

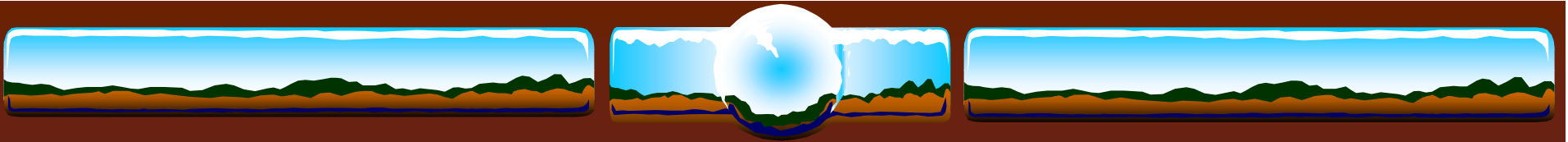
A Cooperative Federalist Model
Applied to Today's Energy
Markets
Gas Industry Standards Board

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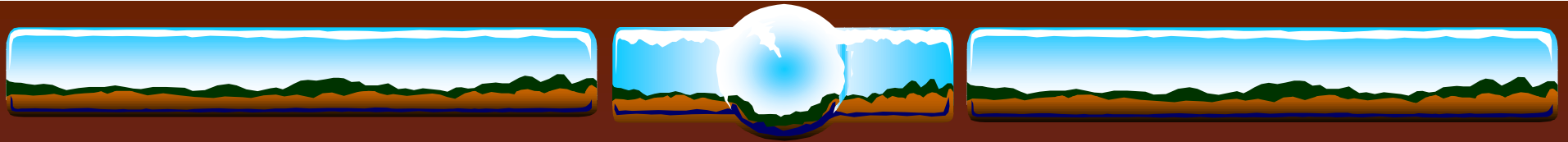
Overview of presentation

- ❖ Changing regulatory roles in a changing environment.
- ❖ “Border issues” in changing markets.
- ❖ A state-federal framework - overview.
- ❖ Group discussion – Strengths and weaknesses of various approaches to federalism, and policy options – regional wholesale markets.



Changing regulatory roles – regulatory restructuring

- Forces driving changes in utility policy/economic regulation.
 - Technology.
 - Economics.
 - New decision making models.
 - Policy and political views.
 - Declining consent of the regulated.
- New regulatory models.
 - Regulation by information.
 - Regulation by negotiation.
 - “Cop on the beat.”
 - From Dave Wirick, NRRI.



Changing regulatory roles – regulatory restructuring

- Retargeting policy resources –
 - Less traditional retail rate regulation.
 - More wholesale terms and enforcement.
 - Public benefits/Universal service
 - Technology and ED/CD
 - Consumer protection.
 - Quality of service concerns recurring – but what approaches will work?
- Rowe, “Substance Plus Process,” 71 University of Colorado Law Review (Fall 2000).

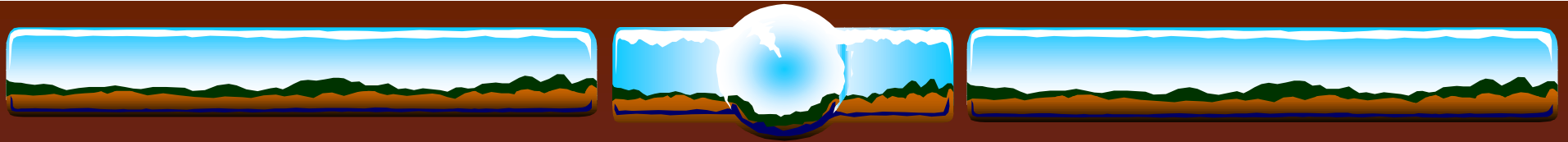


Commission Transformation Program

- ❖ Three commissioners' summits ('95, '98, '01)
 - "Four sector" reviews.
 - Organizational change reports.
 - Consumer affairs reports.

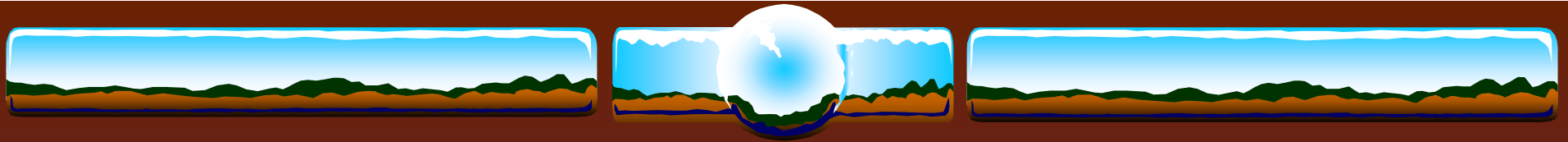
- '98 NRRI conference report:
 - Commissions committed to:
 - Extensive change in the way they perform their missions.
 - Protecting the public – low-cost, high quality, universally available, non-discriminatory utility service.
 - Removing barriers to competition.
 - More proactive role, including outreach to other state and federal decision-makers, consumers, and the public at large.

