

V. Grassroots Democracies?

Federal policy in the 1930s and 1940s transformed the electric power sector. Although investor-owned utilities still served most people in the United States, a significant minority received service from cooperative and public utilities. By 1967, nearly a thousand rural electric cooperatives covered the nation and, by geographic area, served most of the country's geographic territory and about 10 percent of the population.¹ During the New Deal period, thanks in part to federal support, hundreds of communities municipalized private utilities and established public agencies to distribute power.² In 2021, public and cooperative utility served nearly 28% of customers in the United States.³ Federal power projects, run by authorities whose members were appointed by the president or the Secretary of the Interior, became a major source of power in several sections of the country. For nearly a hundred years, institutions intended to be accountable to their communities have provide electric service to tens of millions of people in the United States.

TVA Chairman David Lilienthal touted the TVA and its activities as exemplars of “democracy at the grassroots.”⁴ In his 1944 book, *TVA: Democracy on the March*, Lilienthal reviewed the TVA's many accomplishments and offered his philosophy of the TVA. He presented the TVA as an escape from the political challenge of maintaining individual identity and local control when technical considerations favored scale in business and government.⁵ He contrasted systems that “can draw in the average man and make him a part of the great job of our time, in the day-to-day work in the fields and factories and offices of business” as superior to systems that are “highly centralized, dictatorial, and impersonal . . . based upon remote control in the hands of a business, a technical, or a political elite.”⁶ Lilienthal had no doubts about which category TVA belonged. He declared:

From the outset of the TVA undertaking it has been evident to me, as to many others, that a valley development envisioned in its entirety could become a reality if and only if the people of the region did much of the planning, and participated in most of the decisions. To a considerable degree this is what is happening.⁷

He highlighted rural electric cooperatives in the TVA region as an example of grassroots democracy. Farmers had come together and set up their own institutions to obtain power service.⁸ Further, he described municipal and cooperative power systems that distributed TVA power as democratic, with control “lodged with the people themselves.”⁹

¹ Rural Electrification Administration, Report of the Administrator, Rural Electrification Administration, 1967: 14.

² David Schap, *Municipal Ownership in the Electric Utility Industry* (New York: Praeger, 1986): 82.

³ American Public Power Association, *2021 Statistical Report* (2021): 10.

⁴ Lilienthal, *TVA—Democracy on the March*, 71.

⁵ *Ibid.*: 72.

⁶ *Ibid.*

⁷ *Ibid.*: 73.

⁸ *Ibid.*: 81.

⁹ *Ibid.*: 119.

Do Lilienthal's lofty words describe the record of the TVA, distributors of TVA power, and cooperative and public power generally in the United States? Have they been models of "grassroots democracy"? Or is the phrase an empty platitude? Cooperative and public power have been democratic in some places at some of the time. The nearly century-long experience of these institutions reflects an inconsistent democratic record.

Some cooperatives and municipal utilities have fulfilled the vision of economic democracy, in large measure, with responsiveness and accountability and genuine governance by communities. Others have been quite different and plagued by a democratic deficit, featuring insulated, self-perpetuating, and even outright corrupt boards and managers. The democratic deficit is especially concerning because most cooperative and municipal utilities receive special treatment on the premise that they are subject to community control. For instance, they generally are not subject to state regulatory oversight in the way investor-owned utilities are and typically do not pay federal, state, or local taxes.

Some federal power projects have been technocratic and unaccountable to local communities. While Congress has structured some to be publicly accountable, the TVA, for example, has operated broadly free of public control, at the national, regional, and local levels, and engaged, at most, in co-optation and accommodation, as opposed to fostering and supporting genuine community participation.

This mixed democratic performance of cooperative and public power can be traced, in part, to policy choices made at the federal, state, and local levels, including by iconic figures of the public power movement. Certain decisions favored and codified democracy, while others produced institutions that did not seem all that different from investor-owned utilities in practice.

Democracy flourishing and floundering at electric cooperatives

The history of electric co-ops shows a mixed record on governance. Some cooperatives are models of democratic governance while others have been effectively identical to their investor-owned counterparts. Some co-ops have held fair, open elections, welcomed participation of members, and been responsive to their needs. They have provided affordable, reliable electric service and offered new services to meet the demands and expectations of their communities.

In contrast, other co-ops have been cooperative in name only. They have featured high rates, poor service, self-perpetuating boards, and corruption among directors and managers. Members have been apathetic and disengaged, with turnouts in board elections rarely reaching 10%.¹⁰ Many boards are disproportionately white and male and not representative of the communities they serve.¹¹ A few co-ops even went decades without holding a board election.

¹⁰ Matt Grimley, "Just How Democratic Are Rural Electric Cooperatives?," Institute for Local Self-Reliance (Jan. 13, 2016), <https://ilsr.org/just-how-democratic-are-rural-electric-cooperatives/>.

¹¹ Derrick Johnson and Ashura Lewis, "Organizing for Energy Democracy in Rural Electric Cooperatives," in *Energy Democracy: Advancing Equity in Clean Energy Solutions*, eds. Denise Fairchild and Al Weinrub (Washington, D.C.: Island Press, 2017): 99.

Many co-ops have built up large surpluses over time and hoarded their wealth rather than sharing them with their member-owners. Former Tennessee Congressman Jim Cooper criticized many rural electric cooperatives for hoarding large surpluses—capital credits that belong to member—instead of paying them out and labeled this equity “among the largest ‘lost’ pools of capital in America.”¹² In 2008, he estimated that the typical co-op member has \$1,824 in co-op equity, noting, in comparison, “the average American family has only \$3,105 in brokerage accounts and \$3[,]469 in checking and savings accounts.”¹³ Outside institutions, such as the REA and generation and transmission cooperatives, have sometimes fostered poor governance practices and impaired and frustrated democracy at local co-ops.

Roanoke Electric Cooperative in the northeastern portion of North Carolina is a model for electric cooperatives. REC was formed in 1936 and today serves approximately 12,000 member-owners across seven counties.¹⁴ It serves a largely agrarian section of the state, and its customers are mostly Black and poor. Through sustained organizing by community members over several decades, REC has a board representative of the member-owners it serves: the majority of the nine-member board are Black.¹⁵ In 1997, the board selected Curtis Wynn to serve as the chief executive officer, who was the first Black CEO of a rural electric cooperative in the entire country.¹⁶ Wynn served as CEO until 2022.¹⁷

REC has taken measures to promote member participation in elections and governance. Following the Covid-19 pandemic, REC instituted online voting and virtual participation at its annual meeting in August 2020. At its 2021 annual meeting, REC saw a dramatic increase in participation with approximately 10% of members casting a ballot for board elections. This increased member interest did not translate to new candidates for board positions. All incumbents up for reelection retained their seats without a challenge. In addition to its annual meeting, the REC board hosts “power hour” meetings with members,¹⁸ and directors lead six forums each year with members of the districts.

REC has undertaken several projects to benefit its members. It has pursued aggressive energy conservation and efficiency programs to reduce member electricity bills and its own wholesale power requirements and costs. For instance, it has extended loans to members to install more efficient HVAC systems and energy-saving windows. Further, it has instituted demand response measures. During period of very high demand, REC can remotely shut off the high-load appliances and equipment of members who have opted into the demand response

¹² Representative Jim Cooper, “Electric Co-operatives: From New Deal to Bad Deal?,” *Harvard Journal on Legislation* 45 (2008): 338.

¹³ *Ibid.*: 356-57.

¹⁴ Kate Aronoff, “Bringing Power to the People: The Unlikely Case for Utility Populism,” *Dissent*, Summer 2017.

¹⁵ “Board of Directors,” Roanoke Electric Cooperative, accessed December 12, 2022, <https://www.roanokeelectric.com/about-us/board-of-directors/>.

¹⁶ Catherine Merlo, “Roanoke Electric Breaks Through Barriers,” *Rural Cooperatives*, March/April 1999: 7.

¹⁷ Roanoke Electric Cooperative, “Curtis Wynn Steps Down as CEO of Roanoke Electric Cooperative to Take the Helm at SECO Energy,” press release, November 10, 2021, <https://www.roanokeelectric.com/2021/11/curtis-wynn-steps-down-as-ceo-of-roanoke-electric-cooperative-to-take-the-helm-at-seco-energy/>.

¹⁸ “Power Hour webinar,” Roanoke Electric Cooperative, accessed October 20, 2022, <https://www.roanokeelectric.com/events/power-hour-webinar/>.

program. In 2021, REC, together with a group of partners, launched a pilot project to determine how electric vehicles improve system balance—using power at low demand hours to charge their batteries and discharging their batteries to supply the grid at high demand hours.¹⁹

Its service to members has not been restricted to power. REC built out a fiber optic network to enable demand response and subsequently used this infrastructure to offer broadband service to members. In addition to these traditional utility services, REC has undertaken forestry and land retention programs to improve land use in its service territory and to allow financially distressed landowners to keep their properties. Black farmers in the area have suffered significant land loss due to unpaid tax liabilities. With support from philanthropic grants, REC has allowed these landowners to keep their property and to increase revenues from farming activities.

In a section of central Indiana that encompasses rural areas and suburbs of Indianapolis, NineStar Connect has sought to cultivate and sustain democratic member governance. The co-op centers on Hancock County and serves more than 17,000 members.²⁰ It is the product of a 2011 merger between the electric co-op and telecommunications co-op that served the area.²¹ It has a 13-member board, with 10 members representing specific districts and three serving at-large.²² All members for vote all directors. NineStar Connect hosts a Friday night dinner before its annual meeting to encourage members to attend and participate.

Taking advantage of an amendment to the Indiana Rural Electric Cooperative Act in 2018, NineStar Connect set up early and online voting that allowed members to cast ballots for the board in a two-week period leading up to the annual meeting. With online and early voting options, 1,700 members cast a ballot in 2021, which was three times higher than the previous peak turnout. In 2021, four new members joined the board. While the co-op discourages traditional political campaigning for board seats, it publishes and distributes an election sheet in which candidates make the case for themselves in their own words. The co-op videographer records a short speech in which each candidate can make a case for why members should elect them. The co-op treats all candidates equally and does not give preferential treatment to incumbents. In a typical election, most board seats are contested.

NineStar Connect undertakes other activities to stimulate member interest and participation in its operations. In addition to its annual meeting, NineStar Connect's board holds a strategic planning meeting that is open to members. It also hosts three other meetings with members over the course of the year. At these meetings, board members or staff discuss co-op operations and troubleshooting appliances and electronic devices. The co-op also holds a leadership academy to train members interested in learning more about the co-op's operations and potentially running for a board position in the future.

¹⁹ Jonathan Susser and Daniel Real, "Roanoke Electric Cooperative, Fermata Energy Show Promise of Vehicle-to-Everything Technology," *Advanced Energy*, October 5, 2021, <https://www.advancedenergy.org/2021/10/05/roanoke-electric-cooperative-fermata-energy-show-promise-of-vehicle-to-x-technology/>.

²⁰ "Commitment to Renewables," *NineStar Connection*, September – October 2020, 9.

²¹ "History," NineStar Connect, accessed October 20, 2022, <https://www.ninestarconnect.com/about/history/>.

²² "Leadership," NineStar Connect, accessed October 20, 2022, <https://www.ninestarconnect.com/about/leadership/>.

The co-op has initiated several programs to serve its members' power needs and improve its own environmental profile. It has established a voluntary time-of-use billing program under which the price of power for customers varies during the course of a day based on the price of wholesale power. Members who opted into the program saved an estimated 10 to 15% on their monthly power bills. NineStar generates solar power at a small community installation and purchases wind power from Wabash Valley Power Alliance, a generation and transmission cooperative in which Nine-Star is a member. Wind farms in Indiana often produce power in the late evening and overnight when power demand is low. To accommodate variable wind and solar resources, Nine-Star Connect installed a Tesla power wall to serve as battery and store power at times of high wind output for later use.

