized it, the goal of changes made by the Business Plan "was to give customers lower prices, stability, and flexible new choices, while giving BPA greater certainty about its expected loads and revenues."[98]

Second, in 1997, BPA and the Northwest Power Planning Council engaged in a Cost Review of the Federal Columbia River Power System, to "ensure that BPA's long-term power and transmission costs would be as low as possible, consistent with sound business practices."[99] A panel of five outside executives was convened to review BPA's costs for the upcoming 2002–2006 rate period (with the exception of fish and wildlife costs). The panel circulated its draft recommendations throughout the region, which were then revised and presented to the BPA Administrator, the Northwest Governors, the Northwest Delegation, and the Appropriations Committees in the House and Senate. During the summer of 1998, BPA heard further public comment on implementing the Cost Review recommendations. These decisions on BPA costs and Cost Review implementation became inputs for the Revenue Requirements Study used in the rate case.

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96. 2002 Proposed Wholesale Power Rate Adjustment, Public Hearing, and Opportunities for Public Review and Comment, 64 Fed. Reg. 44, 318 (Aug. 13, 1999).

97. *See* Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin., 126 F.3d 1158 (9th Cir. 1997) (upholding BPA's Business Plan).

98. 64 Fed. Reg. at 44, 320.

99. *Id.*

Third, officially beginning in 1997, concluding in 1998 but then reopened during the rate case, BPA developed a "Subscription Strategy" to guide its power marketing and contract decisions for the new rate period. This process was actually started by a "Comprehensive Review of the Northwest Energy System," initiated by the four northwest governors "to address and resolve many questions regarding the impact of energy deregulation and competition on BPA and the Pacific Northwest."[100] The Subscription Strategy "reflects agency decisions on equitable distribution of the electric power generated by the FCRPS . . . [and] suggested general rate design approaches to be considered in the formal ratemaking process."[101] The most important decisions made during the Subscription process were forecasts of the power loads that BPA would be requested to serve to preference customers and how much power/benefits BPA would offer to the IOUs to settle their statutory Residential Exchange rights. BPA ultimately amended its Subscription Strategy Record of Decision to increase the proposed IOU benefits by 100 megawatts to facilitate an allocation agreement reached by the four state public utility commissions.[102]

Fourth, BPA and the Clinton Administration made decisions regarding funding for fish and wildlife. In 1996, a number of federal agencies executed a Memorandum of Agreement ("MOA") that settled BPA funding for fish and wildlife expenses through the end of the 1996–2001 rate period.[103] The MOA obligated BPA to internalize the cost of restrictions on hydropower operations in order to comply with a 1995 Biological Opinion issued by NMFS under the Endangered Species Act. It also required BPA to provide an average of $252 million per year for fish and wildlife programs. These costs are necessarily covered by BPA's rates, since the agency does not receive annual appropriations.[104]

In 1997, the eight Northwest Senators sent a letter to Vice President Al Gore requesting that the Clinton Administration work with the Northwest Delegation and the Governors to extend the MOA into the 2002–2006 rate period to enable BPA to account for environmental costs in Subscription and the rate case. The result was the "Fish and Wildlife Funding Principles," announced by Vice President Gore in September 1998. The Principles required BPA to "take into account the full range of potential fish and wildlife costs."[105] These costs were as reflected in thirteen long-term alternatives for configuration of the [federal power

100. *ROD*, *supra* note 71, at § 2.1.1.

101. 64 Fed. Reg. at 44, 320.

102. With regard to the DSIs, BPA's non-binding conclusion that it would "be able to meet all loads that DSI customers asked BPA to serve," *see id.*, ended up being just plain wrong.

103. *See* BPA Environment, Fish and Wildlife, *Memorandum of Agreement, at* http://www.efw.bpa.gov/TMT/DOCS/moa.html (last visited May 17, 2004) (copy on file with the *McGeorge Law Review*). The MOA was signed by the Secretaries of Energy, Commerce, Army and the Interior.

104. *See BPA Facts*, *supra* note 52.

105. Fish and Wildlife Funding Principles, *at* http://www.bpa.gov/power/pl/subscription/substrategy_Appendix.pdf (last visited Feb. 5, 2005) (copy on file with the *McGeorge Law Review*).

system], with each alternative assumed to be equally likely to occur.[106] Which is to say, by requiring BPA to "keep the options open," the Principles required BPA to recover in its rates sufficient funds to cover the most expensive alternative. Assuming BPA successfully managed this, if the most expensive alternative were not ultimately adopted, the agency would be left with a slush-fund of money already extracted from rate-payers.

The Principles also required BPA to set rates to achieve at least an 80% "Treasury Payment Probability" or a likelihood of having funds sufficient to make the annual Treasury payment. This is not an 80% likelihood of making any given payment, but rather an 80% likelihood of making every payment in the five year rate period, which is roughly a 97.5% likelihood of making any given payment. To achieve this level of risk aversion, BPA must systematically overcharge its customers. How much extra it must charge is highly susceptible to the cash reserves on-hand at the start of the rate period. The 80% TPP, and the principle that the rates be able to cover the costs of even the most expensive of the thirteen fish and wildlife funding alternatives, were inputs into the rate case Revenue Requirements, about which the parties were not permitted to argue.

Where the first two processes described above, the Business Plan and the Cost Review, were triggered by BPA facing the prospect of its rates slipping above market, the second pair of processes were driven in part by the realization that the agency had dodged that bullet. BPA managed to cut its costs and retain a critical mass of DSI load, and in the meantime, market prices began to creep back up. As BPA and other interested parties looked ahead to the post-2001 rate period, it was fairly clear that BPA power would be substantially below market. With all of the existing contracts due to expire, regional customers could be expected to put as much load as possible on the agency. Meanwhile, any extra power BPA could scrounge up beyond the minimum necessary to meet its contractual obligations could be sold in out-of-region or market sales at rates well above cost. These sales, if projected at the rate-setting stage, could also benefit in-region customers buying at the statutory rates by driving down the cost of the rest of the system.

But the gap between the market price and BPA's costs was begging to be filled. So long as BPA's rates are at all below market, the agency does not have to worry about losing load. This makes BPA an attractive target for interest groups and other federal agencies seeking funding with below-market rates, complaints about the effects of the hydropower system on fish are more effective at bringing political pressure to bear for increased funding for recovery.[107] At the

106. *Id.*

107. And the inverse is true. As BPA's financial situation has deteriorated since 2000, funding levels for fish and wildlife programs have fallen off—from the $252 million per year BPA committed to under the 1996 MOA to $139 million for 2003—and complaints from the Northwest Power Planning Council, environmentalists and the Tribes have had little traction at the agency. *See* Natalie M. Henry, *BPA: Council Warns Agency to Maintain Fish, Wildlife Program*, GREENWIRE (Feb. 25, 2003).

same time, it becomes harder for the ratepayers to create political pressure on the agency to lower its rates. Complaints from customers who had just threatened to leave the system if BPA did not reduce its rates are especially likely to fall on deaf ears once the threat of exit no longer exists.