- '01 summit in mid-October. How do commissioners' now view change?⁵



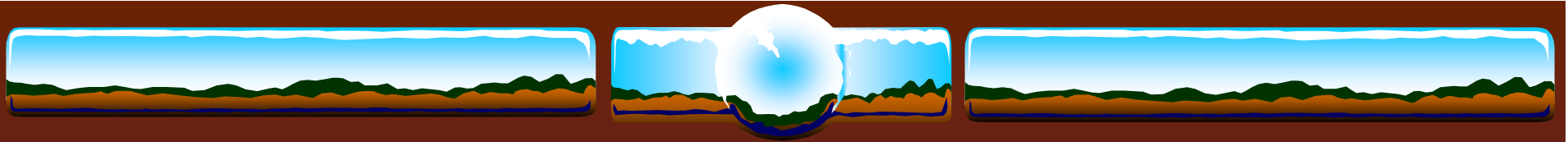
NRRI Transformation – selected reports

- • *E-Regulation (8-'01)*. Wirick
- • “Draft Preliminary Report to the New Jersey Board of Public Utilities on the Implementation of Energy Industry Transition to Competition,” (8-'01). Wirick & Burns.
- • *The Creation of Dynamic Regulatory Institutions (1-'01)*. Wirick.
- • *Final Report on the Virginia State Corporation Commission (3-'01)*. Wirick & Wilhelm.
- • *New Models for Commission Performance: The Diversity Imperative (11-'99)*. Wirick.
- • “Determining What Consumers Really Want,” Lawton, et al., in *Customer Choice: Finding Value in Retail Electricity Markets* (Public Utilities Reports, Inc., 1999).
- • *Determining the Structure of an Optimal Personnel Profile for a Transformed Commission ('98)*. Graniere.



NRRI Transformation – selected reports

- • *The Structure of State Utility Commissions and Protection of the Captive Ratepayer: Is There a Connection* ('98). Zearfoss.
- • *Proceedings of the Second NARUC/NRRI Commissioners Summit: Ensuring the Relevance of Commissions at 2003* ('98). NRRI Staff.
- • *Staffing the Consumer Education Function* ('98). Lawton, Sevel, & Wirick.
- • *Ensuring the Relevance of Public Utility Commissions* ('98). Wirick, et al.
- • *Transforming Public Utility Commissions in the New Regulatory Environment: Some Issues and Ideas for Managing Change* ('96). Wirick, et al.
- • *Missions, Strategies, and Implementation Steps for State Public Utility Commissions in the Year 2000: Proceedings of the NARUC/NRRI Commissioners Summit* ('95). NRRI Staff.



- “Regulation” includes substance, design of the forum, and process.
 - None are exempt from change.
- *Generally*, attempt to match the type and level of regulation to where the market is and where it is going. (Now a highly disputed issue in electricity, less in telecoms, perhaps least in natural gas?)

"The pyramid of policy"

Form

- Contested case Tariff
- Rulemaking
- ADR
- Contract
- Implicit consensus

Retail Rates

*Rate base/Rate of Return

*AFORs *Price cap

Customer

Customer education
Consumer protection
Retail service quality

Forum

- Legislature
- Agency
- Court
- Standards body
- Private dispute resolution

Public Benefits/Universal Service

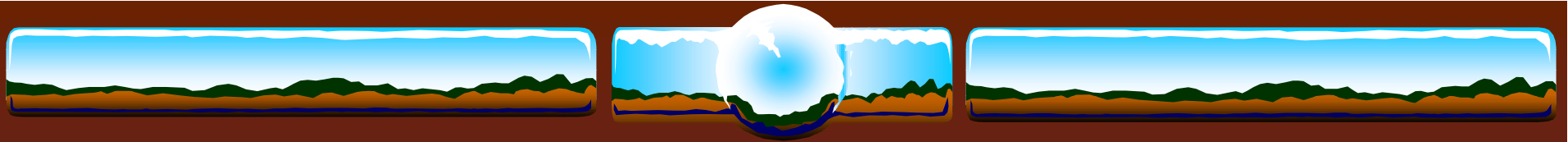
Customer support – Low Income, elderly, etc.
Research and development
Efficiency Renewables

Wholesale

*Network issues/reliability *Open access *Interconnection/unbundling
*Rates *Terms *Structural/non-structural safeguards

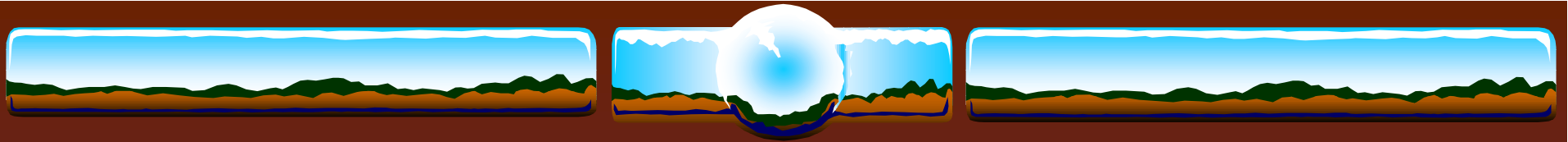
General consumer law*Uniform Commercial Code*General contract law*
*Anti-trust *Common law

"State of nature" – Hobbes vs. Rousseau



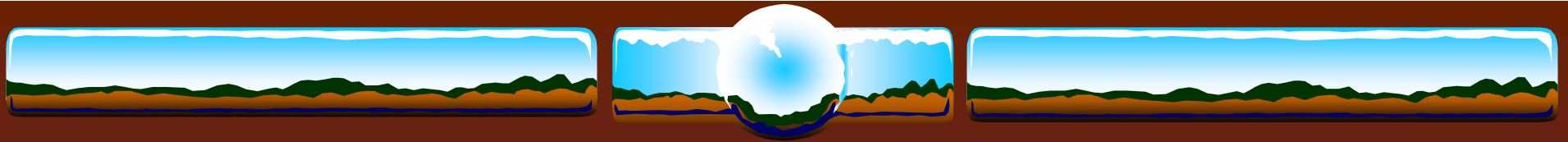
Border Issues – *“Take one!”*

- ❖ **Nation to nation** – treaties, settlements.
- ❖ **Nation to member state** – subsidiarity, federalism.
- ❖ **State to state** – regional coordination, consultation, shared proceedings, regional authorities (RTOs).
- ❖ **Nation or state to firm** – law, regulation, or “ether.”
- ❖ **Firm to firm** – business practices, standards, law, regulation (treatment of CPNI).
- ❖ **Firm to customer** – consumer protection, privacy.



