

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Office of Public Participation

)

Docket No. AD21-9-000

COMMENTS OF ACADIA CENTER, CONSERVATION LAW FOUNDATION, FRESH ENERGY, NATURAL RESOURCES DEFENSE COUNCIL, NW ENERGY COALITION, SIERRA CLUB, SOUTHERN ENVIRONMENTAL LAW CENTER, SUSTAINABLE FERC PROJECT, UNION OF CONCERNED SCIENTISTS AND VOTE SOLAR

Pursuant to the Federal Energy Regulatory Commission's (Commission) March 5, 2021 Notice of Virtual Listening Sessions and a Public Comment Period (Notice)¹, the undersigned Public Interest Organizations (PIOs)² hereby submit comments on the establishment and operation of the Office of Public Participation (OPP), as well as recommendations for additional steps the Commission can take to improve governance. These comments focus on much needed governance improvements to achieve greater environmental justice, equity and consumer-centered outcomes.

I. INTRODUCTION

The significance of the issues being addressed by the Commission and their impact on the transition to a cleaner and more innovative resource mix, transmission development, environmental justice, equity for consumers, and other key issues, has never been greater. At the same time, the complexity and opacity of the decision-making on such issues can impede adequate participation of both the general public and directly affected populations.

While the OPP will be an important step towards improving public participation at the Commission itself, equally important is the development of proposals *before* they reach the Commission within the stakeholder processes of the Regional Transmission Organizations and Independent System Operators (RTOs/ISOs) and the non-RTO/ISO transmission planning

¹ Notice of Virtual Listening Sessions and a Public Comment Period, Docket No. AD21-9 (Mar. 5, 2021).

² Acadia Center, Conservation Law Foundation, Fresh Energy, Natural Resources Defense Council, NW Energy Coalition, Sierra Club, Southern Environmental Law Center, Sustainable FERC Project, Union of Concerned Scientists, and Vote Solar.

entities. Improving access at this stage of the decision-making process will enhance significantly the benefits that can be achieved by the OPP.

Almost thirteen years ago, Commission Order No. 719 recognized the importance of improving public participation in the RTO/ISO decision-making by requiring the RTOs and ISOs “to establish a means for customers and other stakeholders to have a form of direct access to the board of directors, and thereby to increase the boards of directors’ responsiveness to these entities.”³ The Commission defined “responsiveness” as “an RTO or ISO board’s willingness, as evidenced in its practices and procedures, to directly receive concerns and recommendations from customers and other stakeholders, and to fully consider and take actions in response to the issues that are raised,” and established the following criteria for evaluating these responsiveness filings: “(1) inclusiveness; (2) fairness in balancing diverse interests; (3) representation of minority positions; and (4) ongoing responsiveness.”⁴ These criteria remain highly relevant today, but the Commission has not revisited the responsiveness of the RTOs/ISOs in any formal manner since Order No. 719.⁵

While wholesale market design and infrastructure planning developments have grown significantly more complex and numerous states and consumer, environmental and community-based organizations continue to experience difficulties in their ability to participate in regional stakeholder processes. As recent comments filed by a group of public interest organizations in New England explain: “Within the ISO-NE stakeholder process at NEPOOL, states, consumers, and other public interest perspectives receive inadequate voice and representation, with barriers to entry and limited voting power—or in the case of the New England States none at all. States, consumers, and other public interest voices further have no representation on the ISO-NE Board.

³ Order No. 719, *Wholesale Competition in Regions with Organized Electricity Markets*, 73 Fed. Reg. 64,1000 (Oct. 17, 2008), P 477.

⁴ *Id.*

⁵ Welton, Shelley, *Rethinking Grid Governance for the Climate Change Era* (March 30, 2020), California Law Review, 2021, <https://ssrn.com/abstract=3564682>, at 17:, noting that “FERC deferred to RTOs to shape their own processes. The result of this deference has been a profusion of dense, convoluted RTO stakeholder governance processes, each with its own quirks.”