The requirement to pay the Treasury is a major source of BPA discretion. One argument made in the rate case was that BPA was inflating the TPP and being ridiculously risk averse for the purpose of amassing huge cash reserves. These funds would then be available to dole out to politically favored parties. As a legal matter, over-recovery is questionable because power rates are only supposed to cover the costs of the system. By being strongly risk averse, BPA was able to keep different environmental mitigation options open without explicitly adopting any particular scheme and without permitting rate case parties to address the issue. Moreover, the "dividend distribution clause" BPA adopted its first time through the rate case was set to disgorge excess rate dollars to stakeholders, not just to the customers that paid in those excess funds in the first place.[108]

By using these decisions as fixed points, BPA effectively preempted almost all debate in the rate case about its spending levels, service levels to customers, and fish and wildlife funding. There were a number of exceptions to these scope limitations, however, some of which were worth substantial dollars to specific groups. The biggest two concerned the level of service to the DSIs , and how the agency should manage risks, especially those risks associated with the uncertain level of fish and wildlife funding and power prices in the wholesale markets. But aside from these targeted openings, agency and executive interests had severely limited the range of outcomes that application of the statutory directives could produce.

2. *The Rate Case: Decisions In Form*

According to the Northwest Power Act, BPA must engage in an elaborate procedure to set its rates. First, BPA must file notice of the proposed rates in the Federal Register, including supporting reasons. Second, one or more hearings must be held to develop a full and complete record and to receive written and oral public comment related to the proposed rates. Any person is to have the opportunity to rebut or refute material submitted by any other person or by BPA. The hearing officer is also instructed to provide a reasonable opportunity for cross-examination. Third, any material submitted at a formal hearing or before the close of hearings shall be made part of an administrative record. Fourth, after the formal hearing, the Administrator may propose revised rates and repeat the first three steps. Fifth, the Administrator shall make a final decision establishing

108. *See* ROD, *supra* note 72, at § 7.5 (refusing to acknowledge that risk mitigation program amounts to systematically overcharging customers and ignoring DSI argument that BPA does not have authority to give excess rate revenues to entities other than the ones that were overcharged).

rates based on the administrative record; the record is to include a transcript of the hearing(s), and any other material submitted to or developed by the Administrator. The Administrator's decision shall include a full and complete justification of the final rates. Finally, the Administrator's decision is effective upon confirmation by the FERC.[109] Note that, while a hearing officer presides over the rate case, her statutory function is to run the public hearing and compile a record. The BPA Administrator makes the final decision about rates, subject to FERC confirmation.

The agency has adopted a formal set of rules to implement these statutory requirements.[110] As a general matter, the agency's procedural rules establish guidelines for participation by parties and non-parties including an ex parte rule, procedures for intervention, filing testimony, discovery, cross examination, oral argument, briefs, and service of documents. The rules also provide for the compilation of an administrative record by the Hearing Officer, upon which the Administrator is to make the final decision.

Despite the narrowing policy decisions already discussed, a lot was still at stake in the rate case. Uncertainty became the defining element of BPA's 2002 WP-02. Besides the typical fight over the rates for each group, BPA also had to account for deregulation of the western wholesale power markets and the associated competitive uncertainty, the vast majority of its twenty-year customer contracts ending at the same time, strong environmentalist pressure, a drought in the Northwest, and a partly drought-induced power crisis in California. Meanwhile, the 2000 presidential campaign was taking place, and one of BPA's DSIs was immersed in a nasty, two-year labor dispute.[111]

Ultimately, BPA must assign rates by power product and customer class. Setting particular rates, however, requires the agency to compute its costs for the rate period and make sure that its revenues cover those costs. This requires forecasting how much power will be available as well as which customer classes will consume the power, how much they will consume, and when they will consume it. Determining costs and consumption in turn requires taking account of market conditions (which affect, for example, expected revenues for surplus power and the costs of covering deficits) and demand elasticity. It also requires making numerous rate design decisions that, theoretically, should force customers with more expensive loads to pay their own costs.

BPA informally held a series of workshops in the spring of 1999 to identify issues and solicit input from interested parties. Over the next several months,

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109. *See* 16 U.S.C.A. § 839e(i)(1)–(6) (West 2000).

110. *See* Procedures Governing Bonneville Power Administration: Rate Hearings, 51 Fed. Reg. 7611 (Mar. 5, 1986).

111. *See* Karen Dorn Steele & Bert Caldwell, *Arbitration Ends Kaiser Labor Strife: Steelworkers Survive—At Least Most of Them Do*, SPOKESMAN REV. (Spokane, Wash), Sept. 19, 2000, at A1 (describing strike-turned-lockout affecting five plants and 2,900 jobs that was finally settled after twenty-three months when parties submitted to binding arbitration).

BPA staff put together the agency's initial proposal covering everything from revenue requirements, to risk analysis, to loads and resources. The proposal consisted of written testimony and six studies sponsored by BPA staff, including technical experts and policy people. In fifteen volumes totaling 4000 pages,[112] BPA proposed five detailed rate schedules, identified four rate development issues, found five rate design issues, suggested sixteen rate adjustments, and classified three methodology issues.

BPA formally opened the rate case with a Federal Register Notice and the release of the Initial Proposal in August 1999. The proceeding concluded with a Final Proposal and 1000 page Record of Decision ("ROD") in May 2000. During the intervening nine months, the parties filed direct testimony responding to BPA's Initial Proposal and proposing alternatives; the parties and BPA filed rebuttal testimony responding to the direct testimony; the parties and BPA engaged in discovery regarding BPA's initial proposal and the parties' direct testimony; party and BPA witnesses were cross examined; the parties filed briefs; the Administrator heard oral argument; a draft ROD was issued; and the parties were given an opportunity to file a brief on exceptions prior to the Administrator issuing the Final ROD and Proposal.

The details of the outcome of the rate case are not particularly relevant here. Suffice to say, process and paper notwithstanding, the Final Proposal (that is, the decisions about appropriate inputs, rate design, and ultimately, the rates) bore a striking resemblance to the agency's initial proposal. The BPA Administrator adopted the position of its own staff for the vast majority of contested issues. As it turned out, the agency (and the most of the major parties) badly misjudged the wholesale power market. In August 2000, with FERC approval still pending, BPA withdrew its rates and reopened the rate case. The case was reopened only to the extent necessary to deal with short-falls specifically related to the costs of market purchases. This in effect meant that all of the rates were going up, the question was how much, and whether some groups would bear more of the costs than others.

Of particular note in the reopened proceeding is that BPA staff reached a settlement with a large percentage of the rate case parties, including almost all of the regional utilities, and not including any of the DSIs.[113] BPA staff incorporated this settlement into a "Supplemental Proposal," which it defended for the balance of the proceedings.[114] This proposal was ultimately adopted by the BPA Administrator in the Final Supplemental ROD, issued in June 2001. The

112. *Sharing the Benefits*, *supra* note 92.

113. *See* BPA, *WP-02 Power Rate Cases, Administrator's Final Record of Decision, WP-02-A-09*, § 1.3.2 (June 22, 2001), *at* http://www.bpa.gov/power/psp/rates/RateCases/wp02/index.shtml [hereinafter *Final ROD*] (copy on file with the *McGeorge Law Review*). It appeared that the utility customers engaged in direct, *ex parte* negotiations with BPA staff, keeping the DSIs and other interests on the outside. *See id.* at § 9.1 (discussing DSI allegations). The DSIs' objections about *ex parte* negotiations were rejected by the Hearing Officer and the Administrator. *See id.*

114. *See id.* at § 1.3.2.2.

settlement entailed a series of "Cost-Recovery Adjustment Clauses" ("CRACs") which were triggered when the base rates failed to produce revenues sufficient to cover agency costs and assure a certain probability of making the annual Treasury payment. One or more of these CRACs has been in effect since the rate period began in October 2001.