NineStar is constrained in how much clean power it can obtain. It cannot increase its own generation or purchase of zero-carbon power outside of the Wabash Valley Power Alliance. Under its requirements contract with Wabash Valley, NineStar must purchase 95% of its power requirements from the generation and transmission cooperative. This power purchase contract runs through 2060. If Wabash Valley's power is more expensive or more polluting than alternatives, NineStar still must obtain nearly all its entire power requirements from the generation and transmission cooperative.

Nine-Star Connect has also entered the water and sewage treatment business. Due to the rural character of its service territory, many members did not have modern water and sewage facilities. In 2016, approximately 70% of Hancock County's geographic area did not have water and sewer service. Many residents relied on wells for water and septic tanks for disposal. Longtime homeowners struggled to sell their properties because banks refused to finance the purchase of homes without water and sewer lines. After failing to attract private and investment in water and sewage, Ninestar Connect built a system of its own and serves hundreds of water and sewage customers.²³ This project has spurred the growth of new residential construction in Hancock County.

In Northeastern California, the Plumas-Sierra Rural Electric Cooperative serves a remote rural area and distinguished itself during the 2021 Dixie Wildfire that ravaged the northern section of the state. Thanks to effective line protection measures and the construction of a cogeneration plant years earlier, Plumas-Sierra maintained service for all but 19 hours during the month-long fire. Its success led to calls for it to buy out neighboring utilities that failed to provide such stellar service during the fire.

The co-op obtains a substantial portion of its power from zero-carbon sources. It purchases power from federal hydro projects and runs a community solar farm. It has voluntarily sought to comply with the federal government's Clean Power Plan, which was enacted by the Obama administration in 2015 and aimed to reduce carbon dioxide emissions from power plants.

²³ Alex Brown and Merritt McLaughlin, "NineStar's Expanded Offerings Boost Hancock County," *Inside Indiana Business*, September 18, 2019, <https://www.insideindianabusiness.com/articles/ninestar-connects-expanded-offerings-boost-hancock-county>.

Plumas-Sierra's members are involved in its governance in both formal and informal ways. At its annual two-day meeting that opens with a Friday evening dinner, members can question the board and management in a parliamentary style session. They can ask about matters such as rates for power and the cooperative's plans to extend fiber optic-based broadband service. In addition to the annual meeting, the board hosts meetings over the course of the year to solicit member input on rates and rate structures. Topics include the breakdown between fixed demand and variable energy charges, which determines both the co-op's ability to service its debts and the viability of members' rooftop solar panels. The cooperative mails and emails a monthly magazine that includes in-depth articles and columns on its business and operations. Apart from these formal engagements, members of the co-op talk with board directors and management, who all reside locally, at restaurants, supermarkets, and other public places and share positive and negative views on the co-op's performance and plans.

In contrast to these three co-ops, other co-ops have been plagued by poor governance. While cooperative in form, they are not democratically governed or responsive to members' demands and needs. Common features of dysfunctional co-op governance include opacity around finances and operations and boards that perpetuate themselves through manipulation of election procedures and obstacles for challengers for board seats. Some cooperatives did not have contested elections, or elections at all, for decades.²⁴ As a result of this manipulation of electric procedures, many co-op boards have been wholly unrepresentative of their communities: Boards in diverse communities in the South have been composed entirely of white men.²⁵

On top of these problems, some co-ops have paid inflated salaries and benefits for part-time board members and permitted members to engage in nepotism, cronyism, and appropriation of co-op funds and resources. Many co-ops function as a personal fiefdom of "old boys club" boards and honor the seven cooperative principles in their breach, not in their observance.²⁶ For members, the practical consequences of this democratic deficit include high rates and poor service.

The board of the Rappahannock Electric Cooperative in Virginia has wielded power with little accountability or transparency. The co-op serves more than 170,000 members across a wide swath of Northern Virginia, stretching from the Appalachians to the tidewater and including some outer suburbs of Washington, D.C.²⁷ It is one of the largest electric co-ops in the country. The board has perpetuated itself and selected preferred successors using proxy votes. Before every annual meeting, the co-op mails out proxy statements that ask members to delegate their vote to a person who will attend in person. To encourage members to send in their proxy

²⁴ Labor Neighbor Research & Training Center and ACORN International, *Democracy Lost & Discrimination Found: The Crisis in Rural Electric Cooperatives in the South* (2016): 15, 28, <https://ruralpowerproject.org/wp-content/uploads/2016/10/Following-the-Money.-Coop-Report2.pdf>.

²⁵ "Electric Cooperative Board Diversity is a Failure in the South," ACORN International, accessed October 10, 2022, <https://acorninternational.org/index.php/our-work/research/electric-cooperative-board-diversity-failure/>.

²⁶ Adam Simpson, host, "Democratizing Power in Rural America Through Electric Co-ops," *The Next System Podcast*, October 7, 2019, accessed October 20, 2022, <https://thenextsystem.org/learn/stories/democratizing-power-rural-america-through-electric-co-ops>.

²⁷ "My Cooperative," Rappahannock Electric Cooperative, accessed October 20, 2022, <https://www.myrec.coop/mycooperative>.

statements, the mailers indicate that members designating proxies will be entered into a raffle to win an iPad or other appealing prize. If mailed proxy statements are left blank, the board treats those as delegations of votes to itself.²⁸

The board can use proxies to control elections. In the past decade, it has used the proxy process to defeat the candidacies of challengers. On multiple occasions, challengers received more votes than incumbents did. The board, however, used the proxy votes it claimed to put the incumbent over the top. For example, in the 2021 board election, 3,613 members voted for Roddy Mitchell while the candidate who placed in second among members received less than half as many votes. The board, however, awarded its 6,049 proxy votes to their preferred third place candidate Eric Paulson and allowed him to win the seat. Incumbent board members appear especially hostile to candidates seeking use a board position to address the co-op's carbon emissions and to mitigate climate change.

The example above is not an exception. The board has repeatedly employed its proxy power to control election outcomes. The board swung elections in favor of its preferred candidates in elections in 2016, 2017, and 2019. Unless a challenger wins with a vote margin greater than the number of proxies delegated to the board, they cannot win a board seat, as Roddy Mitchell discovered in 2021. This is a very tall order.

On top of manipulating elections, the cooperative operates in an opaque, secretive manner. Previously, it refused to publish election tallies and shared them with members who requested access in writing, agreed to use them only for "proper" purposes, and accepted the risk of legal liability for any "improper" use. The elections themselves were opaque. The board, however, responded to member organizing and pressure and recently made election results public.

The secrecy of co-op governance and operations continues in other important areas. The co-op refuses to make audited financial statements easily accessible to members. Citing the co-op's status as a "private" business, the board and management contend they are not bound by the state freedom of information laws that apply to municipalities and other public bodies. As with vote tallies previously, members must request audited financial statements in writing and accept the risk of liability for any "unauthorized" use. Due to the difficulty of obtaining financial statements, members cannot evaluate the state of the co-op's finances and its prospects.

The proceedings of the board are conducted in secret. The board has resisted opening its monthly board meetings for member attendance or participation. Members cannot learn about co-op operations and strategy, nor can they judge the knowledge, competence, and commitment of individual board directors. The board has resisted opening its meetings to the public on the grounds that it would compromise proprietary information and the ability of the co-op to respond to emergencies. The co-op has further rejected pleas to publish its lobbying activities and the amount of funds spent advocating for or against measures in the general assembly in Richmond.

²⁸ Seth Heald, "Reforms Needed at Virginia Electric Co-ops," *Virginia Mercury*, September 3, 2021, <https://www.virginiamercury.com/2021/09/03/reforms-needed-at-virginia-electric-co-ops/>.

The insular board and opaque operations mean a co-op that is indifferent to, or even working against, the views and interests of member-owners. Although the new CEO of Rappahannock Electric Cooperative has accepted climate change as a serious problem, the management of the co-op for a long time dismissed the importance of climate change mitigation. It viewed proposed regulations on greenhouse gas emissions as a source of compliance costs and burdens, instead of an opportunity for positive innovation. The co-op, together with other co-ops in Virginia, lobbied and killed a bill to amend existing electric cooperative law and promote transparency and effective democracy.

Rappahannock Electric Cooperative has also worked in concert with other electric cooperatives in the state to advance anti-worker objectives. During the pandemic, the association of Virginia electric cooperatives, of which Rappahannock Electric Cooperative is the largest member, worked to defeat a bill to raise the state minimum wage.

The Black Warrior Electric Cooperative embodies a longstanding dearth of cooperative democracy. This co-op serves 26,000 customer-members in central Alabama. Annual meetings require a quorum of 5% of members for a board election to be held. Without a quorum, the board reappoints itself or selects successors for retiring members. This quorum requirement is common among state electric cooperative laws and the by-laws of electric cooperatives. For example, at the annual meeting on April 21, 2016, a lawyer for Black Warrior declared the required quorum was not present. He stated that the requisite 1,276 members were not present and so the meeting was an “informal” one.²⁹ As a result, the board would reappoint itself and continue to serve for another year. The board and management seemed uninterested in having a quorum. They held the annual meeting on a Friday morning when many members were at work or had other commitments and could not attend.

What is remarkable was how common and consistent this lack of a quorum at Black Warrior’s annual meeting was. It represented the norm for Black Warrior. The co-op did not hold a board election for more than 60 years. A lawsuit brought by members alleging misgovernance of the co-op confirmed this fact. The general manager of the co-op admitted under oath that the annual meeting had not had a quorum since 1950.³⁰ Further, he stated, “At this point no one serving on the [Black Warrior] Board of Directors has been elected at a membership meeting. All persons on the board were selected and appointed by the board.”³¹ As a result, the co-op that serves sections of Alabama’s “Black Belt” had a mostly white board for decades. A reverend of a local church described the problem bluntly:

²⁹ John Zippert, “Members File Lawsuit to Assert Democratic Rights; Black Warrior Electric Membership Corporation Holds Annual Meeting in Choctaw County Declares No Quorum of Members Present,” *Greene County Democrat*, June 15, 2016, <https://greenecodemocrat.com/2016/06/15/members-file-lawsuit-to-assert-democratic-rights-black-warrior-electric-membership-corporation-holds-annual-meeting-in-choctaw-county-declares-no-quorum-of-members-present/>.

³⁰ John Zippert, “Judge Hardaway Turns Down Request for Injunction to Stay the Black Warrior EMC By-law Change Vote,” *Greene County Democrat*, May 3, 2017, <https://greenecodemocrat.com/2017/05/03/judge-hardaway-turns-down-request-for-injunction-to-stay-the-black-warrior-emc-by-law-change-vote/>.

³¹ *Ibid.*

The cooperative has used this lack of a quorum, to allow its board of directors to perpetuate itself, without any democratic input from the members. We have also determined that there are no African-American members of the [Black Warrior] Board of Directors, which makes it unrepresentative of its membership in rural communities of the Alabama Black Belt.³²

The co-op was not governed by the community, but by a self-perpetuating clique that did not reflect the demographics of the customers they served.

The co-op also provided little information to members and operated behind a veil of secrecy. For example, according to one member, it did not publish a service territory map indicating the boundaries of board districts. Co-op staff rebuffed members' attempts to obtain information about the co-op's operations and election processes. The lawsuit challenging the undemocratic governance of the co-op was revealing: It sought, among other things, to compel the co-op to produce its governing document and basic information about its electric operations.³³ The co-op did not disclose when or where the board held monthly meetings, let alone encourage members to attend these meetings. As of 2016, the board's website did not include pictures of board members so a question regarding the racial composition of the board could not be easily answered.³⁴

Black Warrior had the means of sharing this information with members. Apart from its website, Black Warrior's board and management could have shared at least some of these materials through Alabama Living, the monthly magazine of the statewide association of electric cooperatives.

The board in February 2017 proposed by-law amendments that only fueled further member opposition to co-op governance practices. Per the 25-page by-law amendments, the board could create new at-large seats that would abolish the requirement that co-op districts were delineated to be approximately equal in population and consistent with a one-member, one-vote principle. The quorum requirement would be tightened up to prevent members from delegating their proxy votes to other members who planned to attend the annual meeting: only members physically present at the meeting would count toward the quorum unless the board decided to permit other methods of establishing a quorum or permitting members to vote.³⁵

The process outraged many members. Instead of educating members on the proposed changes, the board sought to obtain member ratification through mail-in balloting. It did not offer any opportunity for in-person discussion or other direct engagement between the board and members. The amendments were legalistic and difficult for many members comprehend. Yet, the

³² Zippert, "Members File Lawsuit."

³³ Zippert, "Judge Hardaway Turns Down Request for Injunction."

³⁴ Labor Neighbor Research & Training Center and ACORN International, Democracy Lost & Discrimination Found: 9.

³⁵ "Black Warrior EMC Members File for an Injunction to Stop Vote on By-law Changes to Stop Vote on By-law Changes," *Greene County Democrat*, April 27, 2017, <https://greenecodemocrat.com/2017/04/27/black-warrior-emc-members-file-for-an-injunction-to-stop-vote-on-by-law-changes-to-stop-vote-on-by-law-changes/>.

board asked Members to vote yes-or-no on the suite of proposed changes to the by-laws.³⁶ A suit to stop the by-law amendment vote was unsuccessful.³⁷

Despite the cooperative's undemocratic governance record, the recent experience of Black Warrior reveals the latent democracy present even in cooperatives that have long been unaccountable to their members. Litigation and organizing by residents contributed to improved governance at Black Warrior. Despite the opposition to the board's process of amending the by-laws, members ratified them and helped usher in important changes in board elections. Using its discretionary powers under the new by-laws, the board permitted mail-in voting and counted these ballots toward the quorum.

In November 2017, Black Warrior had a board election for the first time in more than 60 years. The annual meeting that month had a quorum under the new election rules, with 3,000 members submitting mail-in ballots and 100 members casting their vote in person.³⁸ Instead of the usual board-controlled reappointment and selection of new board directors, members voted in three new trustees to serve on the board. While still not representative of the community, two of the nine trustees today are Black.³⁹ The website now features more information, including the full by-laws. At the same time, the cooperative still has not embraced transparency in full measure. For instance, it declined to answer a request for information regarding governance sent by a sustainable energy organization and interfaith group committed to climate justice to all Alabama electric co-ops.⁴⁰

The Pedernales Electric Cooperative in the Hill Country of Texas was plagued for poor governance for decades from the 1960s until the mid-2000s. Pedernales (pronounced "Perdenales" by residents of the area) is the largest electric co-op in the United States, with more than 375,000 customers.⁴¹ President Lyndon Johnson helped form the cooperative in the late 1930s when he served as a representative in Congress.⁴²

Johnson displayed his political brilliance and put his growing clout to use in forming the cooperative. Due to a very low population density, the REA rejected the community's initial application for a loan. The REA had a policy requiring that rural electric projects have a line density of at least 3 customers per mile. The agency assumed that co-ops not meeting that threshold would not produce enough revenue from the sale of power to repay their obligations to

³⁶ John Zippert, "Advocates Urge a 'NO' Vote Black Warrior EMC Sends Out Package of Revised By-laws for a Membership Vote by May 1," *Greene County Democrat*, April 20, 2017, <https://greenecodemocrat.com/2017/04/20/advocates-urge-a-no-vote-black-warrior-emc-sends-out-package-of-revised-by-laws-for-a-membership-vote-by-may-1/>.

³⁷ Zippert, "Judge Hardaway Turns Down Request for Injunction."

³⁸ Black Warrior EMC Board of Trustees, "Dear Black Warrior Board Members," *Alabama Living*, September 2018, 5 https://issuu.com/alabamaliving/docs/september_2018_blackwarrior.

³⁹ "Electric Cooperative Board Diversity is a Failure in the South," ACORN International.

⁴⁰ "Alabama Rural Electric Cooperative Scorecard: Findings & Significance," *Energy Alabama and Alabama Interfaith Power & Light*, 7 (2021).

⁴¹ "Our Service Area," Pedernales Electric Cooperative, access October 21, 2022, <https://www.pec.coop/about-us/service-area/>.

⁴² John L. Park and John Siebert, "Rebuilding Cooperative Leadership: The Case of Pedernales Electric Cooperative," *Journal of Cooperatives* 24 (2010): 67.

the REA. Even after a vigorous membership drive, Pedernales did not even have 2 customers per mile of line. Johnson, however, lobbied President Roosevelt who directed REA Administrator John Carmody to make an exception to its policy on minimum line density.⁴³ Years later, when Johnson had acquired national prominence in the Senate and subsequently served as vice president and president, he continued to tout the formation of the electrification of rural Texas as among his proudest achievements.⁴⁴

Notwithstanding this illustrious beginning and connection to a leading light in American politics in the twentieth century, Pedernales, over time, became a sclerotic cooperative controlled by a clique of self-perpetuating directors and managers. The board required prospective candidates to be approved by a nominating committee composed of individuals selected by the board. The nominating committee served to insulate the board from challenges and practically guaranteed that only candidates to the board's liking would even appear on the ballot.⁴⁵ Between 1976 and 2007, the board's nominating committee exercised absolute control over the candidates who appeared on the ballot—and ultimately election outcomes themselves.⁴⁶

While being paid for their work, the board itself exercised little control over the co-op's management and indeed showed minimal interest in the utility at all. In 2007, board president W.W. "Bud" Burnett, who also held the full-time position of "coordinator", admitted he was mostly ignorant of the co-op's business and management.⁴⁷ For keeping "no office, files or regular hours at the co-op and kn[owing] little about its day-to-day operations," Pedernales paid Burnett \$1 million between 2001 and 2007.⁴⁸

With this passive board, management, especially the general manager at the top of the co-op, wielded great power and ran the co-op in an autocratic style. The general manager made the important operational and strategic decisions and could rely on the disengaged board to accept or acquiesce to his plans. The position also provided for great enrichment. Bennie Fuelberg, the general manager of Pedernales for more than 30 years, made a salary comparable to the executives of for-profit corporations.⁴⁹ In 2007, the co-op paid Fuelberg \$1.4 million.⁵⁰ The co-op retained a law firm nominally for legal services, which actually funneled money through to relatives of co-op board members and managers, including Fuelberg's brother.⁵¹ The co-op also purchased a software company purportedly to provide "scalable, flexible, reliable, and extremely accurate" billing system" which ultimately lost money and offered a service that most co-ops in

⁴³ John Williams, *The Untold Story of the Lower Colorado River Authority* (College Station, TX: Texas A&M University Press, 2016): 1998.

⁴⁴ *Ibid.*: 2450.

⁴⁵ Claudia Grisales, "Co-op's Election Rules under Fire," *Austin American-Statesman*, August 4, 2007, A01.

⁴⁶ *Ibid.*

⁴⁷ Claudia Grisales, "Testimony Shows How Co-op Operates at Top," *Austin American-Statesman*, December 9, 2007, A01.

⁴⁸ Claudia Grisales, "No-shows Collect Co-op Pay," *Austin American-Statesman*, February 3, 2008, A01.

⁴⁹ Laylan Copelin and Claudia Grisales, "At Pedernales Electric Co-op, Dissent on Overload," *Austin American-Statesman*, July 22, 2008, A01.

⁵⁰ Claudia Grisales, "Co-op's Full Story May Not Emerge," *Austin American-Statesman*, July 13, 2008, A01.

⁵¹ Patrick George, "Co-op's Ex-Lawyer Goes on Trial Today," *Austin American-Statesman*, May 16, 2011, A01.

the position of Pedernales would have purchased from a third-party provider.⁵² On the inside, employees refused to raise questions about co-op practices and strategies for fear of inciting Fuelberg who was known for his temper and dictatorial control of the cooperative.⁵³

Fuelberg and other managers traveled at the co-op's expense. They and their partners traveled widely across the country and in luxury, frequently flying first class and staying at hotels like the Ritz-Carlton in New York.⁵⁴ While Fuelberg became rich leading the co-op, the board retained a large capital credits account and refused to disburse the funds to the members. The co-op had hundreds of millions of dollars in surplus but had not paid out any of it to members, either as credits on their bills or refunds.⁵⁵

In early 2007, after years of quiet acceptance and indifference, members revolted against the cozy arrangement between the board and management.⁵⁶ Newspaper reports and lawsuits revealed a board of directors that did little except perpetuate itself and a management team, most notably Fuelberg, who had made millions leading what was formally a non-profit enterprise serving the community. Community members realized an institution that was supposed to belong to all of them functioned as a personal enrichment vehicle for board members and executives. The incumbent board and management initially resisted calls for change. In the summer of 2007, all sitting board members up for reelection won another term.⁵⁷

The opening of criminal investigations into the conduct executives and the threat of legislative action finally forced the incumbents to step aside. The local district attorney initiated an investigation into possible misappropriation of cooperative funds and resources by Fuelberg and other executives. This probe, which was subsequently taken over by the attorney general of Texas, resulted in convictions of Fuelberg and the co-op's general counsel for fraud, although the former's prison sentence was reduced and the latter's conviction was, partly, vacated on appeal.⁵⁸ Two members of the Texas legislature who represented parts of Pedernales' service territory opened an investigation into the board and management of the co-op. They pledged to pursue legislative reform of electric cooperatives in the state. With the growing legal and political

⁵² Claudia Grisales, "Utility Releases Financial Data," *Austin American-Statesman*, November 9, 2007, B01.

⁵³ Claudia Grisales, "General Manager Is Firmly in Control, Co-op Workers Say," *Austin American-Statesman*, December 9, 2007, A08.

⁵⁴ Claudia Grisales, "Co-op Records: Posh Travel, No Oversight," *Austin American-Statesman*, January 6, 2008, A01.

⁵⁵ Claudia Grisales, "Utility's Clients Demand Change," *Austin American-Statesman*, June 17, 2007, B01; Copelin and Grisales, "Dissent on Overload."

⁵⁶ Park and Siebert, "Rebuilding Cooperative Leadership," 69.

⁵⁷ Grisales, "Co-op's Election Rules under Fire."

⁵⁸ Claudia Grisales, "Judge Amends Jail Sentence for Former Pedernales Co-op Official," *Austin American-Statesman*, September 23, 2016, <https://www.statesman.com/story/business/2016/09/23/judge-amends-jail-sentence-for-former-pedernales-co-op-official/10129820007/>; Chuck Lindell, "Court Upholds 2 Convictions, Tosses 1 for PEC Lawyer," *Austin American-Statesman*, November 21, 2014, <https://www.statesman.com/story/news/2014/11/22/court-upholds-2-convictions-tosses-1-for-pec-lawyer/10106455007/>.

pressure, Burnett and Fuelberg announced in late 2007 that they would step down, and the board brought in Juan Garza of Austin Energy as the new general manager.⁵⁹

The board and Garza instituted a range of governance reforms.⁶⁰ They opened board meetings to the public. Further, they reduced the power of the board to control elections through the nominating committee and proxy ballots. Some members and local officials welcomed these changes but believed they were only a start. The reforms under Garza did improve transparency and member participation and lowered rates but one state legislator closely involved in oversight of Pedernales criticized them for not doing enough, including on board elections on which the co-op maintained at-large board seats.⁶¹ The reforms nonetheless did end decades of insider control, creating real possibilities for member participation in co-op decision-making and ensuring more open elections.

The Tri-County Electric Cooperative in South Carolina experienced a member uprising in the summer of 2018. Tri-County serves a mostly rural area of South Carolina between Charleston and Columbia. It is about a tenth of the size of Pedernales and has around 18,000 meters.⁶²

The trigger for member action was shocking revelations in *The State* newspaper about board compensation. Tri-County's board of directors paid themselves lavish salaries for a part-time position—far higher than what directors at other cooperatives received.⁶³ Specifically, they abused the per diem policies to schedule unnecessary meetings and travel, ensuring they most received at least \$45,000 per year in 2016 and board chair Heath Hill collected \$79,000.⁶⁴ In contrast, the Santee-Cooper Project, a state-owned generation and transmission agency that supplies power to many of the state's cooperatives, paid its board members \$10,000 that year.⁶⁵ To boost their compensation, members filed reports overstating how much time they devoted to co-op business. One member claimed she worked on cooperative business on the non-existent “February 30.”⁶⁶ They further awarded themselves health and life insurance benefits. To ensure they stayed in power, they used the nominations committee process. In 2017, “board members placed six of their direct relatives on the co-op's nine-member nominating committee,”⁶⁷ which practically ensured candidates the incumbents did not want would not appear on the ballot.

⁵⁹ Claudia Grisales, “Pedernales Execs Plan to Step Down,” *Austin American-Statesman*, November 14, 2007, A01; Claudia Grisales, “Utility Quickly Names a Leader,” *Austin American-Statesman*, January 4, 2008, A01.

⁶⁰ Park and Siebert, “Rebuilding Cooperative Leadership,” 65.

⁶¹ Claudia Grisales, “After Reforms, Is Electric Co-op Transformed?” *Austin American-Statesman*, September 23, 2016.

⁶² “Our Coverage Area,” Tri-County Electric Cooperative, accessed October 21, 2022, <https://tri-countyelectric.net/coverage-area>.

⁶³ Lacy K. Ford and Jared Bailey, *Empowering Communities: How Electric Cooperatives Transformed Rural South Carolina* (Columbia, SC: University of South Carolina Press, 2022): 144-145.

⁶⁴ Avery G. Wilks, “SC Utility's Part-Time Board Enriched Itself While Customers Paid High Power Bills,” *The State*, August 17, 2018.

⁶⁵ *Ibid.*

⁶⁶ Avery G. Wilks, “Tri-County Board Stands Up Dozens of Angry Customers at Meeting,” *The State*, August 16, 2018.

⁶⁷ Avery G. Wilks, “High Pay and Expensive Perks: Has ‘Absolute Power’ Corrupted SC Electric Co-ops?” *The State*, August 13, 2018.

Lawsuits and further reporting by The State revealed a culture of self-dealing in which board members treated the co-op, nominally controlled by the community, as their personal fiefdom. Board members and their family and friends had received special services from the co-op for free or at heavily discounted prices.⁶⁸ Board chair Heath Hill threatened to fire employees who questioned this nepotism and cronyism. The revelations suggested that Tri-County Electric Cooperative functioned as “Hill Electric” in practice.⁶⁹

The board majority’s reversal on a set of by-law amendments drove a wedge between them and the cooperative’s CEO and general counsel. The board had requested CEO Chad Lowder to draft a set of new by-laws, not necessarily to improve governance, but to burnish public perception of the co-op. Although the board had endorsed a set of by-law amendments, including on board pay, a majority, using hook and crook, subsequently did an about-face and successfully worked to defeat the amendments at the May 2018 annual meeting.⁷⁰

Revelations of high pay and unaccountability for board members and high rates for customer-owners inspired them to act in the summer of 2018. Around 1,600 members of Tri-County petitioned to fire board members and adopt a new by-law on board member pay at a special meeting in August 2018.⁷¹ The Electric Cooperatives of South Carolina, the association of electric cooperatives in the state, also called on the board to resign.⁷² After years of insularity and self-dealing, the board’s misconduct and publicity of it had generated tremendous grassroots anger. Members voted overwhelmingly to fire the board. On August 21, 2018, the full board resigned.⁷³

The revolt at Tri-County brought in major changes at the co-op and for all electric co-ops in South Carolina. In a special election in November, co-op members voted in a new board that pledged to make the co-op accountable to the communities it served and was more representative of member-owners. The new chair was retired teacher Barbara Weston, who during the summer member revolt declared at a July meeting, “That’s our money. It is not fair. It is not right, and we are not trusting [the incumbent board] with any more of our money or our time.”⁷⁴ Tri-County became one of three electric cooperatives in the country with a majority-Black board.⁷⁵

The democratic deficit at some distribution co-ops has also come from outside—from generation and transmission cooperatives. In the 1930s and 40s, the REA envisioned principally funding distribution co-ops that would purchase power from investor-owned utilities and federal

⁶⁸ Avery G. Wilks, “SC Utility’s Directors Got Free Power Lines, Landscaping Work, Employees Say,” *The State*, August 21, 2018.

⁶⁹ Ibid.

⁷⁰ Ford and Bailey, *Empowering Communities*, 144-145.

⁷¹ Avery G. Wilks, “‘It’s Time You Catch Hell.’ Tensions Erupt as Midlands Utility Board Refuses to Resign,” *The State*, July 19, 2018.

⁷² Avery G. Wilks, “Knives Are Out for Midlands Utility Board That Gave Itself High Pay,” *The State*, June 7, 2018.

⁷³ Avery G. Wilks, “SC Co-op Board Resigns, Won’t Challenge Customers’ Historic Vote to Fire Them,” *The State*, August 21, 2018.

⁷⁴ Avery G. Wilks, “SC Utility’s Customers Fired Their Board After Pay Scandal. Now, They’re Taking Over.” *The State*, December 28, 2018.

⁷⁵ “Electric Cooperative Board Diversity is a Failure in the South,” ACORN International.

power projects. But for some distribution co-ops, federal power was not available and investor-owned utilities refused to sell power to them on fair terms. In its early years, the REA financed relatively few generation plants but did threaten to fund co-op's generation projects as a means of coaxing investor-owned utilities into offering power to cooperatives at reasonable rates.

The power supply issue was a persistent problem for some co-ops. Growing political conservatism in the late 1940s foreclosed major expansions of federal power projects, let alone “enough TVAs to cover the entire country” as George Norris wanted. Nonetheless, the federal government, even during the conservative Eisenhower administration of the 1950s, did not leave distribution co-ops to fend for themselves in the fight for wholesale power. The REA stepped in to ensure that cooperatives had access to fairly priced wholesale power. The agency supported and funded distribution cooperatives joining forces to establish generation and transmission cooperatives to collectively purchase wholesale power and build power plants and transmission facilities.⁷⁶ These “G&Ts” freed co-ops from dependence on unreliable private utilities that viewed co-ops as an economic and ideological threat.

Co-ops across much of the country formed generation and transmission co-ops. Co-ops in the Midwest were especially keen to set up G&Ts, likely due to the smaller presence of federal power projects when compared to the West and South. Many G&Ts invested in coal-fired generation on a large scale. They also pursued nuclear projects in partnership with the cooperatives' erstwhile adversaries—the investor-owned utilities.⁷⁷ In the course of their REA-supported multibillion-dollar investment program in the 1960s and 70s, some G&Ts became among the largest power generators in the United States and operated facilities comparable in size to what the federal government and investor-owned utilities had built.⁷⁸

Generation and transmission co-ops complicated governance and impaired democracy in cooperative power in at least two ways. Distribution co-ops appointed representatives, sometimes members of their own boards, to serve on the boards of G&Ts. Despite this apparent democratic, bottom-up control of G&Ts by distribution co-ops, the G&Ts have often exercised power, if not dominance, in the relationship. In most instances, G&Ts are qualitatively larger than any individual member: some control billions of dollars of complicated generation and transmission assets.⁷⁹ As a result, their board, comprising representatives of distribution co-ops, often deferred to the decisions of G&T management and ratified their choices without much critical inquiry. Further, some G&Ts covered multiple states and saw their constituencies as being different and distinct from those of their distribution co-op owners. For instance, some G&Ts, which served only distribution cooperatives in one state, owned and operated generation and transmission facilities in neighboring states.

⁷⁶ Rural Electrification Administration, Report of the Administrator of the Rural Electrification Administration 1960 2-4.

⁷⁷ Jack Doyle, *Lines Across the Land: Rural Electric Cooperatives: The Changing Politics of Energy in Rural America* (Vic Reinemer, ed., Washington, D.C. Environmental Policy Institute, 1979): 113-15.

⁷⁸ *Ibid.*

⁷⁹ “Managing Members’ Capital Responsibly,” Basic Electric Power Cooperative, accessed on October 24, 2022, <https://www.basinelectric.com/News-center/publications/Annual-Report/Managing-Members-Capital-Responsibly>.

The saga over a coal-fired power plant owned by a large Midwestern G&T illustrates the governance problems facing cooperatives. In 2020, Great River Energy, a generation and transmission cooperative serving 28 distribution cooperatives in Minnesota, announced it would close the money-losing Coal Creek power plant in neighboring North Dakota and replace the lost power supply with electricity from wind firms.⁸⁰ As the name suggests, Coal Creek burned coal, specifically lignite a highly polluting form of coal, to generate power. If it pursued this plan, Great River would reduce its greenhouse gas emissions and lower its wholesale energy costs.⁸¹ The Coal Creek plant was so uneconomical that Great River stated it would sell it for \$1.⁸²

North Dakota politicians and Coal Creek residents strongly opposed Great River's plans and forced it to reverse course. The closure of the plant would cost hundreds of jobs in the town of Coal Creek. Unions representing workers at the plant opposed the loss of many well-paying jobs in a community that had few other employers. Further, many conservative state officials seemed to support continued reliance on coal and to oppose wind as a matter of principle. Local officials threatened to withhold permits for wind energy development if Great River closed Coal Creek.⁸³

Under these conditions, Great River sold the Coal Creek plant for a nominal sum, as it had initially planned, and the transmission line at a price well below fair value to a local energy marketing firm. The purchaser would attempt to keep Coal Creek operational, pledging to invest in expensive and unproven carbon capture and sequestration technology for the plant, and obtain a valuable transmission facility at an attractive price.⁸⁴ Great River would operate the transmission line and purchase power from Coal Creek.⁸⁵

Great River's management urged the distribution co-op members to ratify the sale of Coal Creek and transmission line. In a 180-degree switch from just two years earlier, Great River was responding to the demands of residents and officials in North Dakota and asking its members cooperatives in Minnesota to approve a plan that that appeared unlikely to benefit them. It kept public information about the deal to a minimum and sought to limit debate among distribution cooperatives' boards and their members. Although 27 out of 28 distribution cooperatives voted to approve the plan, the board of Great River's largest member, Connexus,

⁸⁰ Frederick Melo, "Great River Energy to Drop Coal, Switch to Mostly Wind," *Pioneer Press*, May 7, 2020, <https://www.twincities.com/2020/05/07/great-river-energy-to-drop-coal-switch-to-mostly-wind-power/>.

⁸¹ Rebecca Mitchell, "Great River Energy's Move to Wind Energy Expected to Stabilize Electricity Costs," *Wadena Pioneer Journal*, September 24, 2020, <https://www.wadenapj.com/business/great-river-energys-move-to-wind-energy-expected-to-stabilize-electricity-costs>.

⁸² Amy R. Sisk, "Several Companies Weighing Coal Creek Purchase," *Williston Herald*, October 12, 2020, https://www.willistonherald.com/several-companies-weighing-coal-creek-purchase/article_65747fd4-0cb5-11eb-b53c-b36e3a13bb01.html.

⁸³ Joshua Partlow, "How Coal Holds on in America," *Washington Post*, January 17, 2022, <https://www.washingtonpost.com/climate-environment/2022/01/17/coal-creek-station-power-plant/>.

⁸⁴ *Ibid.*

⁸⁵ Mike Hughlett, "Great River Completes \$227M Sale of North Dakota Coal Plant, Transmission Line," *Star Tribune*, May 2, 2022.

unanimously voted no.⁸⁶ The board and the CEO of Connexus wrote in a public letter that they believed the deal was sacrificing a significant opportunity for Great River to reduce its carbon emissions and to lower the cost of wholesale power for members.⁸⁷ The board and CEO did not mince words, stating “the decision and approach to sell Coal Creek Station and related transactions have neither fulfilled the savings Connexus expected for its members nor reduced greenhouse gases by enabling the continued operations of that plant.”

Whether boards of other distribution co-ops in Minnesota shared their views but deferred to the “technical” choice of Great River’s management is unknown. But the plan reflects a reversal of what should be the chain of accountability in a cooperative of cooperatives such as Great River. Instead of soliciting members’ input and views, Great River acceded to the demands of officials and residents in a neighboring state and directed its members to ratify this major reversal.

In addition to top-down governance in practice, the power contracts between generation and transmission co-ops thwart democracy in distribution co-ops. Most G&Ts have required distribution co-op members to enter long-term “requirements” contracts to purchase power. Under these contracts, distribution co-ops must purchase most or all their power needs from the G&T. Commonly, distribution co-ops must purchase at least 95% of their power from the G&T.⁸⁸ These contracts have terms that are decades long, with some contracts lasting for 50 years or more.⁸⁹

Due to requirements contracts with G&T, many distribution co-ops do not have control over a fundamental question for any power company—how and where to obtain power and on what terms? Under requirements contracts, distribution co-ops have little or no room to purchase power from alternative sources that offer lower rates or produce less greenhouse gas emissions, develop community power projects, or support rooftop solar. The creation of G&Ts freed distribution co-ops from dependence on investor-owned utilities but replaced it with a subordination to a large entity that they formally control but effectively do not.

The requirements contracts have triggered conflict and legal struggle between the G&Ts and distribution co-ops. With the growing concerns about climate change and the increased availability of low-cost renewable power, many distribution co-ops have sought to escape their restrictive contracts with G&Ts. In general, G&Ts have resisted modifications to their power contracts, arguing that requirements contracts provide the revenue stream needed to service G&T

⁸⁶ Dan Gearino, “Despite One Big Dissent, Minnesota Utilities Approve of Coal Plant Sale. But Obstacles Remain,” *Inside Climate News*, August 3, 2021, <https://insideclimatenews.org/news/03082021/coal-creek-plant-north-dakota-minnesota-utilities-approval/>.

⁸⁷ Fred Bator and Greg Ridderbusch to Connexus Members, July 30, 2021, <https://www.connexusenergy.com/blog/2021/connexus-energy-board-votes-on-coal-creek-station/>.

⁸⁸ John Farrell, Matt Grimley and Nick Stumo-Langer, Institute for Local Self-Reliance Re-Member-ing the Cooperative Way 6-7 (2016), https://ilsr.org/wp-content/uploads/2016/03/Report_Remembering-the-Electric-Cooperative.pdf.

⁸⁹ Gabriel Chan, Stephanie Lenhart, Lindsey Forsberg, Matthew Grimley and Elizabeth Wilson, Barriers and Opportunities for Distributed Energy Resources in Minnesota’s Municipal Utilities and Electric Cooperatives 29 (2019), https://weown.it/sites/default/files/story_resource/files/DERs%2Bin%2BMN%2BMunis%2Band%2BCo-ops%2B%28Full%2BReport%2B-%2Bfor%2Bweb%29.pdf.

debt obligations to the REA and other lenders.⁹⁰ Before federal regulators and in court, they have argued that termination of contracts triggers the payment of large damages and penalties.

As a means of freeing themselves from requirements contracts, some distribution co-ops exited their G&Ts entirely through administrative and judicial litigation. For instance, Delta Montrose Electric Cooperative in Colorado and Kit Carson Electric Cooperative in New Mexico left their G&T, Tri-State Electric. They paid exit fees and won the freedom to select their provider and source of wholesale electricity.⁹¹ In both instances, the distribution co-ops wanted to reduce their wholesale power costs and increase their purchase of renewable electricity. Their requirements contracts foreclosed these aims.

REA's contribution to impaired cooperative democracy

The inconsistent democracy in electric cooperatives is, in part, a product of the REA's decisions, beginning in the 1930s. Congress created the REA to serve principally as a public lending institution to support rural electrification. Because electric co-ops showed themselves to be the most promising path to universal electric service in the countryside, the REA soon became a technical advisor to rural residents seeking to form co-ops and construct distribution systems. The REA provided a wide range of assistance to new and prospective cooperatives, including legal help. At the time, many states had general incorporation statutes for cooperative enterprises, but no law tailored for electric cooperatives owned and governed by their customer-members. The REA drafted a model Rural Electrification Act that legislatures in 30 states ultimately adopted, in full or in part, through legislation.⁹²

While serving the immediate purpose of supporting the creation of rural electric cooperatives, the REA's model law failed to codify democratic governance. The model law stands out for its brevity and sparseness. With its concision, the law has relatively little to say about democratic governance of co-ops. It granted boards discretion over procedures on meetings, elections, and voting in their by-laws.

Consider the Texas law on Electric Cooperative Corporations, which was adopted from the model Rural Electric Cooperative Act published by the REA. The law reads, "An electric cooperative shall hold an annual meeting of its members at the time provided in the bylaws."⁹³ But the law qualifies this with "[f]ailure to hold the annual meeting at the designate time does

⁹⁰ Basin Electric Power Cooperative, Resolutions Adopted by the Members of Basin Electric Power Cooperative 6-7, November 10, 2021, https://www.basinelectric.com/_files/pdf/Bylaws-and-Resolutions/2021-BEPC-Resolutions--FINAL.PDF.

⁹¹ "Kit Carson Electric Completes Split from Tri-State," *Tao News*, September 1, 2022, https://www.santafenewmexican.com/news/local_news/kit-carson-electric-completes-split-from-tri-state/article_d5aa2bbe-2a31-11ed-94ca-fbe7eb9134fb.html; Judith Kohler, "Tri-State, Delta Montrose Cooperative Agree to End Contract in \$62.5 million Deal," *Denver Post*, April 17, 2020, <https://www.denverpost.com/2020/04/17/tri-state-to-end-contract-with-cooperative/>.

⁹² Tyrus H. Thompson, *Comply with Electric Cooperative State Statutes 2* (2017), https://portal.nrucfc.coop/content/dam/cfc_assets/public_tier/Public%20Images/meetings/iac2017/Complying_Electric_Cooperative_State_Statutes.pdf.

⁹³ Utilities Code: 4A, Ch. 161, § 161.067(b), <https://statutes.capitol.texas.gov/Docs/UT/htm/UT.161.htm>.

not result in forfeiture or dissolution of the cooperative.”⁹⁴ On electing board members, the law states “the directors shall be elected by the members at each annual meeting or as otherwise provided by the bylaws.”⁹⁵

The law gives co-op boards extraordinarily latitude not to follow the bare minimum for democratic control. As a result, co-op incorporators could make important decisions on governance in their by-laws and, for instance, know that even not holding annual meetings or elections would not run afoul of the law governing them. Further, the law permits proxy voting and allows for quorum requirements for meetings.

The model law did not mandate or even encourage undemocratic governance. What it instead did was grant individual co-op incorporators and boards autonomy to decide how democratically controlled they would be. Some co-ops instituted democratic governance in their by-laws and have been effectively controlled by their communities since their founding.

The many silences of the model law gave license for co-ops *not* to follow best practices on community governance. Incorporators and boards of co-ops could draft by-laws that insulated board members and management from public accountability. Or more likely, they could draft by-laws that were silent on key questions such as when and where annual meetings would be held, whether annual meetings required a quorum, whether proxy voting was permitted, how members could run for board positions, and whether members could attend board meetings and offer their input on co-op operations and strategy. Further, boards could set up nominations committees to control ballot access and prevent candidates they opposed from appearing on the ballot. Many co-ops have set up nominations committees whereby boards or persons selected by boards decide who will appear on the board election ballot. The REA model law did not require proxy voting or the creation of nominations committees but it did permit them.

In the wake of the Tri-County Electric Cooperative’s member revolt, the South Carolina legislature recognized that defective law was a cause of misgovernance. It amended the state’s Rural Electric Cooperative Act and mandated greater transparency and public accountability in cooperative governance. The new law, among other provisions, required disclosure of board member compensation and advance public notice of board meetings, permitted early voting, and prohibited proxy voting.⁹⁶

The REA also thwarted co-op democracy through its policies for lending for generation and transmission projects. Under its organic statute, the REA could only extend credit to rural electrification projects that it concluded would be self-liquidating. The REA could fund distribution or generation and transmission co-ops that would generate sufficient revenue to repay the loan on its original terms. In contrast to its approach to the PWA, Congress prohibited the REA from awarding grants to rural electrification projects.

In effect, Congress structured the REA to serve as a conservative banking agency, but with a special mandate to electrify rural America. For co-ops and other borrowers, the need to

⁹⁴ Ibid.

⁹⁵ Utilities Code: 4A, Ch. 161, § 161.072(a), <https://statutes.capitol.texas.gov/Docs/UT/htm/UT.161.htm>.

⁹⁶ S.C. Code Ann. § 33-49-420; S.C. Code Ann. § 33-49-615; S.C. Code Ann. § 33-49-430

service debt, with little or no latitude from the REA, restricted their autonomy to set rates, which had to yield enough revenue to repay the loan, and to decide where to expand service, which had to yield positive incremental revenue.

In the early years, debt finance did not significantly impinge cooperative formation and operations. To be sure, some projects did struggle to gain financing because they did not have sufficient customers per mile of distribution line. And others could not demonstrate enough anticipated power usage for their system. Yet, rural electrification happened quickly, despite a global conflict in which the United States actively participated from 1941 to 1945. Rural electrification increased from one in ten in 1935 to more than nine in ten in 1953. Advance payment on REA loans was far more common delinquency and default on loans.

In lending to finance generation and transmission projects, the REA followed a particularly conservative approach to its mandate to fund only self-liquidated projects. For the REA, G&T borrowers needed to sell enough electricity and produce enough revenue to repay their loans. To promote repayment, the REA required G&T borrowers to enter requirements contracts with their distribution customers. Under the REA's conditions, G&T co-ops required borrowers to purchase most or all of their power needs from the G&T.⁹⁷ As noted earlier, requirements contracts typically meant that a distribution co-op had to purchase 95% or more of its power needs from the G&T in which it was a member. For the REA, this policy ensured that generation and transmission co-ops would sell enough power to repay their loans as contractually obliged. For the REA, requirements contracts served as effective security on the loans.

Requirements contracts foreclose democratic control over power supply questions at distribution cooperatives. For distribution co-ops in a generation and transmission co-op, they lost the right to decide where and from whom to purchase power and on what terms or whether to generate a portion of their own requirements. For example, if member-owners and a co-op board concerned about climate change wanted to increase the purchase of zero-carbon power and reduce reliance on polluting, high-cost coal-generated power, a distribution co-op bound by an all-requirements contract with its generation and transmission contract would be powerless to make change. The board and management could only do so by breaking its contract and subjecting the co-op to potentially large legal damages. The REA locked distribution cooperatives into their G&T and deprived them of control over a question of fundamental importance to any power company.

The mixed democracy of municipal utilities and other public agencies

Municipal and other public agencies serve more than 2,000 communities in the United States. The Los Angeles Department of Water & Power, a municipally owned utility that is the largest in the country by sales of electricity serves more than 1.4 million customers City of Los

⁹⁷ Rural Electrification Administration, Bulletin 111-1; *Alabama Power Co. v. Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir. 1968).

Angeles.⁹⁸ On the other end, hundreds of small communities with populations of less than 1,000, heavily concentrated in the Midwest and South, have publicly owned electric companies too.⁹⁹ For instance, the town of Greensburg, Kansas (population 1,400 in 2016) has a publicly owned electric utility.¹⁰⁰ The performance and public accountability of these public utilities varies widely. Some are models of community governance and have become a source of pride for residents. Others have been plagued by weak accountability and corruption.

The Chattanooga EPB (formerly Electric Power Board) is arguably the most famous municipal utility in the country. It did not achieve this standing solely through its electric service. The EPB received international acclaim in 2010 for becoming one of the first entities (private or public) anywhere in the world to provide 1 gigabyte per second broadband service.¹⁰¹ For Chattanooga, the availability of high-speed, fairly priced broadband has helped draw high-tech companies and entrepreneurs to the city.¹⁰² The threat of EPB and other municipal utilities entering the broadband market inspired AT&T, Comcast, and other telecom companies to act: state law restricts municipal utilities from extending their broadband services where they want.¹⁰³ The Federal Communications Commission unsuccessfully tried to preempt such state measures in 2015.¹⁰⁴

The broadband success reflects the innovative, forward-looking approach of the EPB's board and management. It is an incidental and unexpected benefit of the EPB's effort to improve the reliability of its electric service. In the American Recovery and Reinvestment Act of 2009, Congress allocated funds for the Department of Energy to support investments in "smart grids" through grants. The Chattanooga EPB applied for and received a grant for \$111 million to lay fiber optics lines along its distribution rights of way to monitor and identify outages quickly.¹⁰⁵ These fiber-optic lines permitted two-way communications between nodes and line crews and operational offices.

The EPB management recognized that its fiber-optic network could have another important purpose. It could form the nucleus of a broadband network. The fiber optic lines had

⁹⁸ American Public Power Association, 2022 Public Power Statistical Report 14-15 (2022), <https://www.publicpower.org/system/files/documents/2022%20Public%20Power%20Statistical%20Report.pdf>.

⁹⁹ "Community Power Map," Institute for Local Self-Reliance, accessed October 24, 2022, <https://ilsr.org/community-power-map/>.

¹⁰⁰ American Public Power Association, Public Power for Your Community: Local control. Local priorities. A stronger local economy 15 (2016), https://www.publicpower.org/system/files/documents/municipalization-public_power_for_your_community.pdf.

¹⁰¹ Steve Lohr, "Fastest Net Service in U.S. Coming to Chattanooga," *New York Times*, September 10, 2010, <https://www.nytimes.com/2010/09/13/technology/13broadband.html>.

¹⁰² Dominic Rushe, "Chattanooga's Gig: How One City's Super-Fast Internet Is Driving a Tech Boom," *Guardian*, August 30, 2014, <https://www.theguardian.com/world/2014/aug/30/chattanooga-gig-high-speed-internet-tech-boom>.

¹⁰³ Karl Bode, "Tennessee Gives AT&T, Comcast Millions in New Taxpayer Subsidies, Yet Banned a City-Owned ISP From Expanding Broadband Without Taxpayer Aid," *Techdirt*, April 13, 2017, <https://www.techdirt.com/2017/04/13/tennessee-gives-att-comcast-millions-new-taxpayer-subsidies-yet-banned-city-owned-isp-expanding-broadband-without-taxpayer-aid/>.

¹⁰⁴ *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016).

¹⁰⁵ Andy Berke and Jonathan Gruber, "The Infrastructure Success Story in Chattanooga," *The American Prospect*, June 17, 2021, <https://prospect.org/infrastructure/building-back-america/infrastructure-success-story-in-chattanooga/>.

excess capacity, more than what the EPB needed for grid monitoring and reliability purposes. To put this infrastructure use, the EPB extended last-mile fiber connections to residences and commercial establishments using its right-of-way for power lines. What had been envisioned as an important, but unglamorous, grid reliability project had laid the basis for the fastest internet service in the country.

On the power side, the EPB has attempted to increase its use of solar and other zero-carbon. In partnership with the TVA, it has established community solar projects that feature a cluster of panels and serve one or more neighborhoods in Chattanooga.¹⁰⁶ The board and managers have sought to expand their generation and purchase of zero-carbon power. They, however, face an important legal obstacle. The EPB purchases the bulk of its electricity from the TVA. Like G&T co-ops, the TVA restricts how much non-TVA power its customers can generate or purchase from other sources. Until recently it did not permit any self-generation or third-party procurement: in 2020, TVA, as a concession, raised the permissible amount of self-generation power to 5 percent of customers' total needs.¹⁰⁷

The Sacramento Municipal Utility District has served the City of Sacramento since the 1946 and serves as a model for democratic governance. A seven-member board, with staggered four-year terms, governs SMUD, with each member representing a district in SMUD's service territory.¹⁰⁸ Residents of SMUD's service territory vote for at least three SMUD board members, along with candidates for federal, state, and local offices, on California's election day in November.

In the late 1980s, SMUD made international news when, for the first time anywhere in the world, a nuclear power project was canceled by a popular vote. Although the board sought to keep the Rancho Seco nuclear power plant open, community organizing overcame board resistance and forced the closure of the plant in a 1989 referendum. Critically, the vote to end power production at Rancho Seco and ultimately decommission the facility was motivated principally by concerns about the high costs and poor operational performance of the plant, rather than worries about its safety.¹⁰⁹

SMUD has set ambitious climate change targets. In 2022, it announced a plan to fully phase out reliance on fossil fuel generated electricity by 2030.¹¹⁰ The report offered a detail path on how SMUD will use a combination of zero-carbon energy, conservation, and efficiency to

¹⁰⁶ Patrick Mueller, "EPB's 'Solar Share' Brings Renewable Energy to Chattanooga," *News Channel 9 ABC*, July 11, 2017, <https://newschannel9.com/news/local/epbs-solar-share-brings-renewable-energy-to-chattanooga>.

¹⁰⁷ Dave Flessner, "TVA Gives Distributors More Flexibility to Generate Their Own Power," *Chattanooga Times Free Press*, June 22, 2020, <https://www.timesfreepress.com/news/2020/jun/22/tva-flexibility/>.

¹⁰⁸ "Our Board of Directors," SMUD, access October 24, 2022, <https://www.smud.org/en/Corporate/About-us/Company-Information/Board-of-Directors>.

¹⁰⁹ Mila Jasper, "30 Years Ago, Voters Forced Shutdown of Rancho Seco Nuclear Plant in Sacramento County," *Sacramento Bee*, June 13, 2019.

¹¹⁰ Michael McGough, "SMUD Announces Zero-Carbon Plan, with Goal of Retiring 2 Gas Power Plants, Retooling Others," *Sacramento Bee*, April 29, 2021.

reach a 100% carbon-free power supply. The aim is significantly more aggressive than the state’s goal of a zero-carbon power sector by 2045.¹¹¹

Nevertheless, SMUD’s climate change mitigation plans have not been universally hailed and faced resistance from some community members. In 2018, SMUD reduced the rate that would be paid to new owners of rooftop solar panels for surplus power they sold to the utility.¹¹² The board and management of SMUD concluded that the lower rate reflected the value of distributed solar energy and limited the cross-subsidization of rooftop solar panel owners, a generally affluent group, by SMUD customers who did not have solar panels on their roofs.¹¹³ This modification of rates, however, triggered strong opposition from homeowners with rooftop solar panels.¹¹⁴ They believed that SMUD was following the approach of many investor-owned utilities and reduced the rate on surplus power as a way to discourage homeowners from installing solar panels on their roofs. This action by SMUD triggered protests by climate justice advocates and owners of rooftop solar panels.¹¹⁵

The Omaha Public Power District (OPPD) serves the Omaha, Nebraska metropolitan area and adjacent rural areas. Like SMUD, OPPD has an elected board. It is comprised of eight members each representing a subdivision of OPPD’s service territory.¹¹⁶ For larger public power districts such as OPPD, a 2013 amendment to Nebraska’s public power laws required the creation of districts for board seats and mandated the elimination of at-large seats.¹¹⁷ For OPPD, this meant members that served portions of the Omaha metropolitan areas, instead of the entire area. Creating smaller constituencies of 100,000 instead of 500,000 residents opened possibilities for more candidates to run for board positions and allowed challengers with limited means to mount effective and even winning campaigns.

While board elections are the primary means of customer-owner control of OPPD, it is not the only one. Board meetings are open to public attendance and participation. Customer-owners can comment on the long-term aims, called strategic directives, of OPPD. They can also write directly to board directors and top executives with their concerns and queries and can expect a member from them or their staff.

In late 2019, OPPD’s board adopted resolution to achieve net-zero carbon for the system by 2050. In amending its strategic directive 7 on environmental stewardship, the board “recognize[d] the scientific consensus that climate change is occurring and that greenhouse gas

¹¹¹ Kavya Balaraman, “SMUD Aims for Carbon Neutrality by 2030, in New Climate Emergency Declaration,” *Utility Dive*, July 20, 2020, <https://www.utilitydive.com/news/smud-aims-for-carbon-neutrality-by-2030-in-new-climate-emergency-declaratio/581883/>.

¹¹² Dale Kasler, “SMUD Reduces Subsidy for Rooftop Solar. What That Means for Rates in Sacramento Region,” *Sacramento Bee*, September 17, 2021.

¹¹³ *Ibid.*

¹¹⁴ Melanie Townsend and Jordan Radach, “Activists, Customers Protest SMUD Ahead of Vote for New Solar Rates,” *Fox 40*, September 16, 2021, <https://fox40.com/news/local-news/activists-customers-protest-smud-ahead-of-vote-for-new-solar-rates/>.

¹¹⁵ *Ibid.*

¹¹⁶ “Board of Directors,” OPPD, accessed October 24, 2022, <https://www.oppd.com/about/leadership/board-of-directors/>.

¹¹⁷ OPPD, Board Policies 46, <https://www.oppd.com/media/317205/oppd-board-policy-binder.pdf>.

emissions, including carbon dioxide, from human activity contribute to climate change impacts.”¹¹⁸ The board of OPPD is now evaluating its paths to reaching its 2050 aim. OPPD published a study called Pathways to Decarbonization that laid out four options for eliminating the utility’s reliance on fossil fuel-generated electricity. One option is an aggressive decarbonization that aims for zero carbon by 2035. OPPD faces the challenges of decarbonizing its power sources while meeting growing demand (notably from Google data centers in its service territory)¹¹⁹, maintaining system reliability and resiliency, and confronting a state political environment that is conservative and skeptical of anthropogenic climate change. In this challenging environment, OPPD has taken important steps toward decarbonization and is in the process of developing the means of reaching this aim.

The Los Angeles Department of Water and Power (LADWP) is the nation’s largest municipally owned utility. It is a part of the government of the City of Los Angeles, serves 4 million residents in the city and surrounding areas in Los Angeles County, and has 10,000 staff.¹²⁰ The utility is governed by a five-member board of commissioners appointed by the mayor of Los Angeles and confirmed by the City Council.¹²¹ The board holds bimonthly public meetings to discuss strategy and operations of the utility. The board’s decisions are subject to ratification by the council. For instance, rate adjustments proposed by the board must be approved by the council before they can take effect.

The LADWP has made aggressive pledges on climate change and improved diversity at its highest levels. After planning to decarbonize fully by 2045, the utility moved the target ahead by 10 years after commissioning a report, in partnership with the National Renewable Energy Laboratory, on options for ending its reliance on fossil fuel power.¹²² The city council adopted a resolution committing to full decarbonization by 2035, through a mix of utility scale and distributed zero-carbon generation resources. And the LADWP has been a leader in diversity at

¹¹⁸ “Board Policies,” OPPD Omaha Public Power District, accessed on December 12, 2022, <https://www.oppd.com/media/317205/oppd-board-policy-binder.pdf>: 46.

¹¹⁹ Paul Ciampoli, “Google to Take Advantage of OPPD Rate for New Neb. Data Center,” *American Public Power Association*, October 7, 2019, <https://www.publicpower.org/periodical/article/google-take-advantage-oppd-rate-new-neb-data-center>.

¹²⁰ “Facts & Figures,” LADWP, accessed October 24, 2022, https://www.ladwp.com/ladwp/faces/ladwp/aboutus/a-power/a-p-factandfigures?_afLoop=912022902304715&_afWindowMode=0&_afWindowId=1dppijim6_1#%40%3F_afWindowId%3D1dppijim6_1%26_afLoop%3D912022902304715%26_afWindowMode%3D0%26_adf.ctrl-state%3D1dppijim6_17.

¹²¹ “Who We Are,” LADWP, accessed October 24, 2022, https://www.ladwp.com/ladwp/faces/ladwp/aboutus/a-whowere?_afLoop=912335477345017&_afWindowMode=0&_afWindowId=1dppijim6_14#%40%3F_afWindowId%3D1dppijim6_14%26_afLoop%3D912335477345017%26_afWindowMode%3D0%26_adf.ctrl-state%3D1dppijim6_30.

¹²² Margaret Shuttleworth, “Council Votes for 100% Renewable LADWP Energy by 2035, a Decade Sooner than Planned,” *Los Angeles Daily News*, September 1, 2021, <https://www.dailynews.com/2021/09/01/la-votes-for-100-renewable-energy-by-2035-a-decade-sooner-than-planned/>; LADWP and NREL, LA100: The Los Angeles 100% Renewable Energy Study: Executive Summary (2021), <https://www.nrel.gov/docs/fy21osti/79444-ES.pdf>.

the upper echelons of management. Since 2020, the board of commissioners has been composed entirely of women and led by a Black president.¹²³

While it can point to certain accomplishments, the LADWP has experienced governance problems over the past decades. Working with PricewaterhouseCoopers, the LADWP instituted a new billing system in in 2013. What was intended to be a more efficient and accurate billing operation mistakenly overcharged many customers. Customers of the LADWP were likely overcharged tens of millions of dollars collectively.¹²⁴ For instance, one retired schoolteacher who lives on her own in an apartment received a water of \$16,000 and suffered a hypertensive crisis that forced her to seek emergency care.¹²⁵ Such exorbitant bills were common for a time.

The subsequent decisions of the LADWP further compounded the billing scandal. Instead of honestly admitting error and fairly resolving legal claims, the management allegedly entered a collusive settlement to limit the utility's legal liability. Paul Paradis, a lawyer and businessman leading the LADWP's lawsuit against PricewaterhouseCoopers for the defective billing system, also helped represent a customer class action against the city for overcharges. With Paradis' involvement, the consumer class action was settled on terms that were highly favorable to the LADWP and unfavorable to consumers, according to advocacy group Consumer Watchdog.¹²⁶

But that was not the full extent of LADWP's entanglement with Paradis. David Wright, the general manager of the LADWP from 2016 to 2019, took bribes for Paradis in exchange for lobbying an association of Southern California public utilities to award a no-bid services contract to a firm run by Paradis. The corruption and the coverup invited a federal prosecution, with Wright pleading guilty and receiving a six-year prison sentence.¹²⁷ Leading city officials, including City Attorney Mike Feuer, were accused of covering up or tolerating the corruption at the city's public utility.¹²⁸

The LADWP's governance structure arguably frustrates public accountability. It functions as a hybrid of independent municipal authority and unit of the City of Los Angeles. Decision-making power is split across the appointed board of commissioners and the city council. The mayoral appointed board is the governing body of LADWP legally but has limited authority. It cannot unilaterally make major changes such as raise rates and initiate investments

¹²³ "History Made as Mia Lehrer Is Confirmed as Newest Member of LA Board of Water & Power Commissioners," LADWP News, October 23, 2020, <https://www.ladwpnews.com/history-made-as-mia-lehrer-is-confirmed-as-newest-member-of-la-board-of-water-power-commissioners/>; Cynthia McClain-Hill Elected President of LA Board of Water and Power Commissioners, Susan Reyes Elected Vice President, LADWP News, July 28, 2020, <https://www.ladwpnews.com/cynthia-mcclain-hill-elected-president-of-la-board-of-water-and-power-commissioners-susana-reyes-elected-vice-president/>.

¹²⁴ Emily Alpert Reyes and Soumya Karlamangla, "Overcharged DWP Customers Would Get Tens of Millions Back Under Settlement," *Los Angeles Times*, August 17, 2015.

¹²⁵ "RRR, the Rotten Ratepayer Ripoff," October 20, 2016, Consumer Watchdog, 1:08. https://www.youtube.com/watch?v=cSEK0t_xJYg.

¹²⁶ Justin Kloczko, "Still in the Dark about the DWP Scandal? Here's a Primer," *Los Angeles Magazine*, September 23, 2021, <https://www.lamag.com/citythinkblog/dwp-scandal-primer/>.

¹²⁷ "Former Head of LADWP Agrees to Plead Guilty to Bribery Charge," United States Department of Justice, December 6, 2012.

¹²⁸ Dakota Smith and Richard Winton, "Attorney's Ethics Complaint Seeks Investigation of Feuer, Others in DWP Case," *Los Angeles Times*, January 21, 2022.

without city council approval. The LADWP transfers about 8 percent of its annual revenue to the City of Los Angeles to pay for public services and to reduce the city's debt obligations.¹²⁹ This intermingling of responsibilities and functions and division of authority impede Angelenos from identifying who is responsible for governance of the utility.

The appointed status of the board impedes direct democratic control of the LADWP. Democratic control occurs indirectly through elections for mayor and city council. The mayor-appointed board arguably means less representation for poor and communities of color at the LADWP. In general, these communities do not have as much clout with the mayor as wealthier and whiter communities do.

The JEA, which serves Jacksonville, Florida, stands at the other end of the spectrum from institutions like SMUD and OPPD. After he was elected in 2015, Jacksonville Mayor Lenny Curry replaced the entire board of the JEA and appointed, among others, Aaron Zahn. In 2018, the JEA board appointed Zahn, an acquaintance of Curry with no experience in the power sector and a new arrival in Jacksonville, to lead the JEA as interim and subsequently permanent chief executive officer.¹³⁰ Zahn had previously worked at investment banks in Charlotte and New York and brought a private financier's outlook to the position.

Zahn moved to lay the groundwork for privatizing JEA. He sought to trim the staff and warned the utility faced a "death spiral" due to declining demand for power.¹³¹ He aimed to reorient the publicly owned the JEA as a profit-minded entity and make it an attractive target for investor-owned utilities and other prospective purchasers, all while denying this plan in public.¹³² Due to the expected public backlash to privatizing a venerable city institution, Zahn and his fellow executives crafted the plan largely in secret and tried to skirt open records laws that apply to JEA. To back up Zahn, Mayor Curry lied and denied that he had any plan or desire to sell JEA, even as allies and friends noted his desire to privatize the utility as an important political goal.¹³³

Zahn painted a dire picture if JEA remained under public control. He warned the utility faced a "death spiral" due to declining demand for power.¹³⁴ Zahn stressed the need for operational efficiency and staff reductions (both of which would be easier under private control) to ensure the utility would remain solvent in the face of projected load reductions—a claim

¹²⁹ Susan Shelley, "Another Day, Another Tax or Fee Hike in California," *OC Register*, July 28, 2018, <https://www.ocregister.com/2018/07/28/another-day-another-tax-or-fee-hike-in-california/>.

¹³⁰ City of Jacksonville: Office of the City Council, Report of the Special Investigatory Committee on JEA Matters (2020), 14, 16, 24.

¹³¹ Nate Monroe, Christopher Hong, David Bauerlein, and Mark Woods, "Money & Power: The Secret Origins – and Public Collapse – of the Campaign to Privatize Jacksonville Public Utility JEA," *Florida Times-Union*, July 24, 2020.

¹³² *Ibid.*

¹³³ "Timeline: The Failed Attempt to Privatize JEA and the Legal Trouble That Followed," *Florida Times-Union*, March 8, 2022, <https://www.jacksonville.com/story/news/local/2022/03/08/attempt-sell-jacksonville-jea-unfolded-federal-indictments-timeline/6982977001/>.

¹³⁴ Monroe, Hong, Bauerlein, and Woods, "Money & Power."

contradicted by what JEA said internally and to regulators and wildly out of line with the forecasts for all other utilities in the State of Florida.¹³⁵

Zahn's undoing was an audacious bonus scheme he and JEA executives crafted. Under this plan, Zahn and other top executives would receive huge payouts in the event of a privatization. The leadership of JEA had committed themselves to privatization and stood to receive millions of dollars collectively if it were sold.¹³⁶ The board's approval of the bonus plan drew the interest of the Jacksonville City Council. The Council launched an investigation and exposed the privatization plan that had been in works for two years—and the way in which Zahn and others stood to profit. The Council's action quickly forced Zahn to cancel the bonus plan, which one council member called "legal theft,"¹³⁷ and ultimately forced the termination of the privatization plan. The JEA board then fired Zahn and CFO Ryan Wannamacher. The U.S. attorney for Jacksonville subsequently indicted Zahn and Wannamacher for fraud.¹³⁸

As with electric cooperatives, the governance of municipal and other public utilities is, in part, a function of law. In authorizing these utilities, states have faced choices over who is to serve as the managing board of these utilities and how board members are to be selected. In many cities, members of the local governing council, elected by residents, serve as the board of the municipal utility.¹³⁹ In other localities, a separate board manages public utilities. Some boards are appointed by the mayor or city council, while other boards are elected by residents.¹⁴⁰

The type of electric board and selection of its members affect governance. With elected boards, community members have a more direct method of holding boards accountable by replacing incumbents in elections. Board members who are appointed face somewhat less popular accountability, though they do have to answer to the mayor or other local elected officials. Some public utilities with appointed boards, such as Chattanooga's EPB, have served their communities ably and diligently for decades, while others, such as the JEA, operated in secret and worked against the interest of their communities.

The law governing the public power districts in Nebraska codifies some democratic best practices. Public power district elections are governed by the same chapter (32) of the Nebraska Revised Statute that governs elections to other public offices. The public power district law mandates principles such as one member, one vote, requires that board primary and general elections be held at the same time and appear on the same nonpartisan ballot as other public offices, and establishes terms of no longer than six years.¹⁴¹ Board elections for public power

¹³⁵ Nate Monroe, "Even Potential JEA Buyers Couldn't Make Sense of Utility's Talking Points," *Florida Times-Union*, January 22, 2020.

¹³⁶ Christopher Hong, "JEA Spent \$10 Million on Its Controversial Efforts to Privatize. Now, the City-Owned Utility Is Off the Market," *Florida Times-Union*, December 24, 2019, <https://www.jacksonville.com/story/news/politics/county/2019/12/24/jea-spent-10-million-on-its-controversial-efforts-to-privatize-now-city-owned-utility-is-off-market/1103290007/>.

¹³⁷ City of Jacksonville: Office of the City Council, Report of the Special Investigatory Committee, 84.

¹³⁸ Nate Monroe and David Bauerlein, "Federal Grand Jury Indicts Former JEA Executives on Conspiracy, Wire Fraud," *Florida Times-Union*, March 7, 2022.

¹³⁹ American Public Power Association, Public Power Governance Survey (2021), 1.

¹⁴⁰ *Ibid.*

¹⁴¹ Nebraska Revised Statute 32-512.

districts are subject to oversight by the Secretary of State. The mandatory certification process illustrates the specificity of statutory requirements for elections. Revised Statute 70-611(1) reads:

Not later than January 5 in each even-numbered year, the secretary of the district in districts grossing forty million dollars or more annually shall certify to the Secretary of State on forms prescribed by the Secretary of State the names of the counties in which all registered voters are eligible to vote for public power district candidates and for other counties the names of the election precincts within each county excluding the municipalities in which voters are not eligible to vote on public power district candidates. The secretary shall also certify the number of directors to be elected and the length of terms for which each is to be elected.¹⁴²

Important decisions over elections are established in statute, instead of left to the discretion of public power districts' boards to determine and codify in their bylaws.

The uneven public accountability of federal power projects

Federal projects constitute an important part of the public power sector in the United States and have featured examples of technocracy overriding public desires and concerns. As described in Chapter IV, the construction of large hydroelectric facilities in the South and West involved the inundation of thousands of acres of land on which indigenous people and small farmers resided. Their origins represent technocracy's triumph over public accountability. Thanks to statutory mandates, the operation of federal power projects has been better. The four power marketing authorities, especially the Bonneville Power Administration, are subject to public participation and input on decision-making. In contrast, the TVA still functions as a largely technocratic body in which the board has vast discretion and faces limited and indirect public oversight.

MAP OF FEDERAL POWER MARKETING AUTHORITIES AND TVA

The Southwest Power Administration, Southeast Power Administration, and Western Area Power Administration function the way federal agencies generally do. When revising their rates, they must follow the notice-and-comment procedures and solicit public input. They must publish a proposed rate schedule, accept public comment on the proposed rates, organize hearings for public input, and publish final rates that consider public input. Further, their final rates are subject to review by FERC, which can approve or veto them or remand to the power marketing administration for further study.¹⁴³

Relative to the other federal power marketing administration, the Bonneville Power Administration is subject to even more extensive public participation requirements under the Northwest Power Act. BPA markets power from more than 30 federal and non-federal dams and

¹⁴² Nebraska Revised Statute 70-611.

¹⁴³ U.S. General Accounting Office, Report to the Chairman, Subcommittee on Water and Power, Committee on Resources, House of Representatives, Power Marketing Administrations: Their Ratesetting Practices Compared with Those of Nonfederal Utilities (2000), 16-17.

power projects in the Columbia River Basin and operates the transmission grid that serves much of the Pacific Northwest and portions of neighboring states.¹⁴⁴

The special statutory duties of BPA are a product of the tumult and uncertainty it faced in the 1970s. In 1976, an impending lack of low-cost hydropower led BPA to publish an insufficiency notice, announcing that after 1983 it would not be able to meet the power requirements of preference customers (cooperatives, municipal systems, and public utility districts).¹⁴⁵ Because it could not construct or acquire generation facilities of its own, it entered an ultimately disastrous partnership with public utility districts and cooperatives in Washington State to construct multiple nuclear reactors at Hanford, Washington. Through a contractual arrangement in which BPA subsidized the construction of these plants, the PUDs and co-ops could take advantage of the BPA's funding advantages while formally respecting BPA's lack of statutory power to build generation facilities.¹⁴⁶

To ensure system reliability in the region and public participation in BPA's activities, Congress passed the Pacific Northwest Electric Power Planning and Conservation Act ("Northwest Power Act" for short) in 1980 that required BPA to prioritize conservation measures, granted it authority to acquire generation resources as necessary, and imposed special public participation requirements on it, including by creating the Pacific Northwest Electric Power and Conservation Planning Council.¹⁴⁷

In developing wholesale rate schedules, BPA is required to host public hearings and solicit input from customers and members of the public. Cooperative and public power customers, investor-owned utilities, industrial power users, and members of the public have multiple opportunities to weigh in on BPA's rate schedules. Even as the BPA administrator is vested with broad discretion, they must solicit and consider public input. Their decisions are subject to review by FERC and the United States Court of Appeals for the Ninth Circuit.¹⁴⁸

The Pacific Northwest Electric Power and Conservation Planning Council, composed of members appointed by the governors of Oregon, Washington, Idaho, and Montana, oversees BPA's long-term planning with the aim of ensuring affordable, reliable electric service and protecting fish and wildlife.¹⁴⁹ The Council and its processes address, in part, the historical marginalization of Native Americans in dam construction projects. The Army Corps of Engineers and Bureau of Reclamation disregarded the views and interests of tribes and their members in constructing dams in the mid-twentieth century. They flooded tribal lands and

¹⁴⁴ "Power Services," Bonneville Power Administration, accessed October 25, 2022, <https://www.bpa.gov/energy-and-services/power>; "Transmission Services," Bonneville Power Administration, accessed October 25, 2022, <https://www.bpa.gov/energy-and-services/transmission>.

¹⁴⁵ Robert M. Greening, Jr., "Bonneville Power Administration's Preference Customers Meet the Northwest Power Act," *Environmental Law* 13 (Summer 1983): 815.

¹⁴⁶ Ken Billington, *People, Politics & Public Power* (Seattle: Washington Public Utility Districts' Association, 1988): 266-68.

¹⁴⁷ 16 U.S.C. § 839b.

¹⁴⁸ 16 U.S.C. § 839e.

¹⁴⁹ 16 U.S.C. § 839b(a).

destroyed the salmon fish stocks that had sustained Native communities.¹⁵⁰ Today, the Council is statutorily required to consult Native American tribes of the Pacific Northwest when developing plans to protect fish and wildlife in the region.¹⁵¹ Whether the Bonneville Power Administration is publicly accountable in the way the drafters of the Northwest Power Act intended is debatable: Some scholars have asserted that as a practical matter, the BPA continues to elevate power above conservation of fish.¹⁵²

In its governance, the Tennessee Valley Authority stands in sharp contrast to BPA and embodies strong technocracy. In enacting the TVA Act in 1933, Congress granted vast discretion to the three-member board, subject to conditions such as the preference clause for publicly owned and cooperative utilities. The board faces only limited oversight. The board of directors, expanded to nine part-time members in lieu of three full-time members by a 2004 law,¹⁵³ is nominated by the president and confirmed by the Senate.

The TVA's power program operates largely independent of Congressional and administrative oversight. Since the Bond Revenue Act of 1959, the TVA has had the authority to issue bonds to fund its power operations and only needs to go to Congress periodically to raise its debt ceiling.¹⁵⁴ Unlike the power marketing agencies, the TVA is not subject to the Administrative Procedure Act nor a special statute such as the Northwest Power Act. Accordingly, its ratemaking decisions are free from administrative and judicial oversight. To the extent it engages members of the public through for instance open meetings, the TVA board does so on a discretionary, rather than a mandatory, basis.

As a result of this structure, the TVA's approach toward public engagement has been accommodation and co-optation. In its early years, the TVA, which faced strong opposition from the private power industry and conservative politicians, sought to appease and win over powerful interests in the Tennessee Valley. To this end, the TVA, in its agricultural work, closely worked with local Farm Bureaus and Agricultural Extension Services that represented large farmers and local elites.¹⁵⁵ This came at the expense of sharecroppers and tenant farmers who were disproportionately Black.

For much of its history, TVA accommodated rather than rejected Southern racial hierarchies. It followed segregationist hiring and housing policies and practices that defined Southern life at the time. For instance, the model town of Norris, Tennessee was a whites-only community in which Blacks could not live nor even visit for vocational training.¹⁵⁶ In the year

¹⁵⁰ Noah Mikell, "Fighting an Upstream Battle: Fish Recovery in the Federal Columbia River Power System," *Oregon Law Review* 100 (2021): 112-13.

¹⁵¹ 16 U.S.C. § 839b(h)(5).

¹⁵² *National Wildlife Federation v. National Marine Fisheries Service*, 184 F. Supp. 3d 861 (D. Or. 2016).

¹⁵³ 16 U.S.C. § 831a(2)(a).

¹⁵⁴ Erwin C. Hargrove, *Prisoners of Myth: The Leadership of the Tennessee Valley Authority 1933-1990* (Princeton, NJ: Princeton University Press, 1994): 150-52.

¹⁵⁵ Philip Selznick, *TVA and the Grass Roots: A Study of Politics and Organization* (New Orleans, LA: Quid Pro Books, 2011): .

¹⁵⁶ Derek H. Alderman and Robert N. Brown, "When a New Deal Is Actually an Old Deal: The Role of TVA in Engineering a Jim Crow Racialized Landscape," in *Engineering Earth* (Dordrecht: Springer, 2011): 1912.

2000, less than 1 percent of the residents of the town (now a suburb of Knoxville) were Black.¹⁵⁷ While David Lilienthal touted the “grassroots democracy” of the TVA, the institution, in practice, was affirming and reinforcing local racial hierarchies and patterns of exclusion.

In more recent times, the TVA has sought to co-opt its public and cooperative customers and large industrial users of power. The public customers of the TVA formed the Tennessee Valley Public Power Association to discuss rates and other power matters with TVA. In practice, this institution been an instrument of TVA, instead of vice versa. Erwin Hargrove wrote that TVA “blessed the formation of the TVPPA and was glad to receive its help in Washington but only as a cheering section. TVA told the distributors what to do.”¹⁵⁸ Given their purely voluntary nature, these consultations have arguably served more to appease would-be critics and defuse their discontent, rather than constituting good faith engagements.

Apart from its limited public accountability, TVA has impeded public accountability among its cooperative and public wholesale customers. In helping form municipal utilities across the Tennessee River watershed and developing a network of preference customers in the 1930s, the TVA insisted that these utilities have independent boards appointed by mayors and other local officials, instead of controlled by elected city councils or elected power boards.¹⁵⁹ While paying tribute to grassroots democracy, Lilienthal and the TVA board were rejecting one important mechanism for promoting and protecting democratic governance of electric utilities. The TVA feared control of power systems by an elected body would lead to “political entanglements” and, for instance, defeated efforts to place the City of Nashville’s power system under the control of an elected board.¹⁶⁰

TVA has further impaired democratic control of local public and cooperative utilities in its wholesale power contracts. Congress gave TVA the authority to set resale rates of wholesale customers.¹⁶¹ It has exercised this power by mandating resale rates in its wholesale contracts or reviewing and approving retail rates proposed by distributors.¹⁶² Moreover, it has mandated that customers purchase most or all their power needs from the TVA.¹⁶³ Due to TVA’s power, municipal customers, such as the Chattanooga EPB, do not have the autonomy to set their retail rates and very little discretion to obtain lower-cost, cleaner power from non-TVA sources.

The TVA and its system of distributors function as a franchise system. Cooperative and municipal distributors are formally independent from TVA. Through contract, however, TVA dominates the distributors and establishes their price and non-price policies. Functionally, the

¹⁵⁷ Ibid.: 1913.

¹⁵⁸ Hargrove, *Prisoners of Myth*, 193.

¹⁵⁹ McCraw, *TVA and the Power Fight*, 227.

¹⁶⁰ Victor C. Hobday, *Sparks at the Grass Roots: Municipal Distribution of TVA Electricity in Tennessee* (Knoxville, TN: University of Tennessee Press, 1969): 41.

¹⁶¹ McCraw, *TVA and the Power Fight*, 227; Harbeson, “The Power Program of the Tennessee Valley Authority,” 20.

¹⁶² “Schedule of Electric Rules and Regulations,” EPB, accessed on December 13, 2022, https://static.epb.com/media/documents/EPB_Rules_and_Regulations_FINAL_062722.pdf.

¹⁶³ “Fitch Affirms Tennessee Valley Authority’s IDR, Global Power Bonds and Lease Financings,” Fitch Ratings, April 23, 2021, <https://www.fitchratings.com/research/us-public-finance/fitch-affirms-tennessee-valley-authority-idr-glob.al-power-bonds-lease-financings-23-04-2021>

system that David Lilienthal hailed for embodying “grassroots democracy” looks similar to the hierarchical system of fast-food franchising. Just as McDonald’s controls what its franchisees serve and on what terms through contract,¹⁶⁴ TVA dictates the power supply of its cooperative and municipal customers and the terms of resale through the wholesale power contract. TVA controls its distributors—at least key aspects of their operations—even as both maintain formal separation from each other. In the 1960s, a member of a power board said, “We are not a customer of TVA—we are just their lackey.”¹⁶⁵

Despite Lilienthal’s eloquent articulation of democracy at the grassroots, the TVA and its distributors represent an anthesis of this vision. In reality, the TVA has been a top-down institution from its inception. Since the 1950s, it has operated broadly free of federal, as well as local, control. What Victor Hobday wrote in 1969 remains true: “[A] suggestion today that TVA’s power operations have increased citizen’s participation or have encouraged anything resembling a town meeting would evoke laughter anywhere in the Valley.”¹⁶⁶

¹⁶⁴ Brian Callaci, “What Do Franchisees Do? Vertical Restraints as Workplace Fissuring and Labor Discipline Devices,” *Journal of Law and Political Economy* 1, no. 3 (2021): 400.

¹⁶⁵ Hobday, *Sparks at the Grass Roots*, 55.

¹⁶⁶ *Ibid.*: 39-40.