

The Use of P3s to Achieve
Sustainability & Resiliency:
Lessons Learned from the
Renewable Energy World

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June 10, 2015

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Framing the Issue:

- 1) The three different concepts: "P3s" "Sustainability" "Resilience", must be integrated if P3s are to achieve the desired integrating purposes
- 2) Each concept has different meanings or nuances when applied in different circumstances
- 3) Each is subject to combination through organizational and contractual arrangements in different forms to achieve the objectives of the involved parties
- 4) Definitional overlaps of the terms need to be clarified in order to relate the three concepts in relation to each particular fact situation.
- 5) The following discussion of the "P3 Balances" which may exist among them is instructive in that regard.

A. The P3 Balance

- 1) We all share three common objectives
 - A built environment that performs well (“Infrastructure”)
 - A natural environment that is environmentally healthy (“Sustainability”)
 - A civil society that is safe or can recover from physical shocks from natural or (“Resilience”)
- 2) Achieving these three objectives necessarily reflects (or fails to reflect) some balance between governmental power, community involvement and private initiatives. (“Public Private Partnerships” or “P3s”)
 - Therefore: “P3s” are not a single inherently unique organizational structure. Each reflects the striking of a balances between this triad of factors to achieve desired results (Which I will refer to as the “P3 Balance”)

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- 3) The P3 Balance reflects trade-offs in responsibility and authority for provision and/or assumption of risk for scarce resources.
 - Provision of Capital
 - Provision of Skills for Execution of Specific Development and Operation Tasks
 - Authority for Management Integration of Project or Program Development and Satisfactory Community Response to Related Requirements
 - 4) There is an increasing consensus that the current P3 Balance for creating Infrastructure, Sustainability and Resilience through our legal organization (political and contractual) to make these tradeoffs is not working satisfactorily.
 - Infrastructure adequacy is in a net declining and deteriorating mode relative to changing growth requirements.
 - Sustainability is undermined by infrastructure deterioration or failure to preserve the balance of supply of scarce natural resources to requirements.
 - “Resiliency” of Infrastructure whether and Sustainability, particularly when challenged by unanticipated events (physical or manmade) is considered insufficient.

B. P3 Balance Adjustment: Tying Objectives Together to Achieve Sustainability and Resiliency

- 1) Therefore there are an increasing number of suggestions and initiatives to readjust the P3 Balance.
- 2) The suggestions are linked by the fact that they involve the reallocation of authority and responsibility over the scarce capital and operating funds, skill and management resources and societal organization required to deal with all three challenges.
- 3) Consequently, when we speak of P3s for Infrastructure, Sustainability and Resiliency we are not talking about combining Platonic ideals, we are talking about readjusting three interlocking systems for coping with current realities through the most efficient use of resources.

- 4) While this is conceptually recognized, there remains still dragging and pulling the P3 Balance from three differentiable not necessarily wholly compatible directions.
- “Infrastructure P3s” are conceptualized as obtaining private capital; risk assumption and skills provision and management by shifting the procurement away from (A) the public acquisition and service provision model and/or (B) the “public” utility model of the past.
 - “Sustainability P3s” are conceptualized as mechanisms for permitting greater private innovation in response to greater public strictures on the manner of private performance of tasks with public impacts, perhaps by furnishing the private sector with incentives to do so.
 - “Resiliency P3s” are conceptualized as some amalgamation of the two and also (A) as a device to attract private capital to insure or reinforce public or private infrastructure against disruptive events and (B) to enlist multiple levels of governmental entities and their constituent communities in the complementary provision of needed responsive support and adaptation.

C. Lessons Learned in Restriking the P3 Balance.

1. Inevitable tensions result from using the P3 approach: there are significant issues among the parties with respect to e.g. source of capital and operating payments; risk metrics and valuation; quality and quantity metrics of service; cost controls.
2. Additional complications arise when use of P3s is also intended to achieve new public policy goals in one sector, e.g. sustainability, at the expense of the other, e.g. private risk taking in areas such as (A) Renewables sale and purchase; (B) ancillary technology-forcing “distributed energy resource goals (e.g., storage; use of microgrids).
3. The fulcrum for resolution of renewables P3 Balance issues is finance: need for firm cash flow to support all financing requirements for P3s (including those created by policy requirements). Risk allocation is embedded in meeting this need, in areas such as: (A) contract risk sharing; (B) allocation of risk among contracts in affecting project cash flow

(C) Significant rearrangement of (i) manner of procurement by Armed Services and (D) permitted availability of private sector sales incentives, e.g. RINs for biofuels. Risk rebalancing must be explicit not implicit.

- Reliability and sustainability are achievable only through satisfactory contractual trade offs reflecting such risk and reward shifting. Policy statements without firm tailored contracts is pabulum. In effect, P3s for renewable energy are only as viable as the scope, ingenuity, flexibility and financeability made possible by these innovative strategies. This lesson is applicable to all P3s.

D. Conclusions: Achievement of Ongoing P3 Balance

1. Analyze P3 proposals in terms of realistically how the public, public interest interest, private, private credit support (and/or rating agencies) and valuations parties will each perceive the “rights and responsibilities” in the particular case, and the risk/reward tolerance of the participating parties.
2. This analysis can (and should) take into consideration the interdependence between an infrastructure facility and the surrounding sustainability and resiliency circumstances it is supposed to address.
3. Always recognize that legal structure and contracts must be to facilitate the ability to finance whatever is to be achieved is key to real world achievement. Therefore P3 Balance must tilt to embrace this goal.
4. The key complication in the process that the assessments of both private risk managers, government procurement specialists and must in practice should be roughly explicitly harmonized so that a P3 is to achieve the results it has set up to achieve. If at all possible, this should be done before rather than after implementation efforts are undertaken.
5. In sum, we are dealing with institutional change not the patch- up of particular perceived infrastructure, sustainability or reliability problems.

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In his 40 years of legal and public policy practice, Roger Feldman has been the Chair of the Project Finance Groups of three major international law firms; been a Founder and Chairman of The National Council for Public-Private Partnerships; been a Director of the American Council on Renewable Energy; and has Chaired American Bar Association Committees on Government and Private Section Innovations; Renewable Alternative and Distributed Energy Resources; and Energy and Infrastructure Siting and Reliability. He has been selected by his peers as one of the Best Lawyers in America for the past decade.

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