3. Implications

The striking similarity of BPA's initial and final proposals suggests that the costs of mass participation were wasted. The agency's stubborn resistance to all challenges to its initial proposal is particularly troubling in light of the agency's need to reopen the rate case to deal with changed circumstances. Being forced to revisit rates midway through the rate period would have been one thing,[115] but BPA had to request a stay of FERC review and reconsider its rates after only five months. In any event, it seems improbable that a proceeding implementing an initial proposal as a final decision furthers any of the typically cited values of participation. Though perhaps relieved at not having lost any ground, the parties ought to feel as if they had been banging their collective heads against a wall for nine months when the agency reissues its initial proposal with new title pages.

While perhaps questionable as an opportunity for deliberation and participation, this process may provide other benefits. First, any given group might lose benefits by failing to participate in the rate case. That is, it provides an opportunity for the engaged to steal benefits otherwise set to flow to the disengaged. Second, the proceeding allows BPA to float proposals and test the political will. Third, the statute requires it. While BPA can do all of the heavy policy lifting outside the rate case, and it can make decisions inside the rate case that may or may not comport with the statutory directives, there are certain forms that must be observed.

In addition, the failure to depart in any substantial way from the initial proposal might have made BPA appear immune to interest group pressure. It rejected almost all comers on almost all issues, from those who wanted more for the DSIs, to interests representing the utilities, conservation, salmon, and etc. The explanation that the statute dictated the outcome and that BPA acted as a faithful agent of Congress is unconvincing because the agency repeatedly justified its decisions by reference to its own discretion. Perhaps the incremental, negotiated decision making of the agency left the outcome of the rate case predetermined. So many issues had already been settled in prior processes that, when all was plugged in, there could be only one reasonable proposal. This relatively optimistic perspective, however, raises the question of control over the initial proposal. That is, simply because there was no opportunity for participation and

115. WP-02 was only BPA's second attempt at setting rates for a five year rate period. During the first fifteen years of life under the Northwest Power Act, the agency held rate cases every one or two years.

input during the formal rate case does not mean that such opportunities were not available to some or all stakeholders prior to the fall of the *ex parte* curtain.

It is also possible that participation in the rate case overloaded BPA with information and arguments such that it defensively rejected everything. That is, rather than driving deliberative decision making to pluralism, stakeholder participation may have driven BPA to pretend that its policy decision was scientifically (and legally) the only possible outcome. This highlights the problem identified earlier: the real difficulty is that BPA can hide behind its statutory authority. As Rossi pointed out, and specifically with regard to the sort of risk management issues that loom large in BPA rate cases, expertise is a pretense; where there is no single right answer, the decision is about who bears the costs and who reaps the benefits.[116] Whether pluralist interest aggregation decision making is acceptable requires a normative view of how governmental bodies should make decisions and the role naked preferences should play. The problem with BPA is somewhat different: the agency is able to extract from stakeholder preferences whatever it likes while pretending that it is following the statute.[117]

F. The Failure of Congressional Oversight

Congressional oversight is insufficient to control BPA decision making. Regardless of whether the threat of budget cuts brings other agency leaders to heel,[118] BPA is self-funded.[119] So long as the agency makes its Treasury payments in full and on time, most members of Congress will have little interest in it. Formally, BPA is supervised by three committees: the Senate Energy and Natural Resources Committee,[120] the House Energy and Commerce Committee, and the House Resources Committee. In practice, it is members of the Northwest Delegation who keep watch over the agency. The Delegation plays an important role in the selection of the Administrator, and individual members lobby BPA on behalf of particular groups.

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116. *See* Rossi, *supra* note 42, at 198; *see also Sharing the Benefits*, *supra* note 92, at 6 (noting initial proposal included "[t]he most sophisticated financial risk management package BPA has ever attempted").

117. Ironically, it was apparently the stakeholders who pressed Congress for the complex provisions of the Northwest Power Act, out of a "deep-seated desire to guarantee in law all of their existing benefits and, if possible, lay claim to a few more." James O. Luce, *When the Walls Come Tumbling Down: The Demise of the Northwest Power Act*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 299, 304 (1996).

118. *See* Croley, *supra* note 17, at 287 (arguing that this threat is not in fact a particularly significant constraint).

119. As the House Appropriations Committee acknowledged with regard to a 1996 energy and water appropriations bill, BPA is self-financed pursuant to the Federal Columbia River Transmission System Act, Pub. L. No. 93-454, 88 Stat. 1376 (1974) "which authorizes Bonneville to use its revenues to finance operating costs, maintenance and capital construction, and sell bonds to the Treasury if necessary to finance any remaining capital program requirements." H.R. REP. NO. 104-293, at 93 (1995).

120. Specifically, the Subcommittee on Water and Power, which as of May 17, 2004 includes three Northwest senators. *See* U.S. Senate Committee on Energy and Natural Resources, *Subcommittee on Water and Power*, *at* http://energy.senate.gov/about/about_water.html (last visited May 17, 2004) (copy on file with the *McGeorge Law Review*).

Though Congress as a whole has no real control over the agency short of passing additional statutory constraints, BPA has used the appropriations process to procure favorable provisions, and thus that same process could conceivably be used against the agency. In 1996, in an amendment made in conference to an appropriations bill, BPA was authorized to sell "excess federal power" to customers outside of the Pacific Northwest without the constraints that the agency otherwise must impose on extra-regional sales. Excess federal power is defined as power that BPA's regional customers had effectively abandoned by putting some of their BPA load on other suppliers.[121] BPA had sought this provision as a way to mitigate actual and potential losses from its traditional customers turning to other suppliers in response to BPA's rates sliding above market rates. The agency was already authorized to, and did, sell power outside the region, particularly to power marketers and utilities in California. Prior to the 1996 law, however, BPA had to include in all out-of-region contracts, a provision allowing it to recall any power required to serve a regional load. Since, under the 1996 provision, excess federal power was not subject to recall, BPA could sell it at a higher rate.

In that same 1996 appropriations bill, Congress set the value of the residential exchange for Fiscal Year 1997 at $145 million. This provision also appeared in conference, though the Senate Report accompanying the bill had noted the issue:

> The Committee is concerned that in the recently proposed rate case for the Bonneville Power Administration, there is a proposal to reduce rates for public power and direct service industries but substantially increase the cost of power exchanged with some residential customers of investor owned and publicly owned utilities. . . . The Committee would be gravely concerned if the [Northwest Power Act] has been applied unfairly or inappropriately. Bonneville is directed to provide the Committee with an explanation and justification of its proposal at the earliest possible date.[122]

Just prior to Senate consideration of the appropriations bill, BPA had released its proposal for the 1996 rate case. BPA proposed cutting the residential exchange program by $125 million, from roughly $180 million to about $55 million.[123] The appropriations bill forced BPA to move more slowly in reducing IOU benefits; requiring a reduction of only $35 million for 1997. As discussed above, BPA was facing intense competitive pressure at this time. Residential

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121. Energy and Water Development Appropriations Act of 1996 § 508(b), Pub. L. No. 104-46, 109 Stat. 419 (codified at 16 U.S.C.A. § 832m(a)(3)(A) (West 2000)).

122. S. REP. No. 104-120 at 121 (1995).

123. PGE, *Puget and PacifiCorp Angered at Impact of BPA's Rate-Cut Plan*, ELECTRIC UTIL. WK. 5 (July 17, 1995).

exchange benefits were simply cash payments to IOUs. Thus, part of BPA's cost-cutting plan entailed reducing that payment so that it could reduce its DSI and public utility rates and prevent those customers from abandoning the system.[124] Although Congress short-circuited BPA's move to cut back residential exchange benefits, the Conference Committee report accompanying the bill directed BPA to phase out the residential exchange by 2001.[125] After providing the IOUs with the congressionally mandated $145 million in benefits in 1997, the residential exchange was worth about $70 million per year from 1998 to 2001.[126]

As discussed above, the BPA Administrator agreed to settle the residential exchange in 2001 by providing the IOUs with a combination of cash and power worth roughly $144 million per year for the 2002–2006 rate period, notwithstanding prior estimates that have found that implementing the program per statutory directives should cost less than $50 million per year.[127] Since the rate case, BPA has started buying back the same power that it arguably broke the law to provide the IOUs with in the first place. As such, the benefits flowing to the IOUs now total over $400 million per year for the 2002–2006 rate period.[128] Apparently BPA has not seen fit to phase out the residential exchange just yet.

The one-year circumvention of the statutory requirements for the residential exchange is an example of the check Congress can pose in extreme cases. Note though that this check came not from Congress but from the Conference Committee, which added both the excess federal power provision and the residential exchange provision to a wide-ranging appropriations bill. The members in both houses were forced to vote the appropriations bill up or down in its entirety, and so the BPA provisions never faced the possibility of amendment on the floor of either chamber.[129] For every BPA benefit in every year except the 1996 residential exchange BPA has been left to allocate the benefits of the federal power system as it saw fit, ostensibly by implementing the provisions of the Northwest Power Act. To the extent that congressional oversight is lacking in rigor, the only potential check left is judicial.

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124. *See id.*

125. *See* H.R. REP. NO. 104-293, at 92 (1995). "The conferees recognize the authority of the Bonneville Power Administration to implement in lieu transactions, among other actions, which could effectively terminate the residential exchange after 2001. Consistent with the regional review, Bonneville and its customers should work together to gradually phase out the residential exchange program by October 1, 2001." *Id.*

126. *See* Wright Letter, *supra* note 95.

127. *See infra* notes 91-94 and accompanying text.

128. *See* Wright Letter, *supra* note 95.

129. The two provisions replaced a placeholder amendment added in the Senate by the Chair of the Appropriations Committee, Senator Mark Hatfield (R-Ore) that would have capped BPA's fish and wildlife expenditures at a percentage (to be determined in conference) of BPA's gross revenues, *see Senate Panel 'Placeholder' on BPA Fish Costs, Cuts Renewables*, ELECTRIC UTIL.WK.4 (July 31, 1995) [hereinafter *Placeholder*], which President Clinton had threatened to veto. *See* Pamela Newman, *Nuclear Waste Proposal Prompts Administration Veto Threat*, ENERGY DAILY (Oct. 19, 1995) (noting OMB director Alice Rivlin's comment that an override of BPA's environmental obligations is "unacceptable" to the administration in a letter to Senator Byrd).

G. The Failure of Judicial Review

BPA has been incredibly successful at defending its decisions before the Ninth Circuit. In its first case under the Northwest Power Act, the Ninth Circuit rejected BPA's decision, but was in turn reversed by the Supreme Court.[130] Since then, the Ninth Circuit has overturned exactly four BPA decisions, three of which were in 1984 and 1985,[131] while rejecting petitions for review of some fifty others.

The line between what the Ninth Circuit can catch and what it cannot is well-illustrated by juxtaposing the results in two recent cases. First, in *M-S-R Public Power Agency v. Bonneville Power Administration*,[132] the DSIs challenged BPA's forecast of how much excess federal power the agency would have available for sale outside of the region.[133] In its forecast, BPA included power that it refused to sell to the DSIs, even though the statutory authorization only permitted it to count as "excess" power that had been freed "due to the election by customers . . . to purchase power elsewhere"[134]—*i.e.*, power that regional customers had abandoned. As the court noted, "the plain language of [the statute] settles the matter."[135]

M-S-R suggests that the Ninth Circuit can perceive and stop particularly blatant violations of statute. However, in *Kaiser Aluminum & Chemical Corp. v. Bonneville Power Administration*,[136] the court manifested not only an unwillingness to reject marginal agency interpretations of the governing law, but a surprising inability to read a contract. The primary issue in *Kaiser* was BPA's refusal to meet DSI requests to purchase power beyond the amount guaranteed by contract, except at a market, or "FPS" rate. The FPS rate is set by BPA based on the wholesale spot or future market

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130. *See* Cent. Lincoln Peoples' Util. Dist. v. Johnson, 686 F.2d 708 (9th Cir. 1982), *rev'd sub nom.* Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist., 467 U.S. 380 (1984) [hereinafter *Alcoa*]. BPA had entered into contracts providing DSIs with service that was interruptible only if necessary for BPA to serve firm loads. Utility customers challenged BPA's refusal to require interruption in case of utility requests for nonfirm service. The Ninth Circuit held that preference required BPA to interrupt the DSIs to provide utilities with nonfirm service. *Cent. Lincoln*, 686 F.2d at 711. The Supreme Court, however, held that BPA's interpretation of the Northwest Power Act was "fully reasonable" and entitled to deference. *Alcoa*, 467 U.S. at 390.

131. M-S-R Pub. Power Agency v. Bonneville Power Admin., 297 F.3d 833 (9th Cir. 2002) (holding BPA violates Excess Federal Power Act by treating power it refuses to sell regional customers as if abandoned); Portland Gen. Elec., Co. v. Johnson, 754 F.2d 1475 (9th Cir. 1985) (holding BPA failed to follow procedures required by 7(i) of the Northwest Power Act); Cal. Energy Res. Conservation & Dev. Comm'n v. Bonneville Power Admin., 754 F.2d 1470 (9th Cir. 1985) (same); Forelaws on Bd. v. Johnson, 743 F.2d 677 (9th Cir. 1984) (holding that BPA failed to follow NEPA when it issued the 1981 contracts).

132. 297 F.3d 833 (9th Cir. 2002).

133. A California utility also challenged this same forecast, but on different grounds that the court rejected. *See id.* at 842–43.

134. *See id.* at 844 (quoting 16 U.S.C.A. § 832m(3)(A)).

135. *Id.* In addition to the plain statutory language, the court noted two other reasons for its holding: an alternative reading would necessarily render certain statutory language surplusage, and clash with the statute's legislative history. *See id.*

136. 261 F.3d 843 (9th Cir. 2001).

in electricity. The DSIs insisted that they had a statutory right and the contractual ability to be served at the IP rate, which is the statutory rate for DSI sales that the agency periodically resets in formal rate cases. During the 1996 rate case, there was concern among other customers that the market would settle below the IP rate and so the DSIs would hold out for FPS, rather than IP sales. Those customers also argued that the agency did not have the authority to sell power to the DSIs at any rate except the IP rate. The Administrator rejected this argument but noted,

> Sales to the DSIs at the IP rate and under the FPS rate schedule are neither in competition with each other nor substitutes for one another. *BPA will not sell power to the DSIs under the FPS rate schedule if it is able to make the sale at the IP rate.*[137]

The Ninth Circuit accepted BPA's argument that this language was not dispositive as to whether the agency contemplated additional sales to the DSIs under the IP rate. In 1996, the market price was below the IP rate, which meant that BPA could either make additional sales to the DSIs at a then-lower FPS rate or lose the load. By 1999, market prices on the West Coast had risen above the IP rate, so that when BPA indicated it had surplus power, the DSIs requested that BPA sell it to them at the statutory rate rather than the much higher FPS rate at which BPA was selling the power to marketers in California.[138] The court accepted BPA's argument that the IP rate was available only for sales made under long-term contracts and that the only rate available for power beyond the amounts BPA was contractually obligated to provide and the DSIs were contractually obligated to purchase was the FPS rate.

In reaching this decision, the court ignored the plain language of the contracts. The sales in question were indeed not contractually required. However, the contracts explicitly did provide that the parties could agree to increase sales under the contract. Under those circumstances, the increased sales would be governed by the same terms and conditions, and the same rate, that governed all other contract sales. Thus, it should have been obvious to the court that BPA *could* have sold the DSIs extra power at the IP rate if it had wanted to. Instead, the court ignored this contractual term and accepted BPA's argument that it was not even permitted to sell at the IP rate.[139]

In another holding, perhaps less-obviously wrong, the panel accepted BPA's contention that the DSIs' statutory right to regional preference is not a right to

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137. *See id.* at 849 (quoting 1996 Rate Case Record of Decision) (emphasis added).

138. *See id.*, at 848. BPA adopted a cap for the FPS rate, tied to the cost of its highest resource as part of a settlement of some issues relating to the FPS rate in 1997. *See id.* at 847. This cap, however, was $63 per megawatt-hour, roughly three times the IP rate. *See id.*

139. *See id.*, at 850 ("Since BPA could only use the IP-96 rate to make sales under the [contracts], BPA *was not able* to sell Surplus Firm Power, which was not covered by those earlier contracts, at the IP rate.") (emphasis added).

price preference.[140] BPA argued that even though it sets the FPS rate to get the most out of the California market, a DSI claiming preference as a regional customer does not have a right to the power at the statutory IP rate, it only has a right to take that power at the FPS rate. The Ninth Circuit agreed this was a reasonable interpretation, making the statutory regional preference rights of customers in the Pacific Northwest no more than a right of first refusal.[141]

Lackluster judicial review will have only a small effect on agency proposals,[142] but it may have an impact on the process and parties nonetheless. The availability of review allows disgruntled groups to impose costs on the agency and other parties, who must then defend the decision. Indeed, as a general matter, if the judiciary becomes more aggressive, parties at the administrative level are better able to delay or even block implementation of regulatory initiatives.[143] In addition, the threat (indeed, the inevitability) of judicial review can be expected to affect the form of BPA's decisions, even if it does not necessarily affect the substance.

BPA's ability to get away with its own interpretations may be justified if we accept the principles behind William Eskridge's dynamic statutory interpretation.[144] The Northwest Power Act is almost perfect for the Eskridge approach: "Dynamic interpretation is most appropriate when the statute is old yet still the source of litigation, is generally phrased, and faces significantly changed societal problems or legal contexts."[145] Although agencies are not disinterested on questions of statutory interpretation, Congress theoretically monitors implementation and has "some relatively effective ways to discipline executive branch officials who stray too far from congressional directives."[146]

As far as the public interest is concerned, this is an inadequate substitute for judicial review. Rather than being incited at a failure to adhere to the actual directives of the Act, Congress is likely to act only if BPA strays too far from what is currently acceptable to a few particular members. Moreover, these interested members are likely to take action by weighing in at the agency on

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140. BPA is only authorized to sell out of the region power for which there is no in-region demand "at any established rate." 16 U.S.C.A. § 837c (West 2000).

141. *See Final ROD*, *supra* note 113, at § 2.4 (concluding sales to DSIs do not violate regional preference because BPA is willing to meet all preference customer load, even though sales to DSIs effectively increase the price preference customers must pay).

142. I say "small" rather than "no" because the agency's general counsel, at least, must recognize that the court has to be given something that it can approve with a straight face, especially after *M-S-R Public Power Agency*.

143. *See* Garrett, *supra* note 19, at 140 n.24 (citing scholars making this point).

144. *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U PA. L. REV. 1479 (1987).

145. *Id.* at 1554. One difficulty with using this approach is the highly technical nature of the Northwest Power Act.

146. Elizabeth Garrett, *Attention to Context in Statutory Interpretation: Applying the Lessons of Dynamic Statutory Interpretation to Omnibus Legislation*, 2002 ISSUES IN LEGAL SCHOLARSHIP, *at* http://bepress.com/ils/iss3/art1 (last visited May 15, 2004) (copy on file with the *McGeorge Law Review*); *but see supra* Part III.F (discussing failure of congressional oversight of BPA).

behalf of specific, dissatisfied stakeholders rather than by mobilizing change at the congressional level.

In short, there is little or no legal check on BPA authority because it is in a better position than either Congress or the courts to deal with the problems of administering an old settlement under drastically changed circumstances.[147] While some members of Congress may weigh in, arguably making the agency somewhat politically accountable, this pressure is unlikely to drive BPA to adhere to the laws—that is, to follow the public interest. On the other hand, if BPA is sufficiently susceptible to political pressure, then we might prefer that the Ninth Circuit defer to the agency so as to avoid a review that gives political losers another shot. This is precisely the "reconceptualization" of roles that Freeman advocates in her theory of collaborative governance: it "necessarily nudges courts from the center of administrative law theory to its margins."[148] The trick is to make this shift fit within the public interest.

IV. COLLABORATIVE GOVERNANCE AND PUBLICITIZATION

A. *Collaborative Governance and Negotiated Relationships*

Where civic republicans suggest that we want some—but not too much!—participation in agency decision making, Jody Freeman embraces private actors. She argues that "the goals of efficacy and legitimacy are better served by a model that views the administrative process as a problem-solving exercise in which parties share responsibility for all stages of the rule-making process, in which solutions are provisional, and in which the state plays an active, if varied role."[149] As such, Freeman advocates what she calls collaborative governance: agency decision making oriented towards problem-solving; with participation by interested and affected parties in all stages of the decision-making process, built through provisional solutions and accountability that transcends the traditionally hierarchical relationships of governing and governed, and a flexible, engaged agency.[150]

Freeman has collected the positive arguments underlying her normative favor for collaborative governance in a theory she calls "negotiated relationships."[151] The negotiated relationships theory is a synthesis of the core observations of public choice and Critical Legal Studies ("CLS"). Based on the work of CLS scholars, she notes that there is no purely public realm to which government might confine itself. At the same time, public choice shows that private influence

147. The Ninth Circuit takes almost a proprietary interest in the agency's action such that BPA is not even liable for breach of contract, so long as it couches such action in statutory terms.

148. Freeman, *Collaborative Governance*, *supra* note 5, at 95.

149. *Id.* at 6.

150. *See id.* at 22–33 (summarizing the features that Freeman finds characteristic of collaborative governance).

151. *See* Freeman, *Public Governance*, *supra* note 3, at 543.

is intimately involved in, perhaps to the point of dictating, government decisions. Thus, Freeman concludes, all is negotiated relationships:

> Both CLS and public choice theory are right at the same time—there is neither a purely private nor a purely public realm. There is, moreover, no center of decision making in administrative law as we tend to suppose. Instead, we find a variety of actors making collections of decisions in a web of relationships.[152]

This is certainly a happier view of the same interest group theories that inspire the core distrust of outcomes that I set out to address. Yet, if the public interest requires resistance to interest group pressures, then the collaborative governance enthusiasm for the role of private parties seems problematic. Accepting that private actors are part of a web of agency governance provides no reason to reject the associated assumptions that they are acting from selfish rationality and agency officials are liable to respond to their spell.

So this dynamic is what makes Freeman's attempt to reconceptualize the discretion debate is crucial. She rejects the traditional choice of constraining discretion or deferring to it.[153] If collaborative governance is to work, the agency and its stakeholders need to be unleashed to respond as necessary to the unique issues presented in any given situation. For as Freeman notes, "the very oversight mechanisms upon which we rely to guarantee legitimacy in an interest representation regime may frustrate the goals of collaboration and undermine sound governance."[154] Thus she proposes that Congress set general goals without dictating precisely how an agency ought to achieve them.[155] Freeman writes, "[T]he choice is between a regime in which the legislature establishes goals and specifies mechanisms for achieving them, and one in which Congress establishes goals and affords agencies and stakeholders the latitude to devise solutions compatible with them."[156]

Instead of constraining the agency and trying to ensure accountability to Congress (which Part II.B suggests is futile), Freeman advocates horizontal accountability. This would include reliance on contracts to force both private and public parties to stick to their deals; having a background threat of regulation; granting independent third parties the power to set standards, monitor compliance, and adopt supplemental enforcement; as well as reliance on professional norms, internalized rules, and informal sanctions. Accountability ought to be "a mix of formal and informal mechanisms, emanating not just from government supervision, but from independent third parties and regulated entities themselves."[157]

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152. *Id.* at 673.
153. *See* Freeman, *Collaborative Governance*, *supra* note 5, at 95.
154. *Id.* at 91.
155. *Id.* at 93.
156. *Id.* at 94.
157. Freeman, *Public Governance*, *supra* note 3, at 549.

This "aggregate accountability" approach is more complicated than traditional administrative accountability because constraints arise not simply for purposes of control, compliance with statutory directives, or even transparency, but rather for facilitating good governance. More so than formal oversight from Congress or the courts, responding to the private role in governance requires "highly contextual, specific analyses of both the benefits and the dangers of different administrative arrangements, together with a willingness to look for informal, nontraditional, and nongovernmental mechanisms for ensuring accountability."[158] In fact, contractual accountability of the sort Freeman advocates may even short-circuit traditional accountability because Congress cannot overrule the agency's decisions without making the agency liable for damages.

B. Privatization and Publicitization

Perhaps the most extreme form of horizontal accountability is privatization. Public choice scholars tend to avoid normative arguments, but , they may call for depoliticizing economic activity "to liberate the market from the hypocrisy of politics."[159] In addition to avoiding the loss that occurs from using political mechanisms to allocate resources where market mechanisms might be more efficient, privatization prevents the particular inefficiencies associated with rent-seeking. A threshold problem with this argument is that there is no reason to believe that rent-seeking will stop, so much as that interest groups will shift resources from lobbying agencies to lobbying Congress. Even though there is no efficiency gain, however, there is a formal gain for the public interest as I have set it out in this article. That is, even if privatization simply shifts interest group pressure from agencies to Congress, an agency responding to the pressure is lawless, illegitimate, and outside the public interest. Whether the same can be said for a similar congressional response is a more difficult question.[160]

A further problem is that any efficiency gained from letting a market perform a given function or provide a given service may come at a cost to democratic norms such as due process, rationality, and accountability. As a compromise of sorts, Freeman proposes "publicitization."[161] Rather than fully privatizing, the government exacts concessions in exchange for contracting out to the private sector. In this way, the government is able to capture the efficiencies of privatization while committing private parties to adhere to the democratic norms that would be applicable if the same work were performed by government actors. There is nothing to stop the government provider from requiring the private actor to, for example, accept direct regulation, provide procedural rights to consumers, or require adherence to minimum standards of service.

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158. *Id.* at 665.

159. *Id.* at 562.

160. *See supra* text accompanying notes 12-15.

161. Freeman, *Privatization*, *supra* note 4, at 1285.

As Freeman recounts, economists arguing for privatization typically focus on cost, and to a lesser extent quality. Public law scholars are concerned with protecting the public interest, relying upon the very procedural protections that privatization destroys. Despite this split in attention, Freeman notes that there is significant convergence on when either camp deems privatization too risky to pursue. To fill this gap, Freeman proposes publicitization:

> The argument for publicization is strongest in instances when services are highly contentious, value-laden, and hard to specify, and when providers enjoy significant discretion; when services affect vulnerable populations with few exit options and little political clout; and/or when the motivation for privatization is explicitly ideological or clearly corrupt.[162]

However, if the appropriate response is to publicitize when all three of these factors line up against privatization, publicitization looks like an alternative to privatization rather than an alternative to leaving the government in charge. Perhaps the cases where these considerations cut in different directions are not the difficult ones as Freeman suggests,[163] but rather the very cases where publicitization might make sense as a compromise.

One objection to publicitization, which Freeman identifies, is that if publicizitization does occur, it will effectively turn private actors into public ones, thereby undermining all benefits of privatization.[164] Freeman's response is that privatization is not a zero sum game between public and private power. She argues that it is not clear "that selectively adding due process, public participation, or oversight will undermine *all* of the economic gains and technical innovations that might come from reliance on private service providers."[165] This is unconvincing. Privatization is a zero sum game with regard to the cost of procedural protection for public law norms because the gains from privatization come directly from abandoning rights-based protections in favor of the market. To the extent that the gains are associated with, for example, a different business model based on more benefits and less process, right up to constitutional minimums, they could be obtained as easily by a government agency taking such steps as by privatization. As Freeman herself points out, compliance with public law norms does not preclude the pursuit of profit.

The point that the efficiency gains produced by shifting to private provision of goods or services may more than offset the losses imposed by retention of democratic norms is an argument in favor of either privatization or changing the

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162. *Id.* at 1291.

163. *See id.* at 1349–51.

164. *See id.* at 1339-40. She also identifies and responds to two other primary objections, that there is no incentive for government to demand publicitization and that it would not address the most serious risks associated with privatization. *See id.* at 1329–39.

165. *Id.* at 1339.

government agency's business model; it says nothing about whether retaining democratic norms like process or participation is worthwhile. While the cost of maintaining some democratic protections via publicitization may not be clear, and some mechanisms, for example, disclosure, are cheap, if all of the otherwise-applicable democratic values are protected by contract, then the publicitized actor might as well be a government agent for efficiency purposes. Something must be sacrificed for the private actor to be more efficient.

C. *The Governing Regime at BPA*

The existing regime at BPA is an example of collaborative governance in practice, and even exhibits a number of signs of partial publicitization. Freeman's theories suggest that the problems identified above, that BPA is able to ignore the public interest (*i.e.*, act lawlessly) almost at will and the procedures required by statute are a formal façade, might be addressed by actually increasing the agency's discretion. Publicitization beyond the steps BPA has already taken, however, is not a promising path.

1. *Collaborative Governance and Administrative Standards*

Congress could unleash BPA, formally permitting it to exercise its discretion to best balance a number of potentially competing goals, without requiring it to adhere to the allocations or procedural requirements currently embodied in the Northwest Power Act.[166] This would make it much less likely that BPA decisions contravene governing law, which means the agency's decisions would be, by definition, both in the public interest and legitimate. In addition, this would make decision making at BPA much more efficient. All of the parties could stop wasting time and money with empty procedures. Small-step policy proceedings and one-on-one (or class-based) contract negotiations, which are already an important part of BPA governance, would suffice. The repeal of substantive and procedural law that gives parties a cause of action against the agency would also save stakeholders and the agency itself some of the time and trouble of marching through the Ninth Circuit to argue the requirements of a complex statutory regime after every decision. One way to implement this solution would be to require the agency to promulgate guidelines to constrain its own discretion, for example, by adopting basic rate-making rules to ensure even-handedness. This solution might even result in meaningful judicial review.

Notwithstanding the concerns raised above about the value of participation and the quality of deliberation at the agency, decision making at BPA already arguably manifests all five of the features identified by Freeman as defining collaborative

166. In an article written as efforts for new Northwest legislation were gearing up in 1996, a member of BPA's general counsel's office proposed a similar solution, arguing that the legislative assumptions underlying the Northwest Power Act proved to be wrong and the strict statutory requirements had hampered BPA's ability to react to changed circumstances. *See* Luce, *supra* note 117.

governance: a problem-solving orientation; participation by interested and affected parties in all stages of the decision-making process; provisional solutions; accountability that transcends traditional public and private roles in governance; and a flexible, engaged agency.[167] Perhaps most important, BPA is not only vertically accountable to Congress in the formal (and unenforceable) sense explored in Part II, the agency is already subject to market-discipline insofar as it must produce rates, power allocations, and other terms and conditions of service that keep its customers from abandoning it for another system. Ultimately, the agency must enter into contracts; BPA is not the sort of agency that passes regulations and sues parties who fail to comply.

While establishing a basic policy framework through the formal processes discussed in Part III.E.1, especially Subscription, BPA representatives also engaged in direct negotiations with customers over the terms of new contracts. The agency ascertained, for example, how much load customers wanted to put on it, and at what price that demand would change (load elasticity). The pre-rate case negotiations with the DSIs is a case in point. BPA met with DSI representatives repeatedly over a period of several months, in the end forcing the DSIs to accept a "Compromise Approach" to post-2001 service. BPA could not pre-commit itself to a specific outcome, but the agency agreed that BPA would start the rate case proposing to serve 1440 megawatts of DSI load, roughly half of the amount the DSIs wanted, at a rate that threatened without necessarily destroying each company's ability to operate. In return, the DSIs would support this proposal both publicly and in the rate case. The alternative, BPA told them, was no service at all.

Similarly, in the reopened rate case, BPA staff engaged in settlement talks with the parties. According to the BPA account, a number of its customers initiated settlement discussions among themselves and came to the agency with a settlement proposal soon after the case was reopened. BPA thus held a series of settlement workshops. Eventually BPA and almost all of its utility customers reached a partial stipulation and settlement.[168] Since a number of parties to the case, including all of BPA's DSI customers, were not part of the settlement,[169] the reopened rate case had to run its course. The BPA Administrator could not pre-commit to the outcome of the case, but the BPA staff agreed to incorporate the settlement in the agency's Supplemental Proposal and it was ultimately adopted by the Administrator.[170]

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167. *See* Freeman, *Collaborative Governance*, *supra* note 5, at 22.

168. *See Final ROD*, *supra* note 113, at § 1.3.2.

169. *See supra* note 113 and accompanying text.

170. For an argument against nonunanimous settlements of utility rate cases, *see* Stefan F. Krieger, *Problems for Captive Ratepayers in Nonunanimous Settlements of Public Utility Rate Cases*, 12 YALE J. ON REG. 257 (1995). Professor Krieger is primarily concerned with the impact of nonunanimous settlements on consumers and the effect on approval by state commissions charged with approving utility rates. He concludes that permitting these settlements hurts consumers, who "run the risk that the utility will form alliances with the commission staff, industrial interveners, or large commercial interveners and then gain commission approval." *Id.*, at 343. His analysis, as well as his proposed solution, a unanimity rule, is critiqued in Alan P. Buchmann &

The problem with the way BPA makes decisions, as manifest in its pre-rate case activities, coercive negotiations with the DSIs, and settlement activities during the reopened rate case, is perhaps only that the positive law had already established both goals and allocations. As Freeman points out, even when Congress tries "to limit the solutions that parties [may] reach, leaving only implementation open to negotiation, the divide between establishing and implementing solutions is slippery."[171] Despite the discretion it provides BPA, the Northwest Power Act cannot be read to have contemplated the solutions reached in the formal and informal processes leading up to and through the 2002 rate case. BPA came up with a solution, couched it in statutory terms, and implemented it. In effect, BPA could be deemed to have followed Freeman's model—it identified problems, let all stakeholders discuss the issues, and implemented solutions that could change with changed circumstances, for example, the cost-recovery adjustment clause solution that came out of the reopened rate case. Missing though is the transparency and credibility that would come from having been formally empowered make these decisions. BPA defended the solutions on their own terms to some extent, as part of gathering political and public support, but ultimately the test was how well its decisions could be shoe-horned into the statutory directives.

One potential fix, which would make this mode of decision making compatible with my definition of the public interest, would be to trade the Northwest Power Act for a rule requiring BPA to supply standards for exercising its own discretion. This approach, advocated by Lisa Bressman, would make the agency accountable for internal consistency, while being free to adjust its standards to deal with changed circumstances in a principled way.[172] The rehabilitation of judicial review that this would entail might be essential to making governance by otherwise unrestrained agencies work. Recall that there were a number of factors identified in Part II.B beside interest group pressure that could be expected to drive agency decision making. The institutional will to power is probably best checked by deploying against it another institution's impulse towards aggrandizement, here, the judiciary's.

Robert S. Tongren, *Nonunanimous Settlements of Public Utility Rate Cases: A Response*, 13 YALE J. ON REG. 337 (1996). Buchmann and Tongren's defense of nonunanimous settlements, however, assumes that regulatory review of a rate case is not only unchanged by settlement, unanimous or not, but is a substantive hurdle for the utility in the first place.

171. Freeman, *Collaborative Governance*, *supra* note 5, at 94.

172. *See generally* Lisa Schultz Bressman, *Disciplining Delegation after* Whitman v. American Trucking Associations, 87 CORNELL L. REV. 452 (2002); *see also* Am. Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1034, *modified in part and reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999) (overturning EPA regulation on nondelegation grounds), *rev'd in relevant part sub nom.* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001). Bressman interprets the Supreme Court's reversal of the DC Circuit decision as merely a rejection of Judge Williams' use of a constitutional fix, leaving open the possibility of imposing the same requirement (that is, of an agency adopting standards to constrain its own discretion) by way of administrative law. *See* Bressman, *supra*, at 473.

This approach might also give more bite to congressional oversight. Decision making, both with regard to what administrative standards to adopt and how such are substantively implemented, would be much more transparent. Stakeholder pressure would not dissipate, but the agency would be more accountable for how it responded to the pressure and the skill of agency personnel—especially the general counsel's office—at putting the Administrator's decisions into statutory terms would not be quite so vital. In addition, there would be substantial efficiency gains and predictability benefits from dropping pointless procedure in agency rate cases and the rubber-stamp approval at the Ninth Circuit that currently masquerades as something more.

2. *Publicitization*

Another way to improve matters might be to extend the role publicitization plays in BPA governance. Freeman identifies three criteria for determining whether to publicitize: when it is difficult to specify the service provided and the provider has substantial discretion, the served population is vulnerable, and the motive for privatization is to avoid constitutional or legal obligations, publicitization is most appropriate.[173] As noted above, when all three of these criteria are met, the service should be left in government hands, and it is rather when they cut different ways that publicitization should be considered. BPA has harnessed private power to the point that some form of publicitization is already in effect. However, BPA probably cannot push it any further.