This lack of representation results in consumer and environmental concerns consistently being given little to no weight in ISO-NE’s decisions.”⁶

Similar obstacles face public interest participation in other RTOs/ISOs. A group of public interest organizations (PIOs) recently reported similar barriers in the Southwest Power Pool (SPP), noting that: “Because the current SPP Bylaws do not provide for non-member PIO appointment and formal representation in SPP’s organizational groups, consumer, environmental and other PIO perspectives are notably underrepresented, if not almost entirely absent, in SPP’s stakeholder process.”⁷ In PJM, the Liaison Committee, which provides for direct communication with the PJM Board, is closed to non-members and state commissions.⁸

It is essential that communities who bear the financial and environmental costs of many of RTO/ISO and regional planning entity decisions have the ability to participate in these processes. A number of the panelists at the April 16 Workshop Regarding the Creation of the Office of Public Participation emphasized the importance of such direct participation. Michelle Martinez, the Acting Executive Director of the Michigan Environmental Justice Coalition, described how their energy democracy campaign at the Michigan Public Service Commission “centered the voices of those most impacted by the negative outcomes of energy decision-making -- in the rooms where decisions were being made,” and that such “on-site engagement was essential and demonstrates the importance of OPP’s conducting engagement on the ground in communities when it is safe to do so.”⁹

⁶ *Comments from Public Interest Organizations (Acadia Center, Conservation Law Foundation (CLF), Environmental Defense Fund (EDF), Natural Resources Defense Council (NRDC), Sierra Club, and the Sustainable FERC Project) on New England States’ Governance Reform Technical Forum* March 26, 2021, available at: <https://newenglandenergyvision.files.wordpress.com/2021/03/clf-edf-nrdc-sierra-club-and-sustainable-ferc-project-comments.pdf>.

⁷ *Public Interest Organizations’ Principles for Good RTO Governance*, Southwest Power Pool’s RTO West Market Proposal, March 3, 2021, available at: <https://sustainableferc.org/wp-content/uploads/2021/03/Final-RTO-Governance-Principles-PIOs-3-3-21.pdf>.

⁸ See: <https://pjm.com/committees-and-groups/committees/lc>.

⁹ Panel 1 Bios and Testimony, April 16 Workshop.

Kerene Tayloe, Director of Federal Legislative Affairs for WE ACT for Environmental Justice explained at the workshop that “community action has been stymied by the prohibitive cost of legal representation and the technical expertise required to understand and successfully navigate the decision-making processes at FERC.”¹⁰ Such difficulties also confront communities attempting to have a voice not just at FERC but also in the highly complex and non-transparent RTO/ISO decision-making processes. Tyson Slocum, Director, Public Citizen’s Energy & Climate Program, reinforced this point by stating that participants in RTO/ISO stakeholder processes “are definitely not representative of the communities living in the footprint of RTOs. And that’s because the barriers to participate, right? There are dozens of meetings that are highly technical and all of the power generators and energy traders and transmission owners, they have full-time staff that are attending these meetings. Much of it they are recovering in rates at the state level and at the federal level, and we don’t see similar types of engagement by public interest groups.”¹¹

Several other panelists at the April 16 Workshop also confirmed the challenges of participation in the RTO/ISO governance processes. Suzanne DesRoches, the Deputy Director for Infrastructure and Energy at the New York City Mayor’s Office of Resiliency and Sustainability, stated that “largely unseen and unknown organizations—independent system operators or regional transmission organizations—make decisions that can cost millions or billions of dollars. However, their stakeholder processes are designed for energy industry experts and are not conducive to public participation or understanding. Involvement in those processes is labor- and cost-intensive, often requiring participation at lengthy meetings with support from technical consultants and legal assistance.”¹² David Springe, Executive Director, of the National Association of State Utility Consumer Advocates, notes that “many of our electric generation and transmission resources that formerly were regulated at the state level are now controlled through regional organizations and are regulated at the federal level. Even areas that do not have formal RTOs/ISOs still operate within the federal reliability framework and offer different levels

¹⁰ Panel 2 Bios and Testimony, April 16 Workshop.

¹¹ Captioning, Panel 2, April 16 Workshop.

¹² Panel 1 Bios and Testimony, April 16 Workshop.

market like operations. Decisions that ultimately impact a large portion of consumer bills are made at these regional organizations, yet there is little support or accessible process for consumers to have meaningful input into these decisions.¹³

Shelley Welton, Associate Professor, University of South Carolina School of Law, explained that “Section 205 filings are often shaped within Regional Transmission Organization (RTO) governance processes for months before they arrive at FERC, at which point the Commission is limited by deferential review standards and the restrictions of *NRG Power Marketing v. FERC* in its ability to shape these proposals.¹⁴ Rebecca L. Tepper, Chief, Energy and Environment Bureau Office of the Massachusetts Attorney General, observed that “most consumer advocates simply do not have the funds to actively participate in RTO stakeholder processes or Commission proceedings.”¹⁵

Chairman Glick recognized the importance of the regional stakeholder processes during the April 16 workshop, stating that the Commission hears from “people coming in to express some concerns and frustration with the governance process”¹⁶ and asked if the “OPP might be able to help facilitate and improve participation at FERC in terms of our proceedings but also in terms of RTO process and stakeholders’ meetings.”¹⁷ Moreover, Professor Welton recommended that “OPP must also devote attention to improving participation and transparency in notoriously opaque RTO/ISO processes and other regional transmission planning processes.”¹⁸

Given this widespread recognition of continued barriers to participation in these stakeholder processes, the PIOs urge the Commission to ensure that the OPP plays a role in improving access to and public engagement with RTO/ISO-level decision-making, as well as to the development of reforms to the governance of RTOs and ISOs. But these are not tasks for just

¹³ Panel 2 Bios and Testimony, April 16 Workshop.

¹⁴ Panel 4 Bios and Testimony, April 16 Workshop. (Footnote omitted.)

¹⁵ Panel 4 Bios and Testimony, April 16 Workshop.

¹⁶ Captioning, Panel 2, April 16 Workshop.

¹⁷ Captioning, Panel 2, April 16 Workshop.

¹⁸ Panel 4 Bios and Testimony, April 16 Workshop.

the OPP, and these comments therefore also provide a number of recommended actions that the Commission can take in this area.

II. RECOMMENDATIONS FOR THE OFFICE OF PUBLIC PARTICIPATION

PIOs believe that the OPP has the responsibility to improve both the oversight of and facilitation of public participation in RTO/ISO and the non-RTO/ISO planning regions governance processes, referred to in these comments as “regional stakeholder processes” or “regional governance.” At a minimum, the OPP should:

- Obtain input from the public on the regional stakeholder processes through regular listening sessions held in a variety of locations and/or accessible virtually and provide periodic reports, including outreach to environmental justice and community organizations. Such input would include, at a minimum, barriers to participation, limitations on access to information, communications difficulties and any other concerns with public access to the stakeholder processes, as well as any reports of improvements that have been made. To accomplish this role, the OPP should establish field offices and assign staff to each RTO/ISO and planning entity.¹⁹
- Establish an online, publicly accessible dashboard with ongoing reporting of governance concerns and records of votes in RTO/ISO committees as compared to the position ultimately adopted or proposed by the RTO/ISO.
- Monitor and report on where regional entities are not sharing information or providing sufficient transparency to stakeholders.
- Establish an Ombudsperson within the OPP to ensure a continued focus on regional governance.

¹⁹ During Panel 2 of the April 16 workshop, Tyson Slocum recommended that such staff would not just disseminate information about important developments and proceedings going on at the RTOs, but also to recruit more public interest entities to participate and engage in these processes.

- Conduct workshops (both in-person at field offices and virtually) to provide education on the governance processes and the specific issues with the greatest impacts on environmental justice, consumers and decarbonization efforts.
- Evaluate how certain Commission decisions (such as the establishment of tight deadlines) may impact stakeholder participation.
- Establish a process for submission of complaints on regional governance, and a public process to work directly with the regional entity to address the complaint. This could be a role for the Ombudsperson.
- Identify proceedings or particular issues for which public input is essential (e.g., when there appears to be a significant amount of controversy).²⁰
- Establish an Advisory Board as described in the written testimony of Kerene Tayloe and Tyson Slocum.
- Provide education to communities not currently within an RTO/ISO footprint where an RTO/ISO, Energy Imbalance Market or other wholesale market structure is being contemplated to provide a better understanding of the options being considered.²¹

III. ADDITIONAL RECOMMENDATIONS FOR COMMISSION ACTIONS

While the OPP can play a critical role in improving regional governance, it cannot be the sole means to address these longstanding concerns. The PIOs urge the Commission to take additional steps to address regional governance concerns. There are three broad categories for such Commission action: 1) specific recommendations or requirements for improvements to regional governance; 2) reforms to the Commission’s decision-making criteria to take regional governance into account; and 3) enhancements to the Commission’s analytical capability to enable more comprehensive and detailed review of submissions by RTOs/ISOs. These three

²⁰ Shelley Welton Testimony and spoken statements, Panel 2, April 16 Workshop.