Border Issues – *“Take two!”*

- ❖ **Inter-industry** – Convergence issues, cross-platform competition (e.g. inter-fuel).
- ❖ **Intra-industry, horizontal** – interconnection, reliability, consistency, business practices.
- ❖ **Intra-industry, vertical** – unbundling, reliability, open access, business practices.
- ❖ **Technology to technology** – forward/backward compatibility.



Border Issues – “*Take three!*”

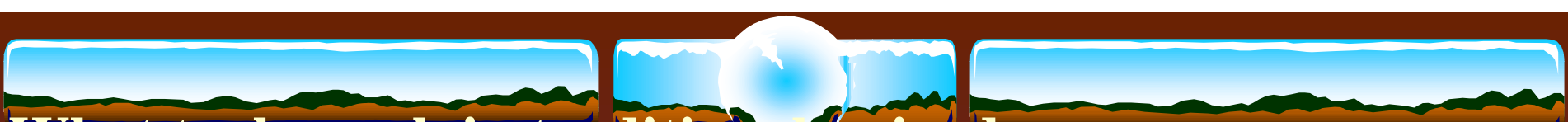
- *Horizontal* between jurisdictions and firms.
- *Vertical* between layers as old internal processes are made transparent.
- How will “harmonization” be accomplished?
 - Private negotiations?
 - Publicly-convened negotiating process?
 - Publicly-ordered outcomes?
 - Compare telecoms Operations Support Systems.
- Results in multiple, overlapping asymmetries.
- Like international law – questions of authority and coordination.



... raising these (and other)

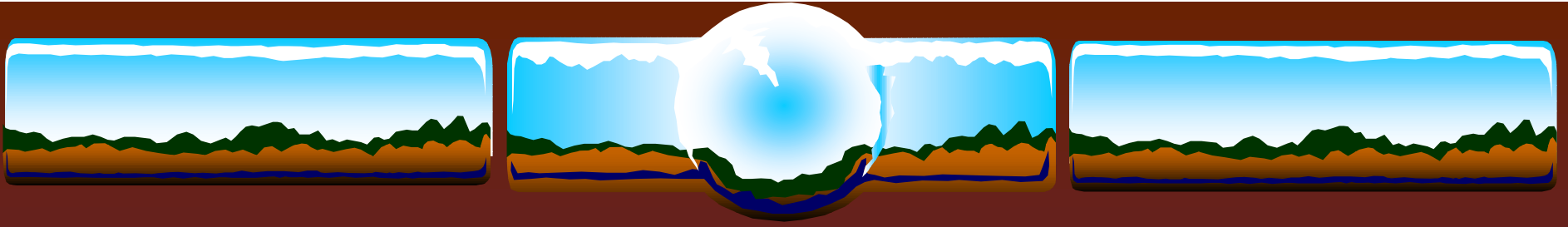
questions . . .

- ❖ How do we define the issues?
 - ❖ Growing gap between retail competition proponents/opponents
 - ❖ Any underlying basis for agreement on wholesale issues?
- ❖ How to address border issues?
 - ❖ What costs and benefits does each solution set impose?
- ❖ Where on the “policy pyramid” should we be?
 - ❖ What form to match the substance?
 - ❖ What forum?
- ❖ How do we keep policy current with markets and technology?
 - ❖ *Macro* regulatory lag?

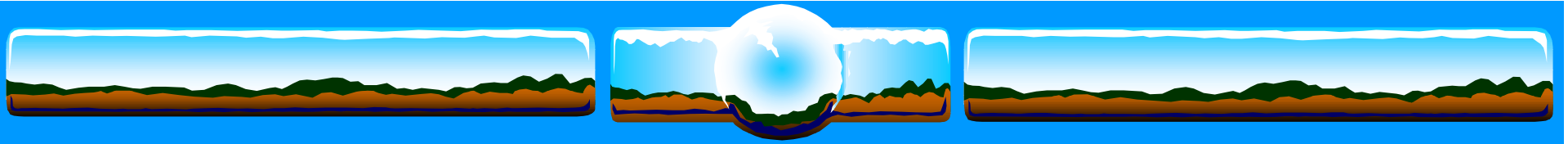


What tools work in traditional, mixed and more competitive markets? Customer service as an example.

Competitive market	Transitional	Sole provider
<ul style="list-style-type: none">✓Information,✓UDAP approaches,✓service quality competition	<ul style="list-style-type: none">✓Aggressive customer outreach,✓wholesale service quality.✓Retail standards for some (or all) customers✓Coordination issues✓Any possible SQ cross subsidy concerns?	<ul style="list-style-type: none">✓Required performance and outcomes.



Intergovernmental issues in
transitional world.
Approaches to federal-state
relations



	Issues	Strengths	Limitations	Approaches	Conflicts
L	International				
E	National				
V	Regional				
E	State				
L	Local				



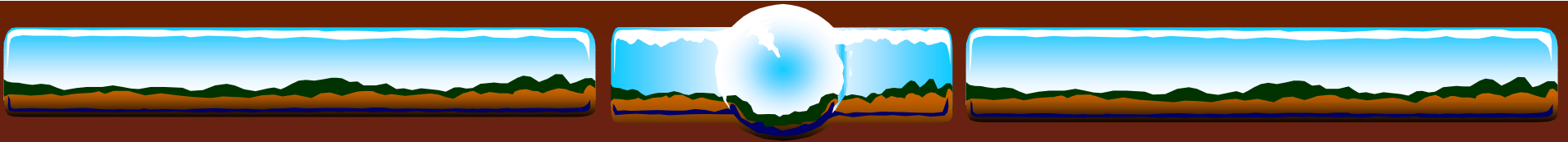
Old word: “One big company,”
two regulators, and a
“horse high fence.”
Dual federalism.

New world: Broken fences,
lots of “borders” – technology, layers,
jurisdictions, etc., but nobody can find
the property lines.
Many issues happen on the borders.

Alternative 1: Preemptive federalism. Efficiency,
consistency, scope of markets require national action.
 (“Withering away of the states.” Strongly top down.

Alternative 2: Subsidiarity. “Bottoms up.” Articles of confederation.

Alternative 3: Cooperative federalism. Both federal
and state authorities charged with implementing
federal law within a federal structure. Less top down.



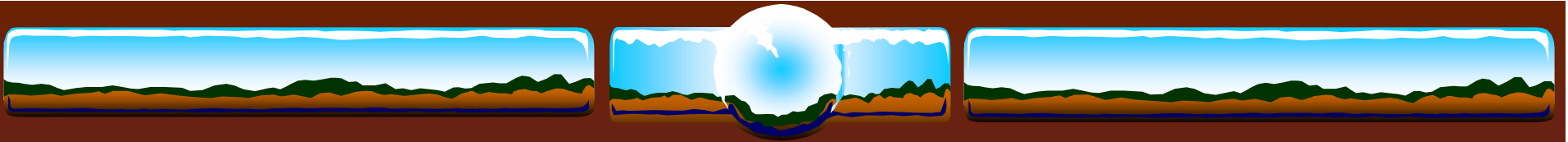
Dual federalism

- ❖ Most common form pre-New Deal.
- ❖ States generally focused on infrastructure, education.
- ❖ Feds generally focused on defense, foreign affairs, monetary policy.
- ❖ States originated many policies later adopted nationally – child labor, minimum wage, unemployment, income taxes, etc.
- ❖ Telecoms – Inter/Intra state. '34 Telecom Act.
 - ❖ Smith v. Illinois – Jurisdictional separations.
 - ❖ Modified by '96 Telecom Act.



Dual federalism

- ❖ Electricity – '35 Federal Power Act.
 - ❖ Vertically integrated industry .
 - ❖ State – retail.
 - ❖ Federal - wholesale.
 - ❖ States concerned with infrastructure at all levels.
 - ❖ Feds concerned with interstate commerce, coordination between vertically integrated companies, sales to all-requirements customers.
- ❖ Energy – strong state experimentation, leadership on retail and market issues.
- ❖ Strengths – simple, clear authority, consistent with states as sovereigns.
- ❖ Limits – Brittle, arbitrary, tough to deal with complexities.



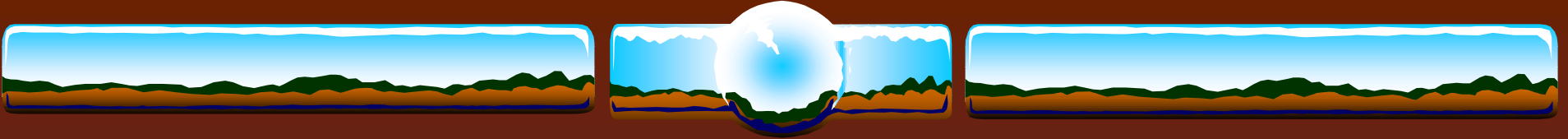
Preemptive federalism

- ❖ National government makes policy.
- ❖ State role limited to implementation.
- ❖ May be tied to receipt of funds.
- ❖ Broad federal authority under Commerce Clause.
- ❖ Strengths – consistency, clear authority, easy to understand, appears efficient, may help overcome local “democratic failure” (e.g. civil rights denial).
- ❖ Weaknesses – Brittle, inflexible, limited public participation.



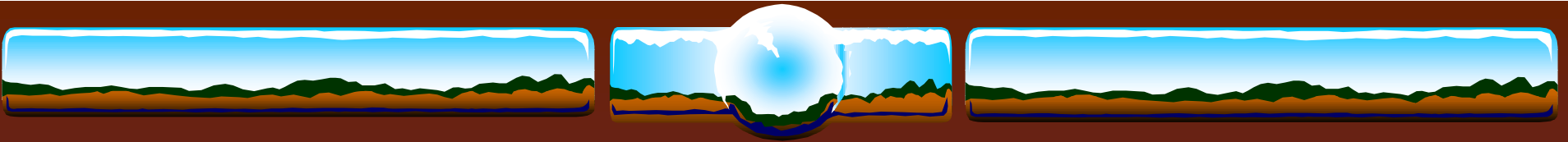
European subsidiarity

- ❖ Bottoms up.
- ❖ Generally, decisions made as close to the citizen as possible.
- ❖ Maastricht Treaty - in areas not within the EU's exclusive competence, will act only if objectives cannot be achieved by Member States, and due to scale or effect of the proposed action, can better be achieved by the Community
- ❖ Amsterdam Treaty - Community action should not exceed what is necessary to achieve the objectives ('proportionality principle')
- ❖ Strengths – Recognizes origins of EU in individual nations. Consistent with democratic governance.
- ❖ Weaknesses – difficult to implement, hard to determine lowest possible level of decision-making.



Cooperative federalism

- ❖ *“All involved governments are regarded as mutually complimentary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the problem at hand.” E.S. Corwin (1950)*
- ❖ No level seeks an advantage over the other, both are united by a common purpose.
- ❖ Sharing of power, policy development and implementation between levels of government.
- ❖ Characterized by shared costs, federal guidelines, shared administration. (Robert Lineberry, 1989)
- ❖ Strengths – flexibility, civic participation, diversity.
- ❖ Weaknesses – perceived delay, complexity, inconsistency.



Cooperative federalism – a telecoms example

- ❖ '96 Telecommunications Act establishes national policy, gives instructions to both FCC and state commissions.
- ❖ Goals.
 - ❖ Open markets
 - ❖ Support introduction of advanced services
 - ❖ Maintain universal service
 - ❖ Consumer protection
- ❖ State duties
 - ❖ Interconnection – prices, terms, facilities, enforcement
 - ❖ Advanced services
 - ❖ Promoting competition
 - ❖ Maintaining and advancing universal service
 - ❖ Protecting customers of monopoly and competitive services
- ❖ FCC authority to require wholesale pricing policies upheld, Iowa v. FCC ('99)



NARUC resolution endorsing an FCC-State “magna carta.” (2-99)

- ❖ Both federal and state proceedings are fact-based and both are able to analyze and act on complex records.
- ❖ Federal agencies possess both national and global perspectives.
- ❖ States are:
 - ❖ Close to local markets and have developed methods for evaluating them.
 - ❖ Close to customers.
 - ❖ Have experience with multiple industry restructurings - including natural gas , telecommunications and electricity.
- ❖ FCC actions affecting states undertaken mindful of states' unique knowledge of local conditions and experience in regulating the local market.
- ❖ Where national standards are appropriate, the FCC will strive to implement them in a way that encourages state input to the fullest extent possible.



NARUC “Magna Carta” Resolution, cont.

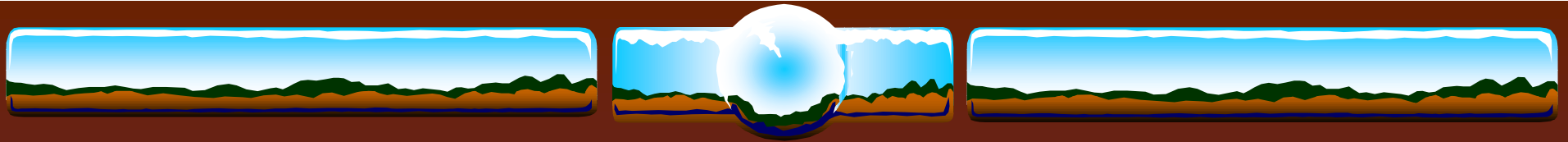
- ❖ Practices – active consultation, use of guidelines and best practices, models to be considered by states, floors and ceilings.
- ❖ Recognize the value of diversity and of experimentation in many circumstances.
- ❖ States will support the FCC in its efforts to meet challenges presented by implementation to the fullest extent possible.

Compare FCC State and Local Advisory Committee “Statement on Telecomm Competition,” 1977.



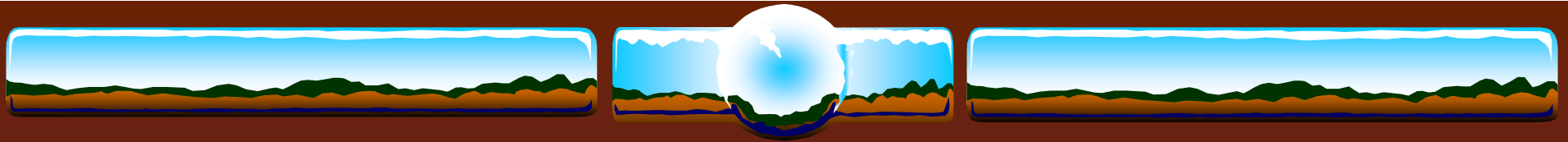
Examples of state/federal cooperation

- ❖ Joint Boards.
- ❖ Sec. 271 implementation.
- ❖ Sec. 706 Joint Conference
- ❖ Anti-Slamming enforcement
- ❖ State/National Action Plan (SNAP) For Consumers
 - ❖ SNAP slamming/cramming database project
 - ❖ Coordination of public information efforts
 - ❖ Information sharing re: enforcement actions
 - ❖ Detariffing discussions



Cooperative federalism – an energy example

- ❖ '97 Public Utility Regulatory Policy Act, amended by '92 Energy Policy Act.
 - ❖ Congress sets standards that state PUCs must consider in a hearing-type format within a certain time.
 - ❖ PUC may reject, modify, or accept, as long as they consider.
- ❖ *“The states did the work and the federal government received the benefits of a relatively seamless set of coherent and consistent energy policies covering all states.” R. Lawton*



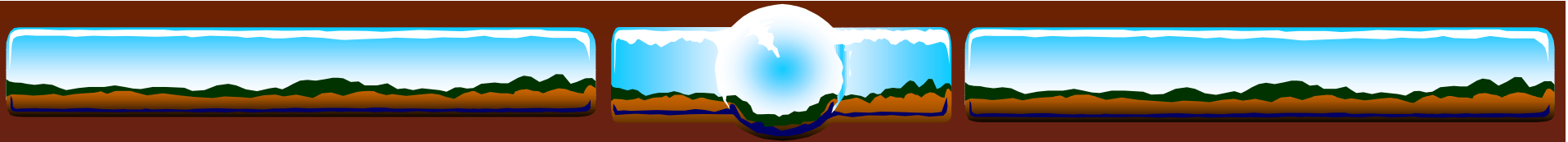
Cooperative federalism – an energy example

- ❖ Reasons for success (Lawton)
 - ❖ Standards – no need to “reinvent the wheel.”
 - ❖ Process – parties’ confidence in data and fair consideration.
 - ❖ State flexibility – Feds may participate in state proceedings, but may not preempt or review.
 - ❖ Participation – public participation widely encouraged.
 - ❖ Produced a coherent set of state energy policies.
 - ❖ Little enduring federal-state disagreement.



PHASES OF INTERGOVERNMENTAL RELATIONS

Phase Descriptor	Main Problems	Participants' Perceptions	IGR Mechanisms	Federalism Metaphor	Approximate Climax Period
Conflict	Defining boundaries Proper spheres	Antagonistic Adversary Controversy Exclusivity	Statutes Courts Regulation	Layer cake Federalism	Pre-1937
Cooperative	Economic stress International threat	Collaboration Complementary Mutuality Supportive	Policy planning Broad formula grants Open-ended grants Tax credit	Marble cake Federalism	1933-1953
Concentrated	Program needs Capitol works	Professionalism Objectivity Neutrality Functionalism	Categorical grants Service standards	Focused or channeled federalism (water taps)	1945-1960
Creative	Urban-metropolitan Disadvantages clients	National goals Great society Grantsmanship	Program Planning Project grants Participation	Fused-foliated Federalism (proliferated)	1958-1968
Competitive	Coordination Program effectiveness Delivery systems Citizen access	Disagreement Tension Rivalry	Revenue sharing Reorganization Regionalization Grant consolidation	Picket fence Federalism (fragmented)	1955-?



Discussion

“The view from the top” – Reasons for national-level decision-making

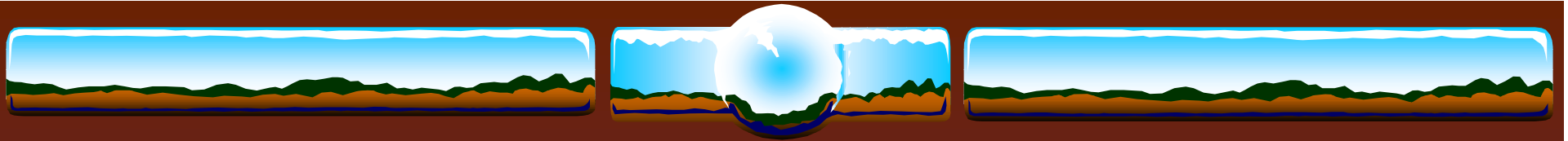
Consistency

Cost efficiency

Speed

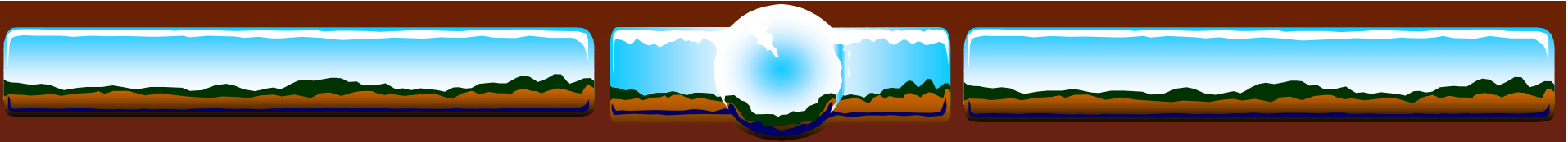
Single forum

Clarity



Discussion

“The view from the top” – Reasons for
national-level decision-making



“The view from the top”

- ❖ Efficiency.
- ❖ Greater agency expertise concerning certain matters.
- ❖ Scope of markets.
- ❖ Size and cost of platforms.
- ❖ Sometimes narrow local interests.
 - ❖ Regulatory externalities. (Action by x affects y)
 - ❖ “Democratic failure” (lower level of government fails to recognize certain core rights, e.g., speech, voting).
- ❖ Mismatch between an issue and the jurisdiction.



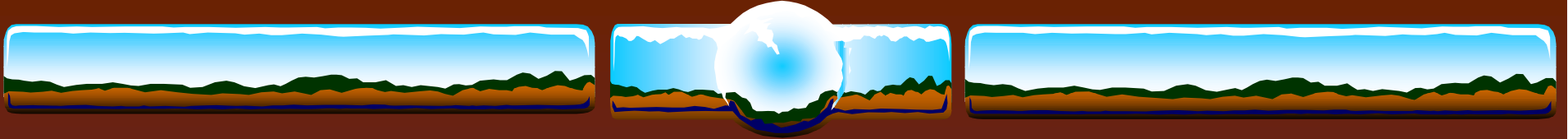
Discussion

“The view from the bottom” - reasons for
state-level decision-making



Discussion

“The view from the bottom” - reasons for
state-level decision-making



“The view from the bottom”

- ❖ Close to consumer.
- ❖ Close to facts.
- ❖ Close to markets.
- ❖ Close to citizens (civic participation).
- ❖ Accountability to citizens and customers.
- ❖ “Laboratories of democracy” (Brandeis)
 - ❖ Experimentation.
 - ❖ Risk minimization, esp. with new issues.
- ❖ Policy implementation often fact/issue/market specific.

The header features three horizontal panels with rounded ends, each containing a stylized landscape with green hills, brown ground, and a blue sky. A white globe is positioned in the center, overlapping the middle panel.

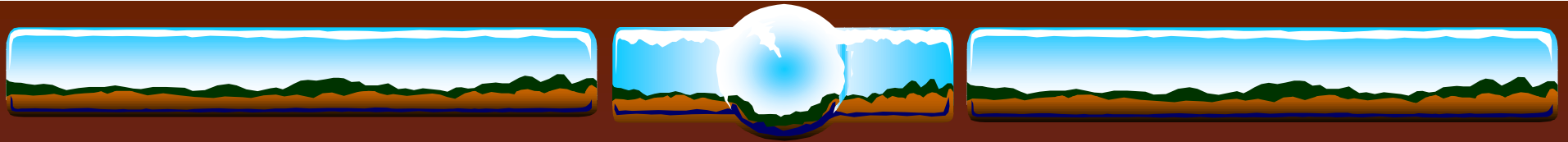
Discussion

Inter-governmental strategies

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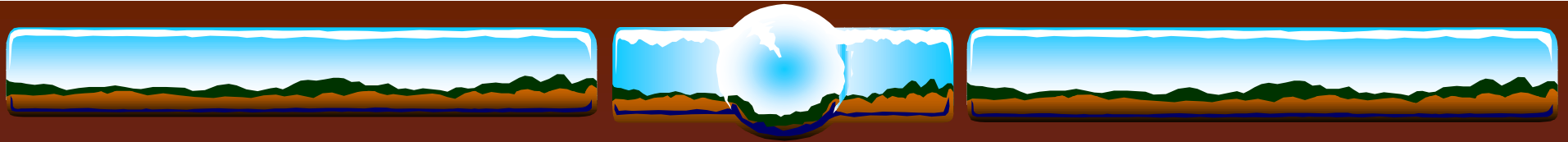
Discussion

Inter-governmental strategies



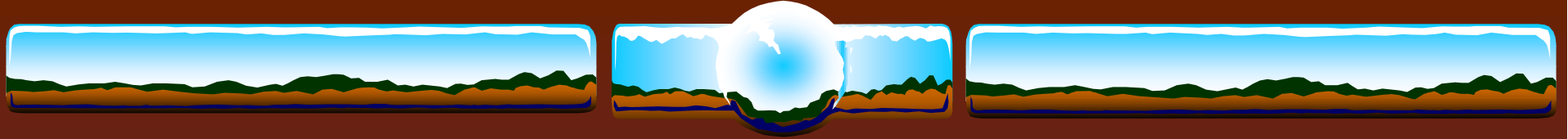
Inter-governmental strategies

- ❖ Identify common goals (e.g. competition, consumer protection.)
- ❖ Focus on core issues – simplify.
- ❖ Share resources and information.
- ❖ Minimize duplication and inconsistency.
- ❖ Admin. Procedure analogy.
 - ❖ Raise issues at lowest level
 - ❖ Exhaust remedies.
 - ❖ Should expert state agency decision receive any deference in federal forum?



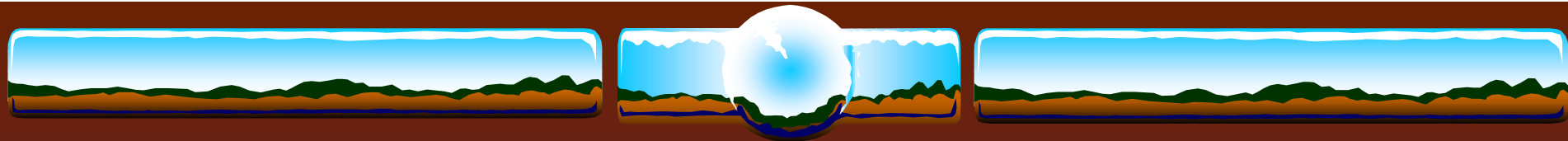
Inter-governmental strategies

- ❖ Shape national policies for state and local implementation.
- ❖ Pursue “pointed and productive dialogue” with minimal procedural overlay.
- ❖ Limited ability to preempt for violating clear national standards.
- ❖ Need ongoing, substantive exchanges, at both the staff and principle level, with a minimum of procedural overhang.
 - ❖ Compare FCC Joint Boards, Joint Conference, State and Local Advisory Committee, other 410(b) committees.
 - ❖ Limits of Federal Advisory Committee Act (FACA)
 - ❖ Effects of FERC or other agency ex parte rules.



Inter-governmental strategies

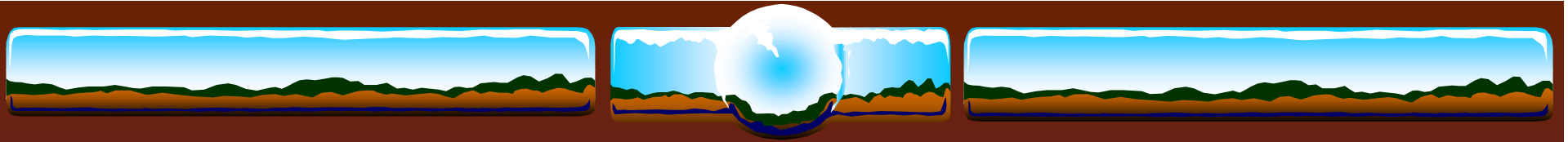
- ❖ Engage localities.
- ❖ Horizontal coordination (state-to-state) - Formal and informal regional cooperation.
 - ❖ E-communications - list-serves, etc.
 - ❖ Regional meetings.
 - ❖ Collaboration. (Compare 13 state Qwest OSS project)
 - ❖ Inter-state compacts.
 - ❖ Regional authorities.



Discussion

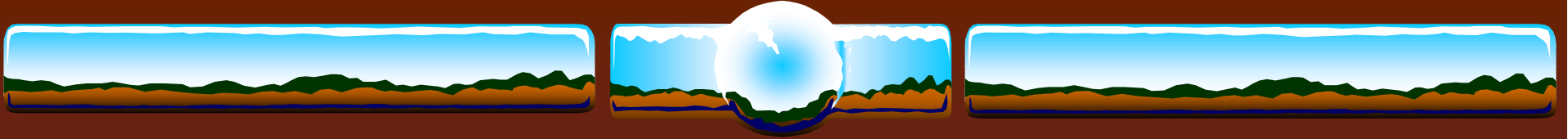
(a topical example)

How do we achieve
an effective wholesale
market?



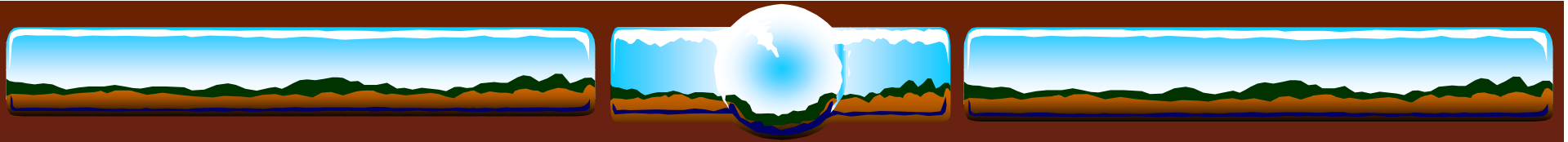
Discussion - How do we achieve an effective wholesale market?

What are the goals?



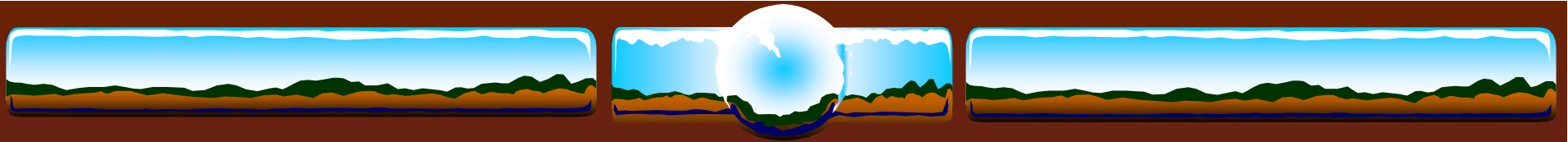
Discussion - How do we achieve an effective wholesale market?

What are the goals?



Discussion - How do we achieve an effective wholesale market?

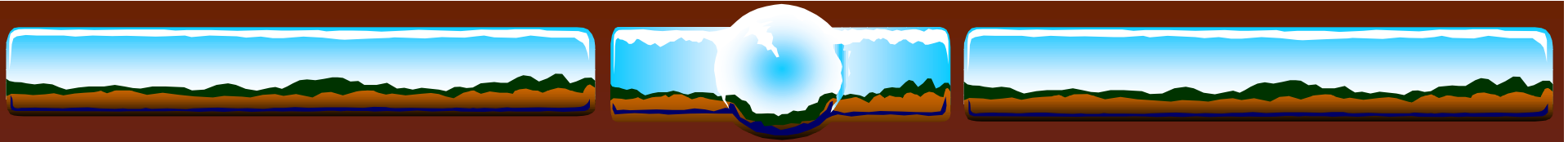
What are the strategies to achieve these goals?



Discussion - How do we achieve an effective wholesale market?

What are the strategies to achieve these goals?

- ❖ Cooperative
- ❖ Communicate
- ❖ Unbundling
- ❖ Open forum for all stake holders
- ❖ Listen
- ❖ Speak with clarity
- ❖ Decisiveness
- ❖ Listen to the process



- ❖ Fewer balls and strikes
- ❖ Let the process drive
- ❖ States need to be willing to give up some jurisdiction
- ❖ Forbearance



Discussion - How do we achieve an effective wholesale market?

What levels of government should be responsible for
each strategy?
How should they coordinate?



Discussion - How do we achieve an effective wholesale market?

What levels of government should be responsible for
each strategy?
How should they coordinate?



Reprise

	Issues	Strengths	Limitations	Approaches	Conflicts
L	International				
E	National				
V	Regional				
E	State				
L	Local				