

# Establishing the Federal Energy Regulatory Commission Office of Public Participation

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A Review of Stakeholder Input



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## Acknowledgements

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In 1978, Congress initiated sweeping changes to the Federal Power Act (FPA) when it passed the Public Utility Regulatory Policies Act of 1978 (PURPA). One key directive of PURPA—later codified in Section 319 of the FPA—ordered the creation of an “Office of Public Participation” at the Federal Energy Regulatory Commission (FERC). On February 22, 2021, in response to a recent congressional directive, FERC issued Docket No. AD-21-9 to solicit public input on how the Commission should establish and operate the Office of Public Participation (OPP) and held a series of listening sessions over the following months. This report summarizes the stakeholder feedback provided through these listening sessions and in written comment.

This report was prepared by M.J. Bradley & Associates for the Sustainable FERC Project of the Natural Resources Defense Council (NRDC).

### About M.J. Bradley & Associates

MJB&A, an ERM Group company, provides strategic consulting services to address energy and environmental issues for the private, public, and non-profit sectors. MJB&A creates value and addresses risks with a comprehensive approach to strategy and implementation, ensuring clients have timely access to information and the tools to use it to their advantage. Our approach fuses private sector strategy with public policy in air quality, energy, climate change, environmental markets, energy efficiency, renewable energy, transportation, and advanced technologies. Our international client base includes electric and natural gas utilities, major transportation fleet operators, investors, clean technology firms, environmental groups and government agencies. Our seasoned team brings a multi-sector perspective, informed expertise, and creative solutions to each client, capitalizing on extensive experience in energy markets, environmental policy, law, engineering, economics and business. For more information we encourage you to visit our website, [www.mjbradley.com](http://www.mjbradley.com).

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## Executive Summary

In 1978, as part of the sweeping changes to the Federal Power Act (FPA) under the Public Utility Regulatory Policies Act of 1978 (PURPA), Congress ordered the creation of an “Office of Public Participation” at the Federal Energy Regulatory Commission (FERC). For forty years, this mandate remained unfilled. On February 22, 2021, in response to a further congressional directive, FERC issued Docket No. AD-21-9 to solicit public input on how the Commission should establish and operate the Office of Public Participation (OPP) and held a series of listening sessions over the following months.

**Over the course of spring 2021, FERC received more than a dozen hours’ worth of spoken comment and more than 100 written comments on the form, function, and goals of the OPP.** Stakeholders included landowners and community members affected by proposed projects, environmental and consumer advocates, energy companies, State and Tribal governments, and many more.

Broadly, commenters provided ideas on how the OPP can serve to improve the decision making of FERC through improving informed input to the Commission’s proceedings and activities. While there was not necessarily consensus across all issues, commenters were united in their belief that FERC has room to improve in establishing accessible, streamlined process for soliciting stakeholder input and providing resources to facilitate greater participation.

This report explores in detail the key recommendations from this diverse and experienced set of commenters. Across these recommendations, we have identified four common themes: authority and independence; improved accessibility; educational, technical, and financial assistance; and dedicated assistance for specific stakeholder groups.

**The Office of Public Participation must have both the authority to have real influence in FERC’s decision making and the independence to serve as an objective entity to assist the public.**

Stakeholders emphasized that the OPP must move beyond a “box-checking” or “rubber stamp” exercise to receive public input and instead ensure that it actively supports the public’s ability to meaningfully inform decision making.

Additionally, most commenters recommended that the OPP serve as a neutral, coordinating entity that facilitates public participation in FERC proceedings and assists the public. Core functions of this role would include information dissemination, providing technical and financial assistance, facilitating systemic changes to remove barriers, and serving as a conduit between FERC’s existing offices and all public participants.

Many commenters recommended the creation of an Advisory Board that could guide the OPP, establish its charter, and serve as an audit authority for the office.

**Increasing the overall accessibility of FERC to the general public through procedural and administrative updates will be an important and central part of the OPP’s work.**

Stakeholders nearly unanimously agreed that FERC’s existing process and administration erected barriers to participation, and provided myriad recommendations for increasing access and opportunity for engagement. Key recommendations included:

- *Improving the website:* Even regular participants in FERC process find the FERC website hard to navigate and utilize—one commenter, with whom many it appears would agree, called the website “nearly unusable.” A third party experienced in web design and user interfaces could be valuable in helping to identify top priority and high impact improvements.
- *Improved Outreach:* Outreach to potentially affected stakeholders, especially landowners, is a critical way that these stakeholders receive notice of a potential project and gain an opportunity to engage. Commenters in general found the existing process severely inadequate and recommended significant changes. A key recommendation was to ensure that the OPP, not the project applicant, has the responsibility of notifying affected landowners and community members of a potential project.
- *Field Staff:* A common recommendation was to establish either rotating or permanent field staff and/or field offices to address and understand regional differences. Field staff could improve public participation by engaging with communities directly, building stronger relationships with impacted communities, and fostering greater public participation by reaching a wider audience.

### Educational, technical, and financial assistance can help to level the playing field and provide additional resources to stakeholders without extensive experience with FERC.

Once stakeholders are engaged, the OPP can provide a broad range of resources to improve the input received. These resources can take three general forms.

First, educational assistance can allow the public to have more thoughtful and insightful engagement in FERC processes. Commenters suggested a broad range of potential forums, including written materials posted on the website, workshops and webinars, and one-on-one interactions with staff. Topics could include guides to commenting, overviews of FERC rules and procedures, history of important FERC decisions and policies, and background on key energy and permitting topics.

Second, technical assistance can provide direct services to assist stakeholders in intervening, commenting, or otherwise engaging the FERC. The OPP could provide technical assistance in a variety of forms, including assigning OPP staff experts to assist the public, offering templates for FERC filings, increasing access to data and information, and facilitating connections to experienced counsel and other experts.

Third, many commenters highlighted the importance of intervenor compensation to ensure that non-industry intervenors have the financial resources to engage experts and support informed engagement. Section 391 of the FPA gives the OPP the authority to provide compensation for intervening and/or participating in Commission proceedings, though the OPP must establish definitions and qualifications for any such program. Commenters recommended that the OPP establish and publish clear eligibility guidelines for intervenor funding. Many commenters also emphasized the need for environmental justice (EJ) and marginalized communities to have access to intervenor compensation.

### Specific stakeholder groups, including landowners, marginalized groups, and Tribal governments may be best served by dedicated or special assistance.

While the OPP can and should provide resources to all parties, commenters emphasized that certain unique stakeholder groups may particularly benefit from OPP resources.

- *Landowners*: Landowners are affected by proposed projects that either pass directly through their land or in close proximity to their land. However, many stated that they have lacked adequate representation and engagement in FERC processes. Landowners suggested that early outreach and engagement with them should be conducted by the OPP, including information on their legal rights, how to intervene, and easy access to any relevant information such as important deadlines and data.
- *Marginalized communities*: EJ and marginalized communities are often disproportionately burdened by proposed projects, but historically have lacked adequate representation and engagement in FERC processes. Specific recommendations to improve outreach to these communities include increasing focus on projects' EJ effects, ensuring dedicated staffing, and reestablishing past policies, such as National Environmental Policy Act (NEPA) EJ guidelines.
- *Tribal governments*: Many of FERC's actions impact lands that have cultural, historical, or environmental significance to Tribal Nations. Tribal Nations noted that, as independent sovereign governments, tribes are not the general public and therefore require a separate process for consultation and engagement under existing law. While these commenters supported the creation of the OPP, they noted that the office may not adequately address how FERC should communicate and consult with tribal governments.

## Background on the OPP

In 1978, Congress initiated sweeping changes to the Federal Power Act (FPA) when it passed the Public Utility Regulatory Policies Act of 1978 (PURPA). One key directive of PURPA—later codified in Section 319 of the FPA—ordered the creation of an “Office of Public Participation” (OPP) at FERC.<sup>1</sup> Congress directed this office to “coordinate assistance to the public with respect to authorities exercised by the Commission,” including assistance to those seeking to intervene in Commission proceedings.<sup>2</sup>

While the directive has been in effect for more than 40 years, FERC has only recently announced that the OPP will be created. Over the years, various entities voiced their support for and attempted to hasten the office’s creation. In March 2016, Public Citizen, a consumer advocacy organization, filed a petition for FERC to carry out the creation of the OPP and fund its work.<sup>3</sup> In spring 2019, lawmakers, such as Senator Jeanne Shaheen (D-New Hampshire), Representative Ann McLane Kuster (D-New Hampshire), and Representative Janice Schakowsky (D-Illinois) sponsored legislation to update and build upon the 1978 PURPA directive.<sup>4</sup>

In December 2020, Congress passed legislation that, among other things, directed FERC to provide a report on the Commission’s progress towards establishing the OPP, including an organizational structure and budget for the office, beginning in fiscal year 2022.<sup>5</sup> Congress directed FERC to provide this update to the Committees on Appropriations of both Houses of Congress by June 25, 2021. On June 24, 2021, FERC published a report that summarized its progress on establishing the OPP.<sup>6</sup> The report outlined steps that FERC has taken thus far, such as conducting listening sessions and receiving comments in Docket No. AD21-9, and what steps FERC still needs to take, such as naming a Director and hiring or assigning staff. Key dates outlined in the report to establish the OPP include:

- hiring the OPP Director and a Deputy by the end of fiscal year 2021;
- working on an intervenor funding rulemaking in fiscal year 2022;
- expanding OPP’s operations to include public education, outreach, and technical assistance in fiscal year 2022; and

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<sup>1</sup> 16 U.S.C. § 825q-1, Office of Public Participation, <https://www.law.cornell.edu/uscode/text/16/825q-1>

<sup>2</sup> Id.

<sup>3</sup> “Petition to Initiate a Rulemaking to Establish the Office of Public Participation as Established by Congress and to Fund its Work,” FERC, March 7, 2016, <https://www.citizen.org/wp-content/uploads/public-citizen-ferc-public-participation-petition.pdf>

<sup>4</sup> U.S. Senator Jeanne Shaheen, “Shaheen Reintroduces Legislation to Boost Public Participation in Approval of Energy Projects and Rates,” Press Release, May 15, 2019, <https://www.shaheen.senate.gov/news/press/shaheen-reintroduces-legislation-to-boost-public-participation-in-approval-of-energy-projects-and-rates>; U.S. Representative Jan Schakowsky, “Schakowsky, Kuster, Kennedy, Lynch Reintroduce Legislation to Boost Public Participation at FERC,” Press Release, June 14, 2019, <https://schakowsky.house.gov/media/press-releases/schakowsky-kuster-kennedy-lynch-reintroduce-legislation-boost-public>.

<sup>5</sup> U.S. Congress, “Consolidated Appropriations Act of 2021,” Division D – Energy and Water Development and Related Agencies Statement, <https://www.appropriations.senate.gov/imo/media/doc/Division%20D%20-%20Energy%20and%20Water%20Statement%20FY21.pdf>.

<sup>6</sup> FERC, “FERC Establishes Office of Public Participation,” <https://www.ferc.gov/news-events/news/ferc-establishes-office-public-participation>.

- having OPP reach full operations in fiscal year 2024.<sup>7</sup>

As FERC works to establish this office, it must adhere to statutory requirements regarding structure, charge, intervenor assistance, and funding, as enumerated in Section 319 of the FPA and described in Table 1 below.

**Table 1: Statutory Requirements for the OPP**

	Explanation of Statutory Requirement
<b>Structure</b>	<ul style="list-style-type: none"> <li>• Director serves a four-year term.</li> <li>• Appointed by the FERC Chair and confirmed by the full FERC Commission.</li> </ul>
<b>Charge</b>	<ul style="list-style-type: none"> <li>• Coordinate “assistance to the public with respect to authorities exercised by the Commission,” including to persons intervening, participating, or proposing to intervene in FERC proceedings.</li> </ul>
<b>Intervenor Assistance</b>	<ul style="list-style-type: none"> <li>• May promulgate rules to provide compensation for “reasonable attorney’s fees, expert witness fees, and other costs of intervening or participating” in FERC proceedings to any person whose participation “substantially contributed” to the approval, in whole or in part, of a position advocated by such person. <ul style="list-style-type: none"> <li>○ Such compensation may be paid only if FERC has determined that: <ul style="list-style-type: none"> <li>• The proceeding is “significant,” and</li> <li>• Such person’s participation without funding constitutes a “significant financial hardship.”<sup>8</sup></li> </ul> </li> </ul> </li> </ul>
<b>Funding</b>	<ul style="list-style-type: none"> <li>• Section 319 authorized funding for fiscal years 1978 through 1981 specifically for OPP to provide intervenor assistance. However, such funding was never claimed by FERC.</li> <li>• However, Congress in 2020 directed FERC to derive OPP funding rather through its annual charges and filing fees, as authorized by the Omnibus Budget Reconciliation Act of 1986.<sup>9</sup></li> </ul>

Source: Federal Power Act, Section 319, <https://www.law.cornell.edu/uscode/text/16/825q-1>.