In several fundamental ways, BPA puts the provision of federal benefits in private hands. First, other than its service to the DSIs, BPA is a wholesaler. It distributes federal power to utilities, who in turn distribute that power to retail customers. So too with federal transmission capacity and, one might argue, with environmental benefits. As such, the retail service of federal power is already effectively publicitized—with certain conditions attached to protect federal interests in, for example, due process and rationality, it is put into non-federal hands for distribution. Second, BPA deals in dollars more than regulations as such. There is an element of economic efficiency embodied in the fundamental principle of BPA's rates, that they recover all costs. Third, BPA is accountable to private parties primarily through contracts. BPA's contracting authority provides a way for the agency to entrench allocation decisions. In fact, some argued that the agency was consciously attempting to immunize certain decisions from change by entering into long-term contracts. Thus, whether BPA's contracts provide much in the way of protection for democratic values, the agency is run more or less like a business.

Freeman actually identifies electricity provision as an example of a situation where her publicitization criteria cut both ways: both highly and less vulnerable

173. Freeman, *Privatization*, *supra* note 4, at 1343-51.

populations are served, and while deprivation would be a severe hardship, electricity provision is rather light on discretion.[174] However, BPA is not your average utility. Its customers are typically quite vulnerable in the sense that they enjoy a federal benefit that could be taken away by any number of agency, judicial, or congressional decisions. For example, witness the cost to regional ratepayers of the listing of several salmon runs by the National Marine Fisheries Service in the early and mid-1990s. Fish recovery expenditures of roughly $150 million in 1991 rose past $400 million in 1995.[175] Most utilities and large industrial users throughout the country make decisions about resource development and electricity supply based on economic factors (though federal and state regulations, for example, licensing and environmental rules, are no small factor when it comes to siting new resources). BPA exercises this same discretion as far as resource development and risk management. Notwithstanding the spread between the winners and the losers in the Western power markets in 2000–2001, these are the types of decisions the market is well-situated to control.

In fact, BPA recently shifted one element of its operation most suited to market control, risk management, partially into private hands. As part of the Subscription process, BPA offered a new product, SLICE, to its public utility customers. Under the SLICE program, customers sign up to receive a certain percentage of the output from the federal system in return for paying that same percentage of the agency's total costs, for better or for worse. Thus, the customer will be obligated to make up shortfalls in the bad water years, while reaping the benefits in the good. BPA is subject to the usual constraints in entering SLICE contracts, it must cover its own costs and mitigate the risk to itself of losing any upside benefits from whatever piece of the system is bound up in SLICE. But the SLICE customer must make its own decisions about how to best manage the risk associated with running a piece of the hydropower system.

Though less overtly so than SLICE, even BPA's traditional forms of service to utility customers might be deemed publicitization. As explained above, the IOUs have a statutory right to residential exchange benefits. Each utility receives BPA benefits at a level tied to the utility's small farm and residential customer load and the utility's own cost of service vis-à-vis BPA's exchange rate. Perhaps particularly appropriate since any given utility's customers are captured,[176] the IOUs are not allowed to add BPA benefits to their profit margin, they must pass them through to end-users. BPA's public utility customers too effectively pass the federal benefits through. The publics are consumer owned, and thus typically

174. *Id.* at 1349–50.

175. *See Placeholder, supra* note 129.

176. Historically, the only real exception would be the rare case of a large industrial load that is either mobile enough to chase cheaper power—like the DSIs that located in the Northwest specifically for access to BPA power—or situated on a service area border and able to push for annexation by one area to escape from another. With the rise of deregulation and particularly open access transmission requirements that will provide consumers with access to market rates and/or market suppliers for their power needs, the utility as monopoly may become a thing of the past.

operate under some sort of cost-of-service requirement themselves, so the benefits are, by the very nature of the business, passed through.

To the extent that the current regime blocks the signal between supply and demand, going still further towards privatization would seem promising. In public hands and subject to political rather than market-based allocation, when BPA's rates slip below market prices, the result is rent-seeking from parties who want the power (forcing others to fight to retain their allocation) or from parties who see room for BPA to collect more money from ratepayers for distribution to favored groups. In this below-market case, there is upward pressure on BPA rates. The agency itself has room to be administratively inefficient (that is, no worries about overhead). It also may feel compelled to acquire more expensive resources to expand the federal pie, or Congress may be inclined to give the agency responsibilities to fund more than just dam operations and transmission lines. Once BPA's rates reach market levels, however, consumers are indifferent about receiving BPA service; some may abandon the system and the rest will put pressure on the agency to get its costs back down.

The equilibrium point then is the market. But BPA controls resources that cost substantially less than other sources of electricity to operate. By distributing below-market resources through BPA, development of new resources in the Northwest is undermined. When BPA concluded the first round of the rate case, it anticipated having to purchase 1,560 megawatts of power each year over the five year rate period to supplement its own existing federal and contract resources. It reopened the rate case because the agency realized after the price spikes in the markets during the summer of 2000 that it would actually have to purchase 3,305 megawatts each of the five years, and at significantly higher prices. In effect, BPA planned to purchase a third again as much power as it already had, at a price anywhere from two to twenty times the cost of federal system power. Since BPA melds these high market purchases in with a lower base, no end user pays the marginal cost for these resources, which (to put it mildly), does not send the right signals for new resource development. As such, it would probably be more efficient if the federal system were operated by private parties, though no doubt under heavy regulation given the ongoing disputes over river management. Alternatively, we might revoke the agency's authority to acquire resources, or its obligation to sell at cost.

V. CONCLUSION

Elhauge's point, that interest group pressure alone says nothing about the merits of a given decision, is well-taken. Yet the problem remains that, under the current regime, BPA cannot be forced to follow the law if it decides not to do so. If public choice gives us reason to distrust outcomes, then we ought to do better than throw up our hands or even raise our voices behind a norm or group of choice. The possibility for procedural innovation gives lie to this sort of fatalism.

Restraining the agency, however, is unlikely to improve BPA's decision making. BPA, like most agencies, cannot be trusted to defend the public interest, in the sense of resisting stakeholder pressure, on its own. The oversight to which it is subject, modest though that is, is triggered largely by disgruntled interest groups. Moreover, there is no reason to assume that BPA's institutional interests, or the personal interests of the agency policymakers, are furthered by carrying out the statutory directives more so than by distributing benefits to interest groups. Without any oversight or incentive to drag the agency back to the statutory directives, constraining its discretion is likely to be futile.

Nor is restraining stakeholder participation likely to improve BPA's decision making. Participation brings a number of benefits to the agency, albeit at some cost to deliberation, and it is too apparent each time through which groups will benefit from which changes to the status quo for BPA to operate behind a veil of ignorance. The existing statutes attempt to provide substantive constraints on the range of outcomes on which the agency may settle, but in practice provide BPA cover for calling policy science. Under this sort of regime, formal participation is already little more than a means for groups to demonstrate political power and the agency to test for political palatability. Yet some sort of participation is vital since BPA must ultimately establish rates and terms that its customers can accept.

As such, the most promising solution is to unleash BPA and give full effect to the existing mechanisms of collaborative governance underlying the formal facade. If Congress untangles the web of often conflicting, highly technical statutory requirements for reaching otherwise coherent (albeit still at times conflicting) statutory goals, the agency's decisions may become more reliable. Further, Congress might consider requiring BPA to itself promulgate standards guiding the exercise of this new discretion. Alternatively, it might leave the agency to its own devices, letting the Ninth Circuit pass on whether the agency was faithfully pursuing the statutory goals, and forcing BPA to justify its decisions in terms sufficient to placate Congress on an ongoing basis. However it is done, increasing the agency's discretion would eliminate the unconvincing, opaque, yet rhetorically forceful argument deployed all too easily under the current regime: that the agency is just following the law.