²¹ Captioning, Panel 2, April 16 Workshop.

categories are not mutually exclusive, although the process undertaken in the first category is a good first step that can inform the second two categories.

A. Commission-directed Regional Governance Improvements

Based upon listening sessions and ongoing stakeholder input regarding the OPP, the Commission would issue a Notice of Proposed Rulemaking or draft Policy Statement recommending improvements to regional governance. The Commission could also hold a technical conference to obtain additional input on regional governance concerns, and specifically the extent to which consumer protection, environmental goals and environmental justice concerns are adequately represented in the RTO/ISO and non-RTO/ISO planning region decision-making.

B. Consideration of Governance in Commission Decision-Making

This group of reforms would both guard against major rule changes resulting from biased stakeholder processes and provide direct incentives for continued improvements to the governance processes.

First, the Commission could develop a set of governance criteria that would explicitly be considered in its decisions on proposed changes to market, transmission planning and other rules, terms and conditions. Such criteria could be determined within the procedures recommended under part III.A of these comments or in a separate proceeding. The RTOs/ISOs and regional planning entities would be given a deadline by which to reform their market rules to meet such criteria, with the OPP identifying the extent to which these criteria are being met going forward.

Under this recommendation, proposals filed at the Commission under stakeholder processes that do not meet these criteria would not be accepted unless adequate justification is provided (such as a tight timeframe due to an emergency or confidentiality requirements). We recommend the following criteria which could apply to both the RTOs/ISO and regional planning entities, although the Commission could develop criteria unique to each type of entity. (For example, recognizing that the non-RTO/ISO planning regions do not have Boards to evaluate the proposals.)

- The proposal was developed through a collaborative process that incorporated all stakeholder views, specifically including non-asset owners and non-market participants -- states and consumer, environmental and community-based organizations. For example, the proposal would contain documentation of such stakeholder views and how they were considered and evaluated.
- Any vote on the proposal by a Board or committee, or development of the proposal within a committee, was open to the public with opportunities for input from all stakeholders (including states and non-member participants).
- For proposals filed without stakeholder approval under the applicable voting rules, if the proposal includes alternatives that were supported by at least one non-generation or transmission owner voting sector, state commission, consumer representatives and/or environmental groups, participating in the stakeholder process regardless of their voting rights.

C. Additional Enhancements to Commission Evaluation of Proposals

The Commission should also increase its own capability to evaluate the proposals received from the RTOs/ISOs to ensure that all proposals receive an appropriate level of scrutiny even where parties may lack the resources to engage expert witnesses. These recommendations could be implemented individually or as a group and could also be considered as part of any technical conference or notice of proposed rulemaking recommended under section A above.

- The Commission would require that certain proposed rule changes preliminarily estimated to exceed a certain impact threshold would include a full assessment of those impacts along with the filing. These impacts would at a minimum address consumers' energy burden, environmental justice, public health, environmental externalities and achievement of state carbon reduction and other policy goals -- and whether there are options for reducing any adverse outcomes. The Commission would issue guidelines, with stakeholder input, for the conduct of such assessments and for determination of thresholds determining when they would be required.
- For more complex and contentious issues under discussion in the RTO/ISO stakeholder or other regional entity processes, the Commission could take the following actions. (The

OPP would also be able to submit a request for such an action based on input from stakeholders.)

- Commission staff would conduct a separate independent analysis of the problem proffered as the rationale for the proposal, with the option to issue a notice of inquiry as needed to obtain additional input. Examples of such proposals include, but are not limited to, the design of an operating reserve demand curve or other energy and ancillary price formation changes, the rationale for alternative resource adequacy or accreditation metrics, the justification of buyer-side mitigation or the costs, the benefits and costs of alternatives to the capacity market constructs, and transmission planning under Order 1000.
- The Commission could convene cooperative work groups with state commissions in each affected region as provided for in Section 209 of the FPA or could create stakeholder Advisory Groups comprised to address and develop recommendations for particular issues, such as capacity market or energy and ancillary service market reforms. The OPP would participate in the selection of the members of these Advisory Groups to ensure adequate representation.

IV. CONCLUSION

For the foregoing reasons, the PIOs respectfully request that the Commission consider these comments and recommendations both in regard to the OPP and the broader Commission actions that can be taken on governance. Such improvements would be a first step to achieve greater environmental justice, equity and consumer-centered outcomes from both regional governance and Commission decision-making.

Respectfully submitted,

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