## Recent Stakeholder Process

On February 22, 2021, in response to Congress’ recent directive, FERC issued Docket No. AD-21-9 to solicit public input on how the Commission should establish and operate the Office of Public Participation.<sup>10</sup>

From March 17 through May 4, 2021, FERC held a series of listening sessions to give members of the public an opportunity to provide their thoughts and ideas about the creation of the OPP.<sup>11</sup> The Commission held the following dedicated sessions to hear from several stakeholder groups:

<sup>7</sup> Id.

<sup>8</sup> Of note, the statute does not explicitly define “significant financial hardship.”

<sup>9</sup> Up until 1986, FERC relied on Congressional appropriations for all of its funding. In the Omnibus Budget Reconciliation Act of 1986, Congress dictated that FERC instead “collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year.”

<sup>10</sup> FERC, “Notice of Workshop and Request for Panelists,” Docket No. AD21-9-000, February 22, 2021, <https://www.ferc.gov/sites/default/files/2021-02/AD21-9-000-workshop-Conf.pdf>.

<sup>11</sup> FERC, “Workshop Regarding the Creation of the Office of Public Participation,” Docket No. AD-21-9-000, April 16, 2021, <https://www.ferc.gov/news-events/events/workshop-regarding-creation-office-public-participation-04162021>.



- Landowners and Communities Affected by Infrastructure Development Session
- Environmental Justice (EJ) Communities and Tribal Interests Session
- Tribal Governments Session
- Energy Consumers and Consumer Advocates Session
- Evening Listening Session (all stakeholder groups)
- Spanish Language Session

Following a brief introduction by Commission staff, each session was open to the public for 3 to 5 minutes of comment per participant. Audio recordings and transcripts of the listening sessions, including a translation of the Spanish language session, were made available.

In addition, on April 16, 2021, FERC held an all-day Commissioner-led workshop.<sup>12</sup> FERC requested speaker nominations in advance of the workshop, and organized it into the following panels:

- **Panel 1: Affected Communities.** This panel sought to understand how members of the public have been affected by the Commission’s procedures and how the OPP can better engage with the public to navigate Commission proceedings. Panelists included affected landowners, environmental NGOs, environmental justice groups, local government, Tribal government, and consumer advocates.
- **Panel 2: The OPP’s Structure and Functions.** This panel explored how the OPP should be structured and how it should function to meet this requirement. Panelists included consumer advocates, environmental justice groups, and environmental NGOs.
- **Panel 3: Energy and Environmental Justice.** This panel discussed how the Commission can best promote equity in its procedures and decision making and build equity-centered engagement efforts within the OPP. Panelists included environmental justice groups, the Department of Energy’s (DOE) Deputy Director for Energy Justice, and the Director of the Environmental Protection Agency’s (EPA) Office of Environmental Justice.
- **Panel 4: Coordinating Public Assistance.** This panel explored how the OPP can facilitate greater understanding of Commission processes through public engagement and education. It also explored how the OPP can coordinate public requests for assistance from persons seeking to intervene or participate in proceedings before the Commission and provide detailed guidance and support. Panelists included environmental consultants, academics, state government, environmental justice groups, Federal Indian law experts, natural gas industry representatives, and environmental think tanks.
- **Panel 5: Intervenor Funding.** This panel explored how the Commission should approach the issue of intervenor compensation and what OPP’s role should be with respect to intervenor compensation. Panelists included academics, state utility regulators, and consumer advocates.

FERC also held a public comment period to solicit feedback, and invited the public to submit written comments on the creation of the OPP by May 7, 2021.

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<sup>12</sup> Id.; FERC, “AD21-9-000 Agenda,” <https://www.ferc.gov/media/ad21-9-000-agenda>.

## Themes and Recommendations

Over the course of spring 2021, FERC received more than a dozen hours' worth of spoken comments from a wide range of stakeholders regarding the form, function, and goals of the OPP. In addition, more than 100 individuals and organizations submitted written comments. Stakeholders included landowners and community members affected by proposed projects, environmental and consumer advocates, State and Tribal governments, and more. The following section organizes and summarizes key themes provided by this diverse stakeholder group.

### Who Does the OPP Serve?

The first and most general question addressed through stakeholder comment is who the OPP should be designed to serve. This question, in many ways, underlies the discussion around roles and processes that is the focus of the rest of this summary.

On this topic, most commenters stated that the OPP should broadly serve the public interest, focusing its efforts on the interests of citizens, landowners, and ratepayers.<sup>13</sup> Commenters emphasized the need for the OPP to serve individuals as well as stakeholders representing these constituents, such as municipalities and advocacy groups. Commenters also identified subsets of this broader constituency for the OPP to prioritize, including those who:

- are currently and/or historically underrepresented in the decision making process;
- lack the resources/expertise to effectively engage; or
- are most impacted by physical infrastructure and FERC action.<sup>14</sup>

Several commenters stated that the OPP should not focus on serving or funding organizations that accept money from utilities or others in the energy industry.<sup>15</sup>

In contrast, two industry stakeholders stated that the OPP should not prioritize serving certain individuals, communities, or stakeholders, but rather should serve and seek perspectives of all stakeholders and communities, regardless of affiliation. The Competitive Enterprise Institute stated that an OPP that favored input from certain groups over others “would be doing a disservice to the goal of wider

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<sup>13</sup> E.g., SOUL of Wisconsin, “Regarding Docket No. AD21-9-000, the Creation of an Office of Public Participation (OPP) under Section 319, § 825q-1(a)(2)(A),” Docket No. AD21-9-000, March 17, 2021, 20210324-5029; The Foundation for Resilient Societies, “Comments Submitted to FERC on April 23, 2021” Docket No. AD21-9-000, April 23, 2021, 20210423-5276.

<sup>14</sup> Union of Concerned Scientists, “Comments of the Union of Concerned Scientists,” Docket No. AD21-9-000, April 23, 2021, 20210423-5149; Citizens Utility Board of Illinois, in Partnership with Citizens Utility Board of Michigan, Citizens Utility Board of Ohio, and Citizens Utility Board of Wisconsin, “Joint Comments of Citizens Utility Board of Illinois, in Partnership with Citizens Utility Board of Michigan, Citizens Utility Board of Ohio, and Citizens Utility Board of Wisconsin,” Docket No. AD21-9-000, n.d., 20210504-5150; Earthjustice, PennFuture, Food & Water Watch, Environmental Defense Fund, Sustainable FERC Project, Center for Coalfield Justice, Natural Resources Defense Council, Western Environmental Law Center, Crag Law Center, Berkshire Environmental Action Team, Inc., Allegheny-Blue Ridge Alliance, Pipe Line Awareness Network for the Northeast, Inc., Chesapeake Climate Action Network, Lower Susquehanna Riverkeeper Association, Columbia Riverkeeper, Vote Solar, Raritan Headwaters, Healthy Gulf, Sandra Schlaudecker (landowner), Seneca Lake Guardian, A Waterkeeper Alliance Affiliate, Clean Water for North Carolina, Gas Free Seneca, Clean Air Council, New Energy Economy, Rogue Climate, Indian Point Safe Energy Coalition, Beyond Extreme Energy, Youth United for Climate Crisis Action, Earth Care, Cowpasture River Preservation Association, Responsible Drilling Alliance, and Project CoffeeHouse (Earthjustice et al.), “Comments of Earthjustice”, Docket No. AD21-9-000, April 23, 2021, 20210423-5251.

<sup>15</sup> E.g., SOUL of Wisconsin 2021.

community participation for which the office was created.<sup>16</sup> The American Public Gas Association stated that “all impacted public stakeholders should be allowed to be equally involved, including affected public gas systems and the communities they support, to ensure the broadest collection of perspectives.”<sup>17</sup>

## Structure of the OPP

Section 391 of the FPA lays out basic requirements for the structure of the OPP, with a focus on the director role, and gives the OPP the authority to provide compensation to those intervening and/or participating in Commission proceedings. Commenters offered recommendations regarding several remaining open questions, such as how the OPP would be established, its authority, and how it would be staffed and organized.

## Establishment

Commenters made two main suggestions for the establishment of the OPP: 1) create additional rulemakings to better define OPP’s goals and functions and; 2) ensure OPP is created as an independent division within FERC. Several commenters recommended that FERC conduct targeted rulemakings regarding the OPP following the conclusion of the public comment period and listening sessions in spring 2021. For example, the Union of Concerned Scientists (UCS) recommended that FERC issue one proposed rule regarding intervenor funding and one proposed rule for OPP’s scope, structure, and function. UCS stated that “these additional rulemaking processes will ensure that the office is formed in a way that is durable and representative of the needs of the communities that have historically been underrepresented at FERC.”<sup>18</sup>

Others recommended that the OPP be established as an independent division within FERC, either to improve the office’s perceived legitimacy or to ensure that it has the requisite authority to effect change. Noting that several prior speakers had expressed mistrust of FERC informed by past experiences, workshop panelist Tyler Slocum explained that “the perception of this office as being an independent advocate for the public is going to help with its legitimacy and that could be very important in its ability to effectively engage with the public.”<sup>19</sup> Similarly, the Office of the People’s Counsel for the District of Columbia stated that in order for the OPP to fully engage with the public, the public must trust that the OPP’s “sole purpose is to serve the public and not the interests of the Commission or any particular party or interest.”<sup>20</sup>

The Chesapeake Climate Action Network (CCAN) said that FERC must set up the OPP as a “self-standing office on equal footing with other offices within the Commission in order for it to have the authority necessary to affect change.”<sup>21</sup> Earthjustice et al. agreed, explaining that the OPP “will need to cover the full range of FERC authorities—energy markets, reliability, pipeline infrastructure, hydropower

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<sup>16</sup> The Competitive Enterprise Institute (CEI), “Comments of the Competitive Enterprise Institute,” Docket No. AD21-9-000, April 23, 2021, 20210423-5095.

<sup>17</sup> The American Public Gas Association (APGA), “Initial Comments of the American Public Gas Association,” Docket No. AD21-9-000, April 23, 2021, 20210423-5177.

<sup>18</sup> Union of Concerned Scientists 2021.

<sup>19</sup> Tyler Slocum, Director of Energy and Climate Program, Public Citizen, Workshop of the Creation of the Office of Public Participation, Panel 2: The Office of Public Participation’s Structure and Functions, Docket No. AD21-9-000, April 16, 2021, pg. 103, lines 9-14.

<sup>20</sup> Office of the People’s Counsel for the District of Columbia, “The Office of the People’s Counsel of the District of Columbia’s Initial Comments on the Office of Public Participation,” Docket No. AD21-9, May 7, 2021, 20210507-5195

<sup>21</sup> Chesapeake Climate Action Network, “FERC Docket AD21-9,” Docket No. AD21-9, May 7, 2021, 20210507-5164.

infrastructure, etc.—and cannot effectively do so if housed under or otherwise within another office.”<sup>22</sup> The Natural Gas Supply Association suggested having the OPP in a separate physical location from other FERC staff to “help prevent [...] interactions to ensure there is no undue influence or access to staff directly involved in proceedings.”<sup>23</sup>

## Role and Authority

The OPP’s roles and responsibilities, as well as its authority to act on such responsibilities, were a foundational topic addressed across written and spoken comments. Most stakeholders agreed that the OPP should serve as a neutral, objective entity that assists the public and facilitates public participation in proceedings under the FPA and the Natural Gas Act (NGA). Key roles, according to many commenters, would include providing technical and financial assistance. However, a smaller number argued that the OPP should be not just a neutral resource, but also be an advocate for the public. For example, while speaking of the need to “fundamentally reform[]” FERC, one commenter stated that serving as a public advocate is the “best that [the OPP] can do to band-aid [FERC’s] ongoing government attack on its own citizens and abuse of their rights and property.”<sup>24</sup> An affected landowner recommended that a division of the OPP initiate, intervene in, and participate in any proceedings before FERC to represent the interests of the public.<sup>25</sup>

A select few even recommended that the OPP have a full voting position on the Commission to better represent public interest and ensure that public input is incorporated into decision making.<sup>26</sup> Rather than “just executing a performative function,” stated the Berkshire Environmental Action Team, the OPP should “tally and evaluate feedback from impacted communities and bring that knowledge to the table when decisions on permit applications are being made.”<sup>27</sup> However, several commenters noted challenges with the OPP assuming a role of advocacy and/or direct decision making. Commenters stated that such a role could trigger ex parte requirements, create concerns regarding the perceived legitimacy of the office, and create challenges around balancing diverse viewpoints.<sup>28</sup> Another commented, “advocates want their own voices to be heard, and not for a government office to speak on their behalf.”<sup>1</sup>

On the whole, however, most commenters recommended that the OPP serve as a neutral, coordinating entity that facilitates public participation in FERC proceedings and assists the public. Core functions of this role would include disseminating information, providing technical and financial assistance, facilitating systemic changes to remove barriers, and serving as a conduit between FERC’s existing offices and all public participants.<sup>29</sup> Many also stated that they see this role as consistent with statutory

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<sup>22</sup> Earthjustice et al. 2021.

<sup>23</sup> Natural Gas Supply Association, “Comments of the Natural Gas Supply Association,” Docket No. AD21-9-000, April 23, 2021, 20210423-5272

<sup>24</sup> Katherine Hudson, Water Keeper Alliance, Listening Session: Landowners and Communities Affected by Infrastructure Development, Docket No. AD21-9-000, March 17, 2021, pg. 87, lines 5-10.

<sup>25</sup> Charles E. Sullivan, Jr, “Re Federal Energy Regulatory Commission Docket No. AD21-9-000,” Docket No. AD21-9-000, March 25, 2021, 202103525-5186.

<sup>26</sup> Berkshire Environmental Action Team, “Comments of Berkshire Environmental Action Team On Docket #AD12-9,” Docket No. AD21-9-000, May 7, 2021, 20210507-5020.

<sup>27</sup> Id.

<sup>28</sup> E.g., David Springe, Executive Director of the National Association of State Utility Consumer Advocates, Workshop on the Creation of the Office of Public Participation, Panel 2: The Office of Public Participation’s Structure and Functions, April 16, 2021; Tyler Slocum 2021; Earthjustice et al. 2021; National Hydropower Association, Inc., “Comments of the National Hydropower Association re: AD21-9 – FERC’s Office of Public Participation,” Docket No. AD21-9-00, April 23, 2021, 20210423-5161.

<sup>29</sup> E.g., Earthjustice et al. 2021, APGA 2021.

requirements establishing the office.<sup>30</sup> Several commenters likened this role to engaging in procedural (rather than substantive) assistance.<sup>31</sup>

Regardless of the role assumed by the OPP, many commenters distinguished between offering the public the opportunity to participate in a proceeding and ensuring the public's ability to influence a decision. Commenters stressed the need to incorporate public input into FERC decision making. Many commenters showed concern that the OPP would be a "box-checking" or "rubber stamp" exercise to receive public input but that this input would not meaningfully inform decision making. Workshop panelist Jacqueline Patterson stated, "If input does not lead to decision making, please don't waste the time of already beleaguered communities in performative action."<sup>32</sup> Panelist Shalanda Baker stated, "Procedural justice is having a meaningful seat at the table and not just a seat at the table, but one where folks can actually change the course of decision making by having their voice in the room."<sup>33</sup> Earthjustice et al. recommended that FERC prepare a charter for the OPP that "formalizes the OPP's position in the agency and role in processes across the agency."<sup>34</sup>

### Organization and Staffing

Recommendations were provided on key OPP staff, such as the OPP director and the consideration of having an Advisory Board. For these roles, commenters made suggestions on what kind of skills and background should be considered as well as what function these roles should have.

In addition, some commenters provided recommendations for the number of staff needed overall at the OPP and the number of staff needed per position. For example, one comment recommended at least 50 full time staff at the OPP, including a director, deputy director, EJ managing director, three EJ managing director staff, etc.<sup>35</sup>

#### **OPP Director**

The director, as noted above in the statutory requirements, will be appointed by the FERC Chair and confirmed by the full FERC Commission. Section 391 of the FPA also dictates that the term of office will be four years and that the director has the authority to staff the OPP and assign duties to employees of the OPP. Commenters made suggestions for FERC to consider when appointing the director of the OPP, and stressed that the OPP director should not have current or past industry ties with utilities or potential project applicants (some comments specify within a certain time period; others do not specify)

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<sup>30</sup> E.g., David Springe 2021, pg. 115, lines 1-4; National Rural Electric Cooperative Association (NRECA), Comments of the National Rural Electric Cooperative Association," Docket No. AD21-9-000, April 23, 2021, 20210423-5094.

<sup>31</sup> Vote Solar, "Comment Letter on Federal Energy Regulatory Commission Office of Public Participation Docket No. AD21-9-000," Docket No. AD21-9-000, April 23, 2021, 20210423-5190; National Hydropower Association, Inc. 2021.

<sup>32</sup> Jacqueline Patterson, Director of Environment and Climate Justice Program, NAACP, Workshop on the Creation of the Office of Public Participation, Panel 3: Energy and Environmental Justice, April 16, 2021, pg. 140, lines 22-24.

<sup>33</sup> Shalanda Baker, Deputy Director for Energy Justice, U.S. Department of Energy, Workshop on the Creation of the Office of Public Participation, Panel 3: Energy and Environmental Justice, April 16, 2021, pg. 129, lines 12-15.

<sup>34</sup> Earthjustice et al. 2021.

<sup>35</sup> Public Citizen, "Comments of Public Citizen, Inc.," Docket No. AD21-9-000, n.d., 20210423-5078

as those ties could create a conflict of interest.<sup>36</sup> Commenters also advised that the OPP director be skilled in public outreach and education and have a record of serving ratepayers.<sup>37</sup>

### **OPP Field Staff/Field Offices**

Another staffing suggestion that was common throughout comments was to establish field staff and/or field offices. Field staff would be able to address and understand regional differences. The field staff would also be able to improve public participation by engaging with communities directly. UCS explained, for example, that the “purposes of the field offices are to are to provide direct, local access to the OPP, build stronger relationships with impacted communities, and foster greater public participation by reaching a wider audience [...]. It would be unreasonable to assume that OPP staff will be able to successfully reach those communities without staff in those communities.”<sup>38</sup> Some commenters suggested having permanent OPP offices in different cities,<sup>39</sup> while other comments suggested having temporary field staff, moving from community to community to engage with communities that would be impacted by a project proposal.<sup>40</sup> Another suggestion was having staff liaisons for state consumer advocates, which can provide regional and important local knowledge.<sup>41</sup>

### **Other Specific Offices or Staff**

*OPP Environmental Justice (EJ) Focused Role:* One staffing need emphasized was for an EJ focused role, such as an EJ Director or Coordinator to improve engagement specifically with EJ communities.<sup>42</sup> This EJ focused role could focus on using existing EJ tools like EPA’s EJSCREEN to facilitate targeted engagement with EJ communities, work with other EJ agencies like EPA’s Region I EJ Coordinator, and make sure FERC decision making includes EJ and environmental equity considerations.<sup>43</sup> Other commenters suggested having an Office Public Investigator to research impacts to EJ communities and further specified that the Office Public Investigator could be used to create performance metrics on environmental equity.<sup>44</sup> Additional recommendations regarding engagement with EJ communities are discussed in the “Engagement and Coordination with Specific Communities” below.

*OPP Office of the Whistleblower:* The National Whistleblower Center recommended that an Office of the Whistleblower should be established within the OPP, “to ensure that the OPP hears from all members of the public, including those with information implicating entities regulated by FERC in significant

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<sup>36</sup> E.g., Office of the People’s Counsel for the District of Columbia 2021.

<sup>37</sup> E.g., SOUL of Wisconsin 2021.

<sup>38</sup> Union of Concerned Scientists 2021.

<sup>39</sup> Id.

<sup>40</sup> Robert Kaiser, “Re: Function and Scope of the Office of Public Participation,” Docket No. AD21-9-000, March 27, 2021, 20210329-5040.

<sup>41</sup> Attorneys General of Massachusetts, Connecticut, Delaware, Maryland, Michigan, Minnesota, Oregon, Rhode Island, and Wisconsin, and the Maine Office of the Public Advocate and Maryland People’s Counsel, “Comments of the Attorneys General of Massachusetts, Connecticut, Delaware, Maryland, Michigan, Minnesota, Oregon, Rhode Island, and Wisconsin, and the Main Office of the Public Advocate and Maryland People’s Counsel,” Docket No. AD21-9, April 23, 2021, 20210423-5246.

<sup>42</sup> On May 20, 2021, FERC announced that Montana Cole was appointed as Senior Counsel for Environmental Justice and Equity. While Ms. Cole’s new role will certainly help incorporate EJ considerations into FERC decision making, we expect her office to be separate from, and additive to, any additional OPP EJ role.

<sup>43</sup> E.g., Commonwealth of Massachusetts, “Comments of the Commonwealth of Massachusetts on the Establishment of the Office of Public Participation,” Docket No. AD21-9-000, n.d., 20210423-5268

<sup>44</sup> [Californians] for Renewable Energy (CARE) and Michael Boyd, “Comments of [Californians] for Renewable Energy (CARE) and Michael Boyd regarding the Office of Public Participation (OPP),” Docket No. AD21-9-000, May 7, 2021, 20210507-5069.

violations of law.”<sup>45</sup> Reforms to a whistleblowing process are explored further in the “Reforms to Process” section below.

*Tribal Government Office:* Many Tribal communities and governments specified that they are not the general public and while they support the creation of the OPP, there should be a separate Tribal Government Office to work directly with Tribal governments.<sup>46</sup> This topic is explored in detail in the “Engagement and Coordination with Specific Communities” below.

*OPP Ombudsperson:* Another specific staffing role called out in several comments was the need for an ombudsperson. Vote Solar wrote that “in order to remain neutral and responsive to the public complaints the Office of Public Participation must also include an Ombudsperson to facilitate the resolution of concerns raised by the public.”<sup>47</sup> Commenters stated that an ombudsperson would be necessary for the OPP to address concerns brought forth by the public and ensure the OPP is fulfilling its duty. One comment suggested an ombudsperson specifically for landowners.<sup>48</sup>

*Outreach Staff:* There were also many examples and comments citing experiences in which FERC staff were dismissive or unhelpful when landowners called with questions. It was suggested that the OPP hire staff with experience in education and public outreach, rather than staff that have industry connections. Friends of Buckingham and Preserve Montgomery County said that a culture shift at FERC is needed and recommended a change in “the culture of FERC from one that [not] only considers the industry with which it is enmeshed, but also the landowners and communities affected by FERC decisions.”<sup>49</sup>

## OPP Advisory Board

Commenters also discussed whether the OPP should have an Advisory Board, including Advisory Board function and membership. In its request for comment, FERC specifically asked whether an advisory board should be created, what its function would be, and board membership. A majority of commenters supported the creation of an advisory board, although a few organizations, such as the Electric Power Supply Association and the Interstate Natural Gas Association (INGAA) expressed concern or opposition.

### **Function of the OPP Advisory Board**

Commenters suggested a range of roles and functions for the Advisory Board, including:

- serving as a sort of audit authority, to make sure the OPP is effectively functioning and meeting the public’s needs;<sup>50</sup>
- reviewing or assessing the OPP’s work and bringing new recommendations and ideas on how to improve upon the current OPP;<sup>51</sup>

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<sup>45</sup> National Whistleblower Center, “National Whistleblower Center Comments on Proposed Office of Public Participation,” Docket No. AD21-9-000, April 23, 2021, 20210423-5220.

<sup>46</sup> E.g., The Pechanga Band of Luiseño Indians (Tribe), “Comments of the Pechanga Band of Luiseño Indians,” Docket No. AD21-9-000, April 23, 2021, 20210423-5322.

<sup>47</sup> Vote Solar 2021.

<sup>48</sup> Larry and Sylvia Mangan, “Comments of Larry and Sylvia Mangan on Docket No. AD21-9-000 regarding the Office of Public Participation,” Docket No. AD21-9-000, n.d., 20210412-5571

<sup>49</sup> Friends of Buckingham and Preserve Montgomery County, VA, “Comments on the FERC Office of Public Participation (OPP) - Docket AD21-9-000,” Docket No. AD21-9-000, April 23, 2021, 20210423-5261.

<sup>50</sup> E.g., Charles E. Sullivan, Jr 2021.

<sup>51</sup> E.g., Earthjustice et al. 2021

- bringing issues and ideas to the OPP based on in-the-field experiences, identifying action items, and assisting in assessing the results of the OPP’s initiatives;<sup>52</sup>
- providing recommendations to the Commission, to ensure public input is being utilized;<sup>53</sup> and
- providing information with an annual report card on the quality of FERC’s public outreach and consultation activities and suggestions for improvement on an annual basis.<sup>54</sup>

### **OPP Advisory Board Membership**

Most comments that addressed the Advisory Board focused on who the Advisory Board should include. Examples of recommendations for Advisory Board members include:

- a balance of representatives from certain communities, including environmental justice communities, a representative designated by the National Association of State Utility Consumer Advocates, a non-governmental consumer advocate representing low-income households, and a representative of landowner interests;<sup>55</sup>
- a member from the coal sector as this sector can provide a “unique perspective on the changing energy sector, the critical need for a diverse and reliable energy supply, and other issues that will help better inform the Commission;”<sup>56</sup>
- representatives from overburdened, disadvantaged communities, who would be provided compensation for time and efforts;<sup>57</sup>
- tribal communities, impacted landowners, consumer advocates, and environmental advocates;<sup>58</sup> and
- representatives from each group of people targeted for listening sessions (landowners and communities affected by infrastructure development, environmental justice communities and tribal interests, tribal governments, energy consumers and consumer advocates).<sup>59</sup>

One commenter suggested that Advisory Board members have limited terms, but did not specify as to how long those terms should be.<sup>60</sup>

### **Opposition to an Advisory Board**

Although a majority of commenters who discussed the creation of an Advisory Board supported and provided recommendations for an Advisory Board,<sup>61</sup> a minority of organizations, such as the Electric

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<sup>52</sup> Electricity Consumers Resource Council, “Comments of the Electricity Consumer Resource Council, Docket No. AD21-9-000, April 23, 2021, 20210423-5139

<sup>53</sup> Appalachian Voices, “Re: Docket No. AD21-9, Comment on Office of Public Participation,” Docket AD21-9, May 7, 2021, 20210507-5217

<sup>54</sup> Richard Eichstaedt, Listening Session: Tribal Governments, Docket No. AD21-9-000, March 24, 2021

<sup>55</sup> Public Citizen n.d.

<sup>56</sup> National Mining Association, “Comments of the National Mining Association on the Establishment and Operation of the Office of Public Participation,” Docket No. AD21-9-000, April 23, 2021, 20210423-5156

<sup>57</sup> CleanAirNow, Kansas City, “RE: Public Input on how the Commission should establish and operate the Office of Public Participation Environmental Justice Comments from CleanAirNow, Kansas City,” Docket No. AD21-9-000, April 23, 2021, 20210423-5118.

<sup>58</sup> E.g., Appalachian Voices 2021.

<sup>59</sup> Aileen Curfman, Listening Session: Tribal Governments, Docket No. AD21-9-000, March 22, 2021, pg. 15, lines 6-8.

<sup>60</sup> Individual, “FERC OPP Comments,” Docket No. AD21-9-000, n.d., 20210420-5033.

<sup>61</sup> E.g., Public Citizen n.d.



Power Supply Association and INGAA, stated that an Advisory Board is not essential to the OPP’s function and/or could create additional layers of bureaucracy.<sup>62</sup> INGAA stated, “If the OPP’s role is more like an ombudsman, and not an advocate, INGAA is unclear on the purpose and need for such an advisory board.”<sup>63</sup> One workshop panelist recommended that the OPP rather set up a “technical working group facilitated by a neutral party,” remarking, “I am purposely avoiding the name ‘advisory board’ because you do not want to get stuck having to follow the Federal Advisory Committee Act.... That is so cumbersome. This group needs to be nimble.”<sup>64</sup>

## **Reducing Barriers to Participation**

Commenters almost uniformly agreed that existing FERC process and procedure have established barriers to participation from a wide group of stakeholders. FERC itself recognizes that there is room to improve; it asked commenters questions such as, “What has hindered or helped your ability to participate in Commission proceedings,” and “How should the OPP coordinate assistance to persons intervening or participating, or seeking to intervene or participate, in a Commission proceeding?”<sup>65</sup>

Commenters accordingly provided a broad range of detailed recommendations for how FERC, through the establishment of a robust OPP, can help reduce or remove these barriers to participation.

Commenters noted that “a fundamental question FERC must be asking itself in every step of this design process... is: how is this specific design decision for the OPP going to make FERC more accessible to the public that it serves – particularly community stakeholders impacted by its decisions.”<sup>66</sup>

Recommendations included those related to accessibility—including improving outreach and notice, providing technical assistance and public education, and reforming the FERC website—engagement with specific communities, and the establishment of an intervenor compensation program.

## **General Accessibility**

Increasing the overall accessibility of FERC to the general public will be an important and central part of the OPP’s work. Commenters repeatedly identified reforming FERC’s current outreach and notice process. Commenters also recommended that the OPP provide public education as well as technical assistance to help the general public better understand and fully engage with FERC and FERC processes. Commenters also found a need to make FERC’s website more user-friendly, as it is currently overly complex and hard to navigate, but is the main way that the public is able to interact with FERC. Finally, many commenters requested that the OPP take action to reduce language barriers.

## **Outreach and Notice**

Commenters noted that the OPP should help reform the current outreach and notice methods FERC uses to reach stakeholders potentially affected by proposed projects. Many commenters criticized the current process, in which the project applicant is responsible for conducting outreach to the communities their

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<sup>62</sup> Electric Power Supply Association, “Comments of the Electric Power Supply Association,” Docket No. AD21-9-000, May 5, 2021, 20210505-5171.

<sup>63</sup> Interstate Natural Gas Association of America, “Speaking on Behalf of the Interstate Natural Gas Association of America April 16, 2021 Workshop on Creation of Office of Public Participation,” Docket No. AD21-9-000, April 9, 2021, 20210423-5224.

<sup>64</sup> Dr. Marty Rozelle, President, The Rozelle Group, Workshop on the Creation of the Office of Public Participation, Panel 2: The Office of Public Participation’s Structure and Functions, April 16, 2021, Pg. 87, lines 20-25.

<sup>65</sup> FERC, “The Office of Public Participation; Notice of Virtual Listening Sessions and a Public Comment Period,” <https://www.federalregister.gov/documents/2021/03/11/2021-05065/the-office-of-public-participation-notice-of-virtual-listening-sessions-and-a-public-comment-period>.

<sup>66</sup> Earthjustice et al. 2021.

project will impact, as a conflict of interest, since the project applicant has no incentive to conduct thorough outreach and engagement. Earthjustice et al., for example, said that having outreach conducted by the party proposing projects creates “a clear conflict of interest in providing full, accurate, and unbiased information that provides communities and individuals with all the key information they need to be meaningfully informed and to meaningfully participate in the FERC process into which they have just been thrust.”<sup>67</sup>

Instead, commenters argued that OPP should take on the role of public outreach. Recommendations included:

- expanding the scope of outreach to include affected community members;
- collaborating with trusted local partners and expanding local staffing;
- prominently highlighting key dates for intervening and engagement;
- distributing information on how to intervene as part of outreach;<sup>68</sup> and
- extending deadlines to intervene to allow an appropriate timeline for outreach.<sup>69</sup>

More details on these and additional recommendations is provided in the “Reforms to Process” section below.

### **Public Education**

Many commenters found that the technical nature of FERC creates another obstacle for public participation. In order to address and reduce this barrier, the commenters requested that the OPP provide the general public with educational resources about FERC. These commenters stated that a deeper understanding of FERC and FERC processes will allow the public to have more thoughtful and insightful engagement in these processes.<sup>70</sup>

Examples of types of materials that FERC could provide include:

- public-facing material with non-technical language to explain Commission procedures, especially for when the Commission is seeking public comment in residential areas;<sup>71</sup>
- summaries for rules or topics related to transmission planning, electric markets, pipelines, etc. The U.S. EPA provides summaries of rules, proceeding, and significant developments in regulation;<sup>72</sup>
- educational content on FERC’s history and role;<sup>73</sup>

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<sup>67</sup> Earthjustice et al. 2021.

<sup>68</sup> E.g., Clarence Adams 2021.

<sup>69</sup> The Niskanen Center, “The Niskanen Center’s Comments on FERC’s Creation of the Office of Public Participation,” Docket No. AD21-9-000, n.d., 20210423-5052.

<sup>70</sup> Sierra Club, “Sierra Club and Public Comments on the Commission’s Proposed Office of Public Participation,” Docket No. AD21-9-000, n.d., 20210507-5182.

<sup>71</sup> Massachusetts Executive Office of Energy and Environmental Affairs, “Comments of the Commonwealth of Massachusetts on the Establishment of the Office of Public Participation,” Docket No. AD21-9-000, n.d., 20210423-5268.

<sup>72</sup> Sierra Club n.d.

<sup>73</sup> Consumer Energy Alliance, “RE: Office of Public Participation Docket (AD21-9),” Docket No. AD21-9, April 23, 2021, 20210423-5121.

- clear information for landowners on how and why to intervene in a FERC proceeding;<sup>74</sup>
- educational workshops, webinars, or other learning sessions on topics like how to file documents or how to apply for intervenor compensation;<sup>75</sup>
- “citizen friendly summaries of lengthy decisions, with bullet points of the most important points and associated page numbers;”<sup>76</sup>
- educational pieces on Independent System Operator and Regional Transmission Organization (ISO/RTO) processes and decisions;<sup>77</sup> and
- similar types of engagement used at the state level like: Shape Massachusetts’ Clean Energy Future” Campaign, “A Public Guide to Energy Facility Sitting in Oregon,” and New England States’ “Engage with Energy” forum.<sup>78</sup>

Some commenters noted that while some of this public education information is already available on FERC’s website, it can be very difficult to find.<sup>79</sup> As further described in the website section below, commenters highlighted a need to make FERC’s website easier to navigate. If that change takes place, FERC could house these public-facing resources in a centralized, easy-to-find location on its website, among other places.

Other comments noted that improved public education can be achieved through a variety of mediums, including summary documents as described above in addition to webinars, trainings, subject matter webpages, blogs, or reports.<sup>80</sup>

### **Technical Assistance**

Many stakeholders recommended that the OPP provide technical assistance to help stakeholders be able to engage fully in FERC’s often-complex processes. As compared to education services described above, technical assistance involves direct services provided to assist stakeholders in intervening, commenting, or otherwise engaging the FERC.

Workshop panelist Kerene Tayloe remarked that technical assistance is “critical to at least make it a fair playing ground where it hasn’t been fair for a very long time.”<sup>81</sup> The Institute for Policy Integrity at New York University School of Law described the inequalities that lead to differences between the public’s comments and industry experts’ comments, noting that “general public comments or input may not be weighted as heavily because they may not be on the same technical level or experience as agency and other stakeholder experts.” The National Consumer Law Center (NCLC) said that “the OPP should assist consumers and community organizations that might have difficulty drafting comments or other input on

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<sup>74</sup> The Niskanen Center n.d.

<sup>75</sup> John Howat, Senior Energy Analyst at the National Consumer Law Center, “Opening Workshop Comments of the National Consumer Law Center,” Docket No. AD21-9-000, April 23, 2021, 20210423-5273

<sup>76</sup> Individual, “FERC OPP Comments,” Docket No. AD21-9-000, n.d., 20210420-5033.

<sup>77</sup> Harvard Electricity Law Initiative, “Comment of the Harvard Electricity Law Initiative,” Docket No. AD21-9, May 7, 2021, 20210507-5096.

<sup>78</sup> Attorneys General of Massachusetts, Connecticut, Delaware, Maryland, Michigan, Minnesota, Oregon, Rhode Island, and Wisconsin, and the Maine Office of the Public Advocate and Maryland People’s Counsel 2021.

<sup>79</sup> Union of Concerned Scientists 2021.

<sup>80</sup> Union of Concerned Scientists 2021.

<sup>81</sup> Kerene Tayloe, Director of Legislative Affairs, WE ACT for Environmental Justice, Workshop on the Creation of the Office of Public Participation, Panel 2: The Office of Public Participation's Structure and Functions, April 16, 2021, Pg. 114, lines 3-5.

their own, particularly if they do not have a legal background in the relevant statutes and FERC precedents or the technical expertise to weigh in on scientific or technical issues.”<sup>82</sup> To reduce this identified inequality, the OPP should provide technical assistance.<sup>83</sup> The OPP could offer technical assistance in a variety of forms, including assigning OPP staff experts to assist the public, sharing templates for FERC filings, and/or increasing access to data and information.

*Staff Expertise:* The OPP could provide technical assistance through dedicated staff. Commenters requested that OPP hire enough staff to provide adequate technical assistance.<sup>84</sup> Technical assistance staff could include legal experts and scientific or technical experts. These staff could provide insight into complex FERC proceedings background and status, help guide individuals through the filing process, and help individuals understand information like complex modeling or cost-of-service studies.<sup>85</sup>

*Templates:* Another opportunity could be for the OPP to create standardized forms and templates for stakeholder use. Earthjustice et al., for example, suggested that the OPP create and maintain templates for different types of filings for participants to use. Earthjustice et al. argued that “the first barrier most prospective participants face is determining the appropriate form and necessary contents of the myriad of different types of filings that FERC accepts.”<sup>86</sup> For parties unfamiliar with FERC processes, a template could eliminate the confusion around formatting and necessary content for different types of filings.<sup>87</sup>

*Access to Data and Information:* A group of citizens’ utility boards found that stakeholders often do not have access to relevant data to make informed input into FERC proceedings. This group suggested that one function of the OPP should be to work with stakeholders to provide them relevant data to be able to make more informed public input.<sup>88</sup> The recommendation to increase staff to provide technical assistance could help address this issue as well, as the technical staff would have access to relevant data and be able to assist parties in accessing said data. There may be information protections set for confidentiality and national security purposes, but the OPP should have the ability to respond to stakeholder requests to help identify information relevant to FERC proceedings.<sup>89</sup> Many commenters also noted that the public cannot access information like critical electric infrastructure information (CEII) and other “privileged” information. A commenter recommended that the OPP set transparent and public standards for what can and cannot be submitted as CEII or privileged.<sup>90</sup> The Institute for Policy Integrity at New York University School of Law further recommended that the OPP “authorize money for open-source modeling and training for intervenors, and work with the Commission and stakeholders to make more data available to the public.”<sup>91</sup>

Additional recommendations for technical assistance resources include:

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<sup>82</sup> National Consumer Law Center 2021.

<sup>83</sup> Institute for Policy Integrity at New York University School of Law, “Comments of the Institute for Policy Integrity at New York University School of Law,” Docket No. AD21-09-000, n.d., 20210423-5020.

<sup>84</sup> E.g., Public Citizen n.d.

<sup>85</sup> R Street Institute, “Comment of R Street Institute,” Docket No. AD21-9-000, April 23, 2021, 20210423-5214.

<sup>86</sup> Earthjustice et al. 2021.

<sup>87</sup> Id.

<sup>88</sup> Citizens Utility Board of Illinois et al. n.d.

<sup>89</sup> Id.

<sup>90</sup> Hydropower Reform Coalition, Appalachian Mountain Club, Connecticut River Conservancy, et al., “Re: Comments on how the Commission should establish and operate the Office of Public Participation pursuant to section 319 of the Federal Power Act. Docket No. AD21-9-000,” Docket No. AD21-9-000, April 23, 2021, 20210426-5035.

<sup>91</sup> Institute for Policy Integrity at New York University School of Law n.d.

- a dedicated help hotline for additional technical assistance;<sup>92</sup>
- coaching, mentoring, consultation, advising, and peer-to-peer support;<sup>93</sup> and
- explainers on types of things the public can do to engage with FERC, including types of filings and a commenting process tutorial.<sup>94</sup>

Finally, one commenter recommended that rather than provide technical assistance, FERC should instead prioritize simplifying its complex processes.<sup>95</sup>

### ***Referral to Representation***

Commenters also highlighted difficulties of finding “competent and affordable legal representation, as well as credible experts.”<sup>96</sup> Earthjustice et al. recommended the OPP compile and make available a list of attorneys and experts who have participated in prior FERC dockets. Additional information provided on attorneys could include what dockets they have participated in, if the attorney was compensated, and what parties the attorney represented. Additional information provided on experts should include their subject matter expertise, what dockets they participated in, if they were compensated, and what party retained the expert.

### ***Website and Hotline Reforms/Internet Access***

Many commenters emphasized that FERC’s website is hard to navigate and creates a barrier to participate or interact with FERC. Commenters identified the need to reform FERC’s website in order to simplify locating docket filings, filing comments, finding and understanding FERC’s decisions/orders, and conducting other activities relating to FERC proceedings and activities. Consumer Energy Alliance said improving the FERC website should be one of the OPP’s highest and first priorities.<sup>97</sup>

Many commenters noted that the FERC website is very important for public engagement. The FERC website is the portal for commenting on proceedings, requesting to be an intervenor, and providing the public with access to information on proceedings. Hydropower Reform Coalition, Appalachian Mountain Club, Connecticut River Conservancy, et al found the FERC website to be “nearly unusable,” “cumbersome and confusing,” and “impossible to comment without knowing the docket number,” which often cannot easily be found.<sup>98</sup> To simplify the website, commenters suggested that FERC make its website as user-friendly as possible, through steps such as:

- hiring experienced consultants to improve the website interface;
- removing technical jargon;
- explaining processes like filing comments or finding certain dockets;
- explaining different types of filings and their purposes; and

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<sup>92</sup> Natural Gas Supply Association 2021.

<sup>93</sup> Vote Solar 2021.

<sup>94</sup> Id.

<sup>95</sup> Francis Eatherington, affected landowner, Public Participating Listening Session: Landowners and Communities Affected by Infrastructure Development, March 22, 2021, Pg. 46, lines 2-4.

<sup>96</sup> Earthjustice et al. 2021.

<sup>97</sup> Consumer Energy Alliance, “RE: Office of Public Participation Docket (AD21-9),” Docket No. AD21-9, April 23, 2021, 20210423-5121.

<sup>98</sup> Hydropower Reform Coalition et al. 2021.

- making important deadlines for becoming an intervenor and for filing comments easy to find on the website, among other recommendations.<sup>99</sup>

Commenters also suggested that FERC have a chat function or a hotline if parties still encounter difficulties with the website<sup>100</sup> and allow the submission of comments without having to create an account.<sup>101</sup> Commenters explained that FERC’s existing ‘FERC Landowner Hotline,’ is insufficient: callers are typically directed to voicemail and rarely receive a call back. If FERC does respond, staff typically tell the landowner to call the gas company point of contact on the gas company hotline.<sup>102</sup> The OPP should improve the hotline by responding within a specified amount of time (e.g. 3 business days), provide answers to landowners’ questions (such as relevant project information), and allow the caller the option to speak to the OPP anonymously.<sup>103</sup>

Other commenters also noted that the FERC website could be a good place to house educational information on topics like the permitting process, how to intervene, what FERC does and how FERC proceedings work, as mentioned above in “Public Education.”<sup>104</sup>

While many commenters argued that improvements to the website would be greatly beneficial, some noted that FERC should not rely solely on its website as a way to engage and participate in FERC proceedings as there are individuals and communities that do not have access to internet. A comment from Jill Averitt, an affected landowner, described how she helped the elderly in her community navigate the FERC website at the local library and community centers, because in her rural community, many of these people lacked internet access. Averitt noted that helping people in her community engage with FERC should not be her responsibility, rather FERC should take on the responsibility of helping the public overcome not only the barriers of a very complex website, but also the barrier of lacking internet access.<sup>105</sup>

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<sup>99</sup> E.g., Natural Gas Supply Association 2021.

<sup>100</sup> E.g., Consumer Energy Alliance 2021.

<sup>101</sup> E.g., CleanAirNow Kansas City 2021.

<sup>102</sup> Niskanen Center n.d.

<sup>103</sup> Id.

<sup>104</sup> E.g., Consumer Energy Alliance 2021.

<sup>105</sup> Jill Averitt, “Comments to docket #AD21-9-000”, Docket No. AD 21-9-000, March 25, 2021, 20210325-5239.

## Language

Many commenters identified language as a barrier to participation. These commenters argued that the OPP must provide increased translation services for multiple mediums, including written materials and communication over the phone and in person. All communities, including those who do not speak English as a first language, must have equal access to participate in FERC proceedings.

Recommendations to reduce language barriers through translation and language services include:

- hiring new staff to increase translation services;<sup>106</sup>
- hiring translation staff to provide translation services both orally and in writing, through multiple languages;<sup>107</sup>
- offering translation services for written documents as well as proceeding and hearings, whether virtual or in-person, and provide services in different languages over the phone;<sup>108</sup>
- creating and publishing an English-Spanish glossary of technical and common terms and cater to other language barriers, like providing sign language interpretations at FERC hearings;<sup>109</sup> and
- having translation services be automatically triggered if 1) “the elementary or middle school nearest to the facility or proposed facility is required to provide a bilingual education program at that school” or 2) if there are any comments received “in an alternative language at least two weeks before the public meeting is scheduled.”<sup>110</sup>

“In the nation over 60 million individuals speak a language other than English; further, 25 million are considered to speak English less than very well, designating them as Limited English Proficient. Linguistically isolated communities can be found across the United States with nearly 20% of Californians considered to be LEP and over 15% of Texans. In Houston alone there are nearly 1 million LEP individuals.”

- *Fenceline Watch*

## Engagement and Coordination with Specific Communities

Commenters identified certain communities and organizations that the OPP should take specific action to engage. These include: landowners who will be directly impacted by a proposed project; EJ, marginalized, and overburdened communities; ISOs and RTOs; state agencies and other regional organizations; and Tribal Nations. While the discussion on “General Accessibility” is broadly applicable to all, this section highlights key recommendations and considerations that are specific to each group’s unique history and experience with FERC and energy projects.

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<sup>106</sup> Commonwealth of Massachusetts n.d.

<sup>107</sup> E.g., Conservation Law Foundation, “Comments of Conservation Law Foundation,” Docket No. AD21-9-000, April 23, 2021, 20210423-5144.

<sup>108</sup> E.g., Conservation Law Foundation 2021.

<sup>109</sup> Port Arthur Community Action Network (PACAN), “RE: Public Comments on Office of Public Participation, Docket No. AD21-9-000,” Docket No. AD21-9-000, n.d., 20210426-5030.

<sup>110</sup> Fenceline Watch 2021.

## Landowners

Landowners are affected by proposed projects that either pass directly through their land or in close proximity to their land. However, many landowners stated that they have historically lacked adequate representation and engagement in FERC processes. Many landowners told stories of frustrating past interactions with FERC that they believed ultimately did not lead to any impact on project outcomes. The Niskanen Center, representing a collection of landowners, conducted a survey in April 2021 in conjunction with Virginia Tech to collect data on landowner experiences with FERC. The survey found that most landowners were not satisfied by their experiences with FERC (survey results can be seen in a box to the right).

An issue of particular interest to many landowners was the use of eminent domain. Landowners expressed feeling helpless, bullied, and ignored:

- “When landowners are notified by the company that it intends to install infrastructure on their property and are immediately told that if they do not cooperate that the company will take the land by eminent domain and they realize that the company is in charge of providing all information about the process and the project to them, they feel helpless.”<sup>111</sup>
- “[T]he fact that companies expect to get eminent domain authority and anticipate that FERC will prioritize their preferred choices, allows them to act as bullies and refuse to address legitimate landowner concerns.”<sup>112</sup>
- “Now I realize that an energy business can propose a project incentivized by guaranteed, high, long-term rates of return based on little proof of actual need, automatically be granted use of the power of eminent domain, and with little consideration of the real costs to landowners, existing businesses, or communities, take use of the land.”<sup>113</sup>

### Results from Niskanen Center Survey:

“Out of those who had a pipeline routed through their property, 31% said that they do not remember receiving a pamphlet or other educational material regarding their rights as a property owner. From those who did remember receiving the materials, 63% said they were very dissatisfied with the information they received, while another 23% said they were somewhat dissatisfied. When asked if it was clear from the information the landowner received that they needed to formally intervene in the FERC proceedings to preserve their rights to take legal action, 92% answered no.”

Landowners suggested that the OPP should conduct early outreach and engagement with them. This outreach should inform landowners of their rights, how to intervene, and provide easy access to any relevant information such as important deadlines and data. The Commission’s current outreach and pamphlet entitled “An Interstate Natural Gas Facility on My Land? What Do I Need to Know?” was described as highly inadequate, with information on when landowners must file for intervenor status found on page seven.<sup>114</sup> Commenters noted that instead such critical information should be prominently displayed and communicated. Furthermore, one commenter suggested that this information was not only hidden but misleading, as it states “You must normally file for intervenor status within 21 days of our notice of the application in the Federal Register,” although landowners usually have 21 days from the

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<sup>111</sup> Friends of Buckingham and Preserve Montgomery County, VA 2021.

<sup>112</sup> Id.

<sup>113</sup> Id.

<sup>114</sup> Niskanen Center n.d.



date of the notice of application, rather than the Federal Register publication, which was found to typically be between 12 and 17 days.<sup>115</sup>

Many commenters also suggested that landowners should be given automatic intervenor status. As Jill Averitt, a landowner, argued, “we shouldn’t have to register to defend our land.”<sup>116</sup>

### ***EJ and Marginalized Communities***

EJ and marginalized communities are often disproportionately burdened by proposed projects, but historically have lacked adequate representation and engagement in FERC processes. Specific recommendations to improve outreach to these communities include additional study, dedicated staffing, and reestablishment of past policies.

The Conservation Law Foundation suggested that the OPP conduct a study, to be completed by January 1, 2022, to identify past Commission actions that have had disproportionately high adverse public health or environmental impact on EJ communities. The OPP should make public the findings of the study and seek public input on steps to remedy past impacts and prevent future disproportionate impacts to EJ communities.<sup>117</sup> The Conservation Law Foundation also suggested that the OPP create metrics to be able to measure impacts Commission decisions could have on EJ communities.<sup>118</sup>

The Property Rights and Pipeline Center recommended that for future siting decisions, direct and indirect impacts to EJ communities must be considered. The Center noted that past energy infrastructure projects, when determining location, have gone “with the path of least resistance.”<sup>119</sup> The Center emphasized the need for change, arguing that “no longer should these communities be overly burdened with fossil fuel infrastructure just because it may be harder for them to organize their opposition.”<sup>120</sup>

A few commenters suggested that having designated EJ staff at the OPP, as mentioned in the “Organization and Staffing” section above, to help facilitate coordinated engagement with EJ communities. Commenters also recommended that, regardless of whether an EJ-specific role is designated, OPP staff should engage with other public officials or staff that work on EJ outreach and policy making, such as the EPA Region I’s designated Region I EJ Coordinator.<sup>121</sup>

Finally, some commenters suggested establishing specific EJ policies or re-implementing past EJ policies. For example, the Union Hill Virginia Freedmen Family Research Group recommended to reinstate and enforce the NEPA EJ guidelines, which were published in 2015 and 2017, but were eliminated under the Trump administration.<sup>122</sup> Similarly, the NCLC cited President Biden’s “Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” which emphasized “entrenched disparities in our laws and public policies, and in our public and private institution[s],” and further emphasized the need for reform in federal entities to improve

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<sup>115</sup> Niskanen Center n.d.

<sup>116</sup> Jill Averitt 2021.

<sup>117</sup> Conservation Law Foundation 2021

<sup>118</sup> Id.

<sup>119</sup> Property Rights and Pipeline Center, “Comments of the Property Rights and Pipeline Center,” Docket No. AD21-9-000, April 23, 2021, 20210423-5275.

<sup>120</sup> Id.

<sup>121</sup> Commonwealth of Massachusetts n.d.

<sup>122</sup> Union Hill Freedmen Family Research Group, “FERC Office of Public Participation Docket AD21-9-000,” Docket No AD21-9-000, April 23, 2021, 20210423-5144

equity and racial justice.<sup>123</sup> NCLC requested that, in line with this Executive Order, FERC require proposed projects to assess equity impacts and require that these assessments be incorporated into FERC application filings. FERC approvals should be contingent on whether or not these equity impacts can be fully mitigated.<sup>124</sup>

### **ISOs/RTOs**

ISOs and RTOs, like FERC, conduct highly technical activities and are often as difficult or more difficult than FERC for the general public to engage with. Commenters recommended that the OPP work to reduce barriers to participation with ISOs/RTOs because, like FERC, ISO/RTO decision making directly impacts consumers. For example, the Public Interest Organizations said that the difficulties that communities face with FERC are the same “in the highly complex and non-transparent ISOs/RTOs decision making processes.”<sup>125</sup> Similar to the barriers to participate with FERC proceedings, the general public lack legal and technical expertise to fully engage in ISO/RTO decision making.<sup>126</sup>

Commenters also noted that ISOs/RTOs are not government agencies, and therefore do not have processes similar to FERC’s for the public to request access to information (i.e., the Freedom of Information Act and Sunshine Act).<sup>127</sup> ISOs/RTOs also do not keep publicly available records of proceedings. If parties wanted to follow certain ISO/RTO actions, they would have to attend ISO/RTO meetings to gain information.<sup>128</sup> These commenters recommended that the OPP work to increase technical assistance at ISOs/RTOs in tandem with assistance provided at FERC. Recommended actions the OPP could undertake include:

- Increasing transparency around ISO/RTO processes and ISO/RTO produced information to increase public participation;<sup>129</sup>
- Regularly monitoring ISO/RTO proceedings and providing summaries on ISO/RTO proceedings and decisions: Commission staff that already attend and listen to ISO/RTO proceedings could help the OPP monitor these regional entities and create a record of ISO/RTO proceedings.<sup>130</sup> This information would be useful for the general public as well as state regulators, transmission planning, participants who are not able to regularly join ISO/RTO meetings, and landowners that are impacted by project development;
- Creating public education pieces like those suggested for FERC for ISOs/RTOs;<sup>131</sup> and

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<sup>123</sup> “Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

<sup>124</sup> National Consumer Law Center 2021.

<sup>125</sup> 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, “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,” Docket No. Ad21-9-000, April 23, 2021, 20210423-5130.

<sup>126</sup> Id.

<sup>127</sup> Office of the People’s Counsel for the District of Columbia 2021.

<sup>128</sup> Harvard Electricity Law Initiative 2021.

<sup>129</sup> RTOGov Researchers, “Comments of RTOGov Researchers,” Docket No. AD21-9, n.d., 20210510-5013.

<sup>130</sup> Harvard Electricity Law Initiative 2021.

<sup>131</sup> Acadia Center et al. 2021.

- Creating field offices for each ISO/RTO or having OPP staff located at ISO/RTO offices.<sup>132</sup>

### **States**

Increased coordination with states can both help the OPP take advantage of existing state-level knowledge as well as provide states with resources to serve their constituents and provide additional local support.

The Berkshire Environmental Action Team, for example, found that many landowners first find out about projects when land agents come knocking on their doors and that local officials first learn about projects when confused landowners reach out to them with questions.<sup>133</sup> They recommended that the OPP should work to increase communications with local officials early on in project proposals.

The National Association of State Energy Officials (NASEO) emphasized that State Energy Offices have useful knowledge of stakeholders and communities within the area and can work with the OPP to suggest communities to engage with for targeted public outreach. Furthermore, NASEO noted that “as trusted and well-known entities, State Energy Offices can amplify the outreach of the OPP to the states and deepen the engagement with state energy stakeholders.”<sup>134</sup> The Appalachian Trail Conservancy said working with local governments will also lead to more informed siting and understanding of potential pitfalls for project applicants. They also noted that county-level government input and data can be useful as well, “because the county often considers things the state does not, being closer to the impacted individuals, the potentially impacted resources, and the economic engines of the community.”<sup>135</sup>

Another state-level resource that the OPP could take advantage of is state consumer advocate organizations. A group of state attorney generals suggested that the OPP have staff liaisons for state consumer advocates to build relationships with these parties and work to increase information sharing. State consumer advocates have regional experience and, similar to State Energy Offices, have built trusting relationships with stakeholders.<sup>136</sup>

### **Tribal Governments**

Tribal Nations are significantly impacted by FERC decisions yet have often not had adequate engagement with FERC. The Pechanga Band of Luiseño Indians said FERC and the OPP should “identify and acknowledge how FERC’s administrative processes currently results in systemic injustice, inequality, and exclusion of meaningful Tribal consultation.”<sup>137</sup> Commenters also noted that some Tribes will be particularly affected by energy projects; for example, the Navajo Nation is experiencing a rapid shift from a coal economy to a more diverse economy.<sup>138</sup>

A key area of comment from Tribal Nations emphasized how FERC has not meaningfully conducted government-to-government outreach in the past and has often ignored tribal needs when approving projects that could significantly impact Tribal lands. It was suggested that FERC revise its government-

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<sup>132</sup> Acadia Center et al. 2021.

<sup>133</sup> Berkshire Environmental Action Team 2021.

<sup>134</sup> National Association of State Energy Officials 2021.

<sup>135</sup> Appalachian Trail Conservancy, Docket No. AD21-9-000, February 17, 2021, 20210310-5048

<sup>136</sup> Attorneys General of Massachusetts, Connecticut, Delaware, Maryland, Michigan, Minnesota, Oregon, Rhode Island, and Wisconsin, and the Maine Office of the Public Advocate and Maryland People’s Counsel, 2021.

<sup>137</sup> The Pechanga Band of Luiseño Indians 2021.

<sup>138</sup> The Navajo Nation, “Re: Comments to the Federal Energy Regulatory Commission’s Office of Public Participation Tribal Government Listening Session, Docket No. AD21-9-000,” Docket No. AD21-9-000, April 23, 2021, 20210423-5279; Arizona Public Service Company, “Comments of Arizona Public Service Company, Docket No. AD21-9-000, April 21, 2021, 20210421-5101.

to-government consultation process, make sure to understand and acknowledge cultural, historical, and environmentally important tribal resources, and hire enough staff to fulfill tribal communication needs.

### **Government-to-Government Consultations/Outreach**

Most Tribal Nations that provided comments in this docket noted that, as independent sovereign governments, tribes are not the general public and therefore require a separate process for consultation and engagement under existing law. While these commenters supported the creation of the OPP, they noted that the office may not adequately address how FERC should communicate and consult with tribal governments. Under Section 106 of the National Historic Preservation Act (NHPA), tribal consultation is required to take place in all steps of a process when a federal agency action could impact historic or culturally important property.<sup>139</sup> Tribal Nations stated that FERC has not met the mandates of this law.<sup>140</sup> A few examples of these comments are provided below.

- *The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR)*: “As an initial matter, it seems necessary to state that CTUIR is not ‘the public.’ Tribes are not ‘the public.’ ‘Commission staff’ hosting ‘listening sessions to give members of the public an opportunity to provide their thoughts and ideas about the creation of the Office of Public Participation (OPP)’ is not government-to-government consultation. It is not reflective, nor an exercise, of FERC’s or the federal government’s Trust Responsibility.”<sup>141</sup>
- *Tulalip Tribes*: “The FERC should hold a government-to-government meeting with Tribes to consult on this proposal. The listening sessions for this process were helpful, but they are not government-to-government consultation.”<sup>142</sup>
- *The Navajo Nation*: “The Tribe, however, wishes to convey that the manner and format of informational gathering for this proceeding does not constitute formal Tribal government-to-government consultation under federal law.”<sup>143</sup>

Many tribes recommended that FERC establish a dedicated process to conduct government-to-government consultation. Additional specific recommendations to improve this consultation include:

- revising FERC’s procedural rules, like its ex parte requirements, to make sure tribes are recognized as consulting parties under Section 106 under NHPA’s tribal consultation process;<sup>144</sup>
- creating an Office of Tribal Participation to be specific to tribal outreach and consultation; and<sup>145</sup>
- adopting practices from other federal agencies, such as the tribal consultation policies at the U.S. Department of Health and Human Services (HHS). The Secretary’s Tribal Advisory Committee worked with tribal leaders to provide feedback on the consultation process, which was described

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<sup>139</sup> General Services Administration, Section 106 of the National Historic Preservation Act, <https://www.gsa.gov/resources-for/native-american-tribes/nhpa-section-106-tribal-consultation>.

<sup>140</sup> The Pechanga Band of Luiseño Indians 2021.

<sup>141</sup> The Confederated Tribes of the Umatilla Indian Reservation Department of Natural Resources, “Subject: Office of Public Participation Comments; Docket No. AD21-9-000,” Docket No. AD 23-9-000, April 23, 2021, 20210426-5048.

<sup>142</sup> The Tulalip Tribes, “Re: The proposed creation of the Office of Public Participation (OPP) Docket No. AD21-9-000,” Docket No. AD21-9-000, March 24, 2021, 20210426-5055.

<sup>143</sup> The Navajo Nation 2021.

<sup>144</sup> The Pechanga Band of Luiseño Indians 2021.

<sup>145</sup> The Confederated Tribes of the Umatilla Indian Reservation 2021.

as a best practice as it “brought a coordinated, department-side process to incorporate tribal guidance on [HHS] priorities, policies and budget, and how to improve the relationship between [HHS] and tribal partners.”<sup>146</sup>

### **Cultural, Historical, and Environmental Significance**

Many of FERC’s actions could have impacts to tribal lands that have cultural, historical, or environmental significance to Tribal Nations. It should be FERC’s responsibility to understand if a project proposal will impact any significant land.

The Tulalip Tribes described their right to fish under treaties, which include the right to protect fish habitats. Hydroelectric projects and tidal projects proposed to FERC have the potential to significantly impact fish and fish habitats, among other reserved resources. In the past 40 years, the Tulalip Tribes said there were 170 proposed hydroelectric projects and eight tidal projects that could have impacted their resources and of those proposed projects, ten hydroelectric projects were built and none of the tidal projects were built.<sup>147</sup> The Tulalip Tribes challenged FERC’s decisions, but noted that working with FERC was extremely difficult. The Tribe had to “rely on the mandatory conditioning authorities that the other federal agencies have, and the Washington State Department of Ecology has for protecting treaty resources” and when necessary go to or threaten to go to federal court. FERC did not help fund any of the Tribe’s legal fees and did not compensate the Tribe for the time it had to spend protecting its resources.<sup>148</sup>

The Tulalip Tribes suggested that FERC hire staff that understand tribal treaties and how proposed projects can impact significant lands or resources. The Tribe noted that “FERC needs to improve on their understanding of and their responsibilities toward protecting Tribes’ treaty reserved resources.”<sup>149</sup> It was also suggested that FERC fund tribal participation. In the past, the Tribe has requested financial support, but was denied every time.<sup>150</sup>

The Pechanga Band of Luiseño provided similar recommendations. The OPP or any other tribal engagement office/staff should understand that FERC actions could impact religiously and culturally significant resources to Tribal Nations and that “Tribal consultation is the key process through which Native American tribes participate on a government-to-government level to protect and preserve their cultural and religious traditions and ultimately, their cultural identity.”<sup>151</sup> FERC should be required to understand adverse impacts that a project could have on culturally and religiously significant resources before considering whether or not to issue a license.<sup>152</sup>

The United South and Eastern Tribes Sovereignty Protection Fund noted that “the Commission has an abysmal track record regarding consultation with Tribal Nations. Project proponents...have also not been held accountable by the Commission for damage to Tribal Nation historic, cultural, and natural

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<sup>146</sup> The Chickasaw Nation, Docket No. AD21-9-000, April 23, 2021, 20210426-5045.

<sup>147</sup> The Tulalip Tribes, “Re: The proposed creation of the Office of Public Participation (OPP) Docket No. AD21-9-000,” Docket No. AD21-9-000, March 24, 2021, 20210426-5055.

<sup>148</sup> Id.

<sup>149</sup> Id.

<sup>150</sup> Id.

<sup>151</sup> The Pechanga Band of Luiseño 2021.

<sup>152</sup> Id.

resources.”<sup>153</sup> They recommended that the Commission create transparent and consistent communications with Tribal Nations to consult on potential projects that can impact significant resources.<sup>154</sup>

### Staffing

As mentioned in part above, commenters submitted a series of recommendations regarding how FERC and the OPP should improve staffing to improve tribal consultation and consideration. These recommendations include:

- creating an Office of Tribal Participation to be specific to tribal outreach and consultation;<sup>155</sup>
- hiring staff that understand tribal treaties and how proposed projects can impact significant lands or resources;<sup>156</sup>
- greatly increasing the number of tribal liaisons, including staff with training and experience with Native American culture;<sup>157</sup>
- ensuring at least one tribal liaison per state: a commenter noted that “there are 574 federally recognized Indian Tribes and over 1700 non-federal FERC licensed hydropower projects yet the FERC regulations provide for one tribal liaison;”<sup>158</sup> and
- improving staff training to educate federal employees on how to work and communicate effectively with Tribal Nations.<sup>159</sup>

### Intervenor Compensation

One key opportunity identified by commenters to reduce barriers to participation in FERC process is for the OPP to establish a program to financially support parties who wish to intervene in FERC proceedings, but lack the resources. Section 391 of the FPA gives the OPP the authority to provide compensation for intervening and/or participating in Commission proceeding. The legislation does not fully define terms, including what is a “substantial contribution” to a proceeding and what is a “significant financial hardship” for an intervenor. As workshop panelist Sharon Jacobs noted, Section 391 is “written in terms that are broad enough to give the Commission substantial discretion in crafting a program for today’s regulatory and

“The Commission may, under rules promulgated by it, provide compensation for reasonable attorney’s fees, expert witness fees, and other costs of intervening or participating in any proceeding before the Commission to any person whose intervention or participation substantially contributed to the approval, in whole or in part, of a position advocated by such person. Such compensation may be paid only if the Commission has determined that—

- (A) the proceeding is significant, and
- (B) such person’s intervention or participation in such proceeding without receipt of compensation constitutes a significant financial hardship to him.”

*Section 391 of the FPA*

<sup>153</sup> The United South and Eastern Tribes Sovereignty Protection Fund, “Re: FERC Creation of the Office of Public Participation Docket No. AD21-9-000,” Docket No. AD21-9-000, April 23, 2021, 20210423-5189.

<sup>154</sup> Id.

<sup>155</sup> The Confederated Tribes of the Umatilla Indian Reservation 2021.

<sup>156</sup> The Tulalip Tribes 2021.

<sup>157</sup> The Confederated Tribes of the Umatilla Indian Reservation 2021.

<sup>158</sup> Id.

<sup>159</sup> The United South and Eastern Tribes Sovereignty Protection Fund 2021.

political environment.”<sup>160</sup> The OPP will need to determine how an intervenor program will function, sources of funding, what intervenor funding could be used for, and who should have access to intervenor funding.

### ***Necessity of the Program***

Many commenters highlighted intervenor compensation as an important opportunity to “level the playing field” between non-experts and industry. These commenters noted that industry typically has experts and other resources that give them the upper hand in participating in FERC proceedings, while individuals or small organizations may find it prohibitively expensive to engage the necessary experts. Earthjustice et al. said “The costs of lawyers and experts needed to capably engage in FERC’s highly technical and administratively unique processes is a huge barrier to impacted individuals and community groups.”<sup>161</sup>

On the other hand, a limited number of commenters found intervenor compensation unnecessary. Energy Transfer LP explained that pipeline certificate proceedings currently do attract significant public participation due to the requirement that pipelines engage in public notification and must contact landowners about the certificate process and said “there is no indication that Congress intended to extend financial support for litigants to disputes over FERC-jurisdictional natural gas pipeline matters.”<sup>162</sup> Energy Transfer LP expressed concern that intervenor compensation would greatly increase the frequency, complexity, and length of natural gas certificate proceedings as intervenor compensation would provide a financial incentive to engage.<sup>163</sup>

### ***Definitions***

Many commenters recommended that there be additional rulemakings used to define some of the key terms regarding an intervenor compensation program. For example, the Electricity Consumers Resource Council noted that in the legislation, it says “The Commission may, under rule promulgated by it...,” which says that the Commission may create a compensation program if a compensation mechanism is found to have value. If the Commission finds that a compensation mechanism would have value then the Commission must promulgate a rulemaking to further define who is eligible for said compensation.

If a compensation mechanism is deemed necessary, four criteria must be defined. The Electricity Consumers Resource Council noted “The statute establishes four criteria for any compensation mechanism that the Commission decides to enact in a discretionary rulemaking: the costs incurred are ‘reasonable’ costs of intervention or participation; they ‘substantially contributed to the approval, in whole or in part, of a position advocated;’ the Commission proceeding is ‘significant;’ and without compensation the intervenor or participant would suffer ‘a significant financial hardship.’”<sup>164</sup> The Commission must further define reasonable costs, what is a substantial contribution, what is significant, and who would have significant financial hardship when participating in FERC proceedings. It was suggested that the Commission create a rulemaking to define these terms.<sup>165</sup> Commenters noted that

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<sup>160</sup> Sharon Jacobs, Workshop of the Creation of the Office of Public Participation, Panel 5: Intervenor Funding, April 16, 2021, pg. 212, lines 20-22, Docket No. AD21-9-000.

<sup>161</sup> Earthjustice et al. 2021.

<sup>162</sup> Energy Transfer LP, “Comments of Energy Transfer LP,” Docket No. AD21-9-000, May 7, 2021, 20210507-5160.

<sup>163</sup> Id.

<sup>164</sup> Electricity Consumers Resource Council (ELCON), “Comments of the Electricity Consumers Resource Council (ELCON),” Docket No. AD21-9-000, April 23, 2021, 20210423-5139.

<sup>165</sup> E.g., Edison Electric Institute 2021, American Gas Association, “Comments of the American Gas Association,” Docket No. AD21-9-000, April 23, 2021, 20210423-5195.

funding will be most effective if the criteria are clear enough to allow potential participants to make informed decisions about the extent of their participation<sup>166</sup> and if those criteria are clearly communicated.<sup>167</sup>

### **Access and Eligibility**

Section 391 of the FPA states that compensation should be provided to intervenors that would face “significant financial hardship” from participating without compensation.<sup>168</sup> Again, comments call for additional detail around definitions for who should be eligible for intervenor compensation and what “significant financial hardship” means.

Many commenters emphasized the need for EJ and marginalized communities to have access to intervenor compensation. The Institute for Policy Integrity at New York University School of Law explained, “because environmental justice communities are often disproportionately affected by energy prices and projects, engaged environmental justice communities could provide information that will help bring to light potential disparate impacts and other issues early on.”<sup>169</sup> Commenters described how these communities have in the past lacked the resources to fully engage in FERC proceedings while simultaneously being those most impacted by FERC decisions.

Commenters also recommended that the OPP establish and publish clear eligibility guidelines for intervenor funding that are available prior to application for funding. The Electric Power Supply Association said that such guidelines will be necessary so that participants do not have to gamble on whether or not they will receive funding.<sup>170</sup>

Additionally, some commenters recommended specific restrictions on funding eligibility, to be enforced through a strict screening process. For example, the Office of the People’s Counsel for the District of Columbia warned that FERC should make sure “that there are guardrails around compensation mechanisms so that the compensation is provided to those representing the public’s interests—not the interests of private parties.”<sup>171</sup> Others recommended that the OPP create some type of screening to disqualify parties that do not need it, have an affiliation with industry,<sup>172</sup> or access to utility funding or donations that have vested interest in projects.<sup>173</sup>

Finally, commenters offered recommendations regarding how funding decisions should be made, specifically regarding which entity should make compensation decisions. Workshop panelist Sharon Jacobs recommended separating this task from public outreach and support functions of the OPP more generally and stated that a key benefit of doing so is that it “shields that office then from any allegations of preference in funding and thereby protects the office from resulting harm to the positive relationships that it is going to be creating with stakeholders.”<sup>174</sup> Panelist Tyler Slocum recommended that most of the

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<sup>166</sup> Electric Power Supply Association 2021.

<sup>167</sup> Chesapeake Climate Action Network 2021.

<sup>168</sup> Federal Power Act, Section 319, <https://www.law.cornell.edu/uscode/text/16/825q-1>.

<sup>169</sup> Institute for Policy Integrity at New York University School of Law n.d.

<sup>170</sup> Electric Power Supply Association 2021.

<sup>171</sup> Office of the People’s Counsel for the District of Columbia 2021.

<sup>172</sup> SOUL of Wisconsin 2021.

<sup>173</sup> Chris Klopp 2021, Listening Session: Landowners and Communities Affected by Infrastructure Development, Docket No. AD21-9-000, March 17, 2021, pg. 60, lines 8-12.

<sup>174</sup> Sharon Jacobs, Workshop of the Creation of the Office of Public Participation, Panel 5: Intervenor Funding, April 16, 2021, pg. 213, lines 12-17, Docket No. AD21-9-000.



review and assessment of intervenor compensation be handled by FERC administrative law judges.<sup>175</sup> Panelist Mark Toney stated in contrast that he did not have a “strong opinion” on the subject, that it was rather an issue of “mechanics,” and that it was more important to ensure “clear standards for how the decision is going to be reached and to have a paper trail.”<sup>176</sup>

### **Sources and Amount of Funding**

If an intervenor compensation program is created, the Commission must identify sources of funding for this program.

Many commenters suggested that the project applicant fund a budget for public participation through fees collected by FERC.<sup>177</sup> The Center for Biological Diversity (CBD) noted that FERC has been mostly self-funded through fees and charges and that the OPP could “develop a mechanism to charge the companies that come before FERC appropriate fees to fund the intervenor compensation program.”<sup>178</sup> INGAA made the same recommendation, that an intervenor compensation program should be funded through FERC’s general budget through sources such as filing fees. Both CBD and INGAA also noted that the 2021 Consolidated Appropriations Act, which directs FERC to create the OPP, says that “funding for the Office of Public Participation will be derived through annual charges and filing fees as authorized by the Federal Power Act and the Omnibus Budget Reconciliation Act of 1986.”<sup>179</sup> The Hopi Tribe also supports a budget for an intervenor compensation program that comes from “socialized fees imposed and collected by FERC across the entire spectrum of entities it regulates.<sup>180</sup> Others believe that the source of funding should be applicants, but perhaps only under certain circumstances; for example, the Hydropower Reform Coalition et al. suggested that “where projects are being proposed as greenfield developments, such as new pumped storage facilities on previously disturbed lands, the applicant, not the OPP, should be required to fund 100% of the budget requested by the public interests.”<sup>181</sup>

Some commenters recommended that intervenor compensation come from FERC’s appropriated budget rather than from industry. A comment from PJM Interconnection (PJM) stated that when considering funding sources for intervenor compensation, “the Commission should recognize that RTOs are already serving the public interest, and funding a significant share of the FERC’s electricity programs” and “Lacking shareholders and other investors, such fees will initially be paid by market participants, but ultimately will be borne by consumers.” PJM noted that if industry was to fund an intervenor compensation program, it is likely that through rate-basing or other mechanisms, it ultimately would be funded by consumers, rather than the organization itself. The American Gas Association sought more clarification on where intervenor compensation funding will come from, giving examples of potential options for funding like the Commission’s general operating account or regulated industries whose projects have intervenor related costs.<sup>182</sup>

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<sup>175</sup> Tyler Slocum 2021, pg. 78.

<sup>176</sup> Mark Toney, Executive Director, TURN – The Utility Reform Network, Workshop of the Creation of the Office of Public Participation, Panel 5: Intervenor Funding, April 16, 2021, pg. 232, lines 1-3 and 22-24.

<sup>177</sup> E.g., New England Flow, “Re: Comments on how the Commission should establish and operate the Office of Public Participation pursuant to section 319 of the Federal Power Act. Docket No. AD21-9-000,” Docket No. AD-21-09-000, April 23, 2021, 20210426-5035; Richard Averitt 2021.

<sup>178</sup> The Center for Biological Diversity, “Center for Biological Diversity’s Comments,” Docket No. AD-21-09-000, April 28, 2021, 20210428.

<sup>179</sup> The Center for Biological Diversity 2021.

<sup>180</sup> The Hopi Tribe.

<sup>181</sup> Hydropower Reform Coalition et al 2021.

<sup>182</sup> American Gas Association 2021.

Regarding total funding that should be made available for intervenor compensation, the SOUL of Wisconsin suggested that at minimum, 25 percent of the OPP budget should be spent on intervenor compensation.<sup>183</sup> The Niskanen Center, in consultation with experts, developed an estimate of more than \$200,000 per intervenor per proceeding (the full model budget can be seen in Appendix A below).<sup>184</sup> Earthjustice et al. noted that this program will likely constitute a large portion of the total OPP budget.<sup>185</sup>

### ***Uses of Funding***

As noted above in the definitions section, what intervenor funding can be used for must be fleshed out further. In Section 391 of the FPA, it states that “reasonable attorney’s fees, expert witness fees, and other costs of intervening or participating in any proceeding” can be eligible for compensation.<sup>186</sup> The legislation does not go further to define what reasonable is. The NCLC stated “companies appearing before the Commission are able to, and in fact do, spend untold millions on their lawyers and experts,” while impacted communities and individuals do not have the resources to do the same.<sup>187</sup> It is critical that intervenor compensation is used to level the playing field between impacted communities and industry.

Many commenters noted that the OPP should use intervenor compensation to allow the public to adequately participate in FERC proceedings. To have the general public participate meaningfully, the OPP should consider for intervenor compensation expenses outside of the intervenor’s means, like hiring an attorney, experts, or any other outside assistance.<sup>188</sup>

Some commenters also provided insight into what should not be eligible for intervenor compensation. The Edison Electric Institute (EEI) suggested having a cap on intervenor compensation to reduce the risk of intervenors trying to prolong litigation to get additional compensation. EEI also noted that such a funding mechanism would avoid double compensation, as there are state-funded consumer advocates and other groups with a statutory requirement to represent certain groups in proceedings.<sup>189</sup>

### ***Timing***

One challenge identified with intervenor compensation is how to provide compensation or support participation for intervenors who are unable to wait until the conclusion of a proceeding to recover costs.<sup>190</sup> One solution from the NCLC recommended that in simple proceedings, where a party only needs compensation to submit comments, the Commission could require the party to submit a filing outlining what the comments would cover and what financial assistance is needed. For more complex proceedings, it was suggested that “the Commission could require a more detailed Notice of Intent to Claim Compensation, as in the California model, and approve an advance of limited up-front funding.”<sup>191</sup> The Utility Reform Network (TURN) recommended providing grants or an advance for organizations who are unable to front the costs of participation to overcome this issue.<sup>192</sup>

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<sup>183</sup> SOUL of Wisconsin 2021.

<sup>184</sup> The Niskanen Center n.d.

<sup>185</sup> Earthjustice et al. 2021.

<sup>186</sup> Federal Power Act, Section 319, <https://www.law.cornell.edu/uscode/text/16/825q-1>.

<sup>187</sup> National Consumer Law Center 2021.

<sup>188</sup> Union of Concerned Scientists 2021.

<sup>189</sup> Edison Electric Institute 2021.

<sup>190</sup> E.g., National Consumer Law Center 2021.

<sup>191</sup> Id.

<sup>192</sup> The Utility Reform Network, “Better Decision Making Through Intervenor Compensation,” Docket No. AD21-09-000, April 22, 2021, 20210422-5004.

### **Potential Models for Intervenor Compensation Programs**

Some commenters noted that existing intervenor support and compensation programs, mostly at the state level, could serve as a model for the OPP's program. Multiple parties pointed to the California Public Utilities Commission's (CPUC) intervenor compensation as a potential model for an OPP program. Under this program, intervenors must file a Notice of Intent to claim compensation by a deadline set by the Administrative Judge or 30 days within the initial Prehearing Conference.<sup>193</sup> This step has been found to be helpful for both the CPUC and other participating parties as it is transparent who is seeking intervenor compensation for a certain proceeding. At the end of a proceeding, each intervenor must file a claim to demonstrate it has made a substantial contribution to the commission's order. Commenters suggested that FERC look at all aspects of the CPUC model when implementing its own.<sup>194</sup>

A group of state attorney generals recommended that FERC consider four state intervenor funding programs as potential models: Massachusetts' Funding Program for Experts, Michigan's Funding Program for Consumer Advocate Intervenors, Rhode Island Public Utilities Reserve Fund, and Wisconsin's Intervenor Compensation Program.<sup>195</sup>

EEI also suggested that FERC hold a technical conference to discuss best practices, what to consider when promulgating a rule, and any past implementation issues with programs that FERC could learn from.<sup>196</sup>

### **Reforms to Processes**

FERC received several recommendations to improve existing processes, including public outreach, addressing complaints, commenting, intervening, and holding public hearings and meetings. Recommendations ranged from re-delegating responsibilities (e.g., the OPP, rather than the project applicant, assuming the task of initial notice to affected landowners) to simplifying processes (e.g., automatically granting intervenor status to affected landowners). Commenters noted that "a focus on systemic changes across the organization will be critical in supporting durable and impactful assistance to the public participation."<sup>197</sup> Here we highlight three overarching processes which commenters believe require significant revisions, including through action undertaken by the OPP.

#### **Outreach Process**

Outreach to potentially affected stakeholders, especially landowners, is a critical way that these stakeholders receive notice of a potential project and gain an opportunity to engage. Commenters in general found the existing process severely inadequate and recommended significant changes.

One of the most common recommendations regarding outreach is that the OPP—not the project applicant—assume responsibility for public outreach throughout all stages of a proceeding. Commenters particularly stressed the need for the OPP to reclaim the responsibility of first notifying affected landowners of a proposed project. Workshop panelist Megan Gibson remarked that "the importance of notice cannot be overstated" and panelist Ken Gee commented that the current practice "epitomizes letting the fox guard her hen house."<sup>198</sup> Earthjustice et al. stated in comments that FERC "must reconsider or otherwise claw-back" the first contact responsibilities from project applicants because they "have a clear conflict of interest in providing full, accurate, and unbiased information that provides communities

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<sup>197</sup> Earthjustice et al. 2021.

<sup>198</sup> Megan Gibson, Workshop of the Creation of the Office of Public Participation, Panel 4: Coordinating Public Assistance, April 16, 2021, pg. 193, lines 3-4, Docket No. AD21-9-000; Ken Gee, Workshop of the Creation of the Office of Public Participation, Panel 4: Coordinating Public Assistance, April 16, 2021, pg. 50, lines 9-10, Docket No. AD21-9-000.

and individuals with all the key information they need to be meaningfully informed and to meaningfully participate in the FERC process.”<sup>199</sup>

Many landowners also strongly recommended making all affected landowner lists public.<sup>200</sup> Deb Evans, an affected landowner, described FERC’s practice of withholding affected landowner names and addresses from the public as “probably the single most damaging to landowners’ ability to represent their interests, limiting both understanding of the process and ability to engage.”<sup>201</sup>

Many recommended that the nature of the OPP’s outreach be proactive, community-based, and sustained throughout a project’s lifecycle. Specific recommendations included:

- expanding formal notifications to also include citizens that would be indirectly impacted by a proposed project (e.g., neighborhood residents);<sup>202</sup>
- targeting engagement with historically marginalized and disadvantaged communities;<sup>203</sup>
- collaborating with trusted organizations and community messengers to help disseminate information and identify key points of contacts in communities. For example, NASEO urged the OPP to collaborate with state energy offices, which, as “trusted and well-known entities,” can “amplify the outreach of the OPP to the states and deepen the engagement with state energy stakeholders;”<sup>204</sup>
- facilitating meetings between communities and public interest groups, companies and government agencies;<sup>205</sup>
- making available local/regional staff who have the capacity to respond to inquiries and requests for meetings as well as expertise to carefully consider, review, and provide reports and data;<sup>206</sup> and
- creating public participation plans.<sup>207</sup>

Public outreach best practices identified by commenters and panelists include EPA’s Superfund program, DOE’s Solar in Your Community, FEMA outreach efforts of certain staff, California’s CARE program,

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<sup>199</sup> Earthjustice et al. 2021.

<sup>200</sup> E.g., Clarence Adams, “The creation of the Office of Public Participation (OPP) Public Comments: Landowners and Communities Affected by Infrastructure Development,” Docket No. AD21-9-000, April 20, 2021, 20210421-5035.

<sup>201</sup> Deb Evans, Workshop of the Creation of the Office of Public Participation, Panel 1: Affected Communities, April 16, 2021, pg. 18, lines 5-10, Docket No. AD21-9-000.

<sup>202</sup> Irene Gilbert, Slot B2H Coalition, Listening Session: Landowners and Communities Affected by Infrastructure Development, Docket No. AD21-9-000, March 17, 2021; Hydropower Reform Coalition et al 2021.

<sup>203</sup> Conservation Law Foundation 2021; Chesapeake Climate Action Network n.d.; Earthjustice et al. 2021; John Howat 2021.

<sup>204</sup> National Association of State Energy Officials 2021.

<sup>205</sup> Hydropower Reform Coalition et al 2021.

<sup>206</sup> Id.

<sup>207</sup> Rebecca Tepper, Chief, Energy and Environmental Bureau, Office of the Massachusetts Attorney General, Workshop of the Creation of the Office of Public Participation, Panel 4: Coordinating Public Assistance, April 16, 2021, pg. 174, lines 9-10, FERC Docket No. AD21-9-000.

Massachusetts’ “Shape Massachusetts’ Clean Energy Future” campaign, and New England States’ “Engage with Energy” forum.<sup>208</sup>

### Complaint Process / Whistleblower Rights

Several stakeholders emphasized the need for the creation of a process to file and address complaints of misconduct filed by individuals. These stakeholders identified land agents, as well as FERC-regulated companies and regional governing entities to a lesser degree, as the potential subjects of such complaints. For example, Deb Evans, an affected landowner, cited concerns with “intimidation, misinformation, and pressure tactics being used particularly towards older widows confronted by persistent land agents at their homes.” Evans noted that “[m]any [affected landowners] were afraid to report actions publicly to FERC for fear of retaliation.”<sup>209</sup> Others identified the unnecessary withholding of information from individuals or stakeholders as an action meriting the filing of a complaint.

These stakeholders recommended that the OPP create a streamlined complaint system, including a landing spot for individuals to report misconduct anonymously and a process for OPP to address such complaints. One commenter stated that the need to manage complaints, particularly of affected landowners, extended throughout a project’s life cycle, including during the proceeding and during and after construction.<sup>210</sup> Some stakeholders recommended that the OPP include accountability and investigatory measures or a way to trigger such measures. For example, the Ohio Farm Bureau Federation recommended that the OPP be able to conduct investigations and performance audits that compliment (but are independent of) FERC proceedings.<sup>211</sup>

In partial contrast, the National Whistleblower Center noted that FERC has existing methods to approach whistleblowing, including a hotline and a notice on its website on how to report violations. The Center rather recommended that FERC and the OPP take steps to encourage whistleblowing, such as through offering financial rewards to whistleblowers, and that FERC establish an Office of the Whistleblower to educate and protect potential whistleblowers.<sup>212</sup>

The Government Accountability Project recommended that the OPP:

- “Ensure that OPP staff are familiar with applicable whistleblower protection laws;”
- “Take measures to explain relevant whistleblower rights to any individual who appears to be making a disclosure;”

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<sup>208</sup> Jacqueline Patterson 2021, pg. 156, lines 10-24; Matthew Tejada, Director of Office of Environmental Justice, U.S. Environmental Protection Agency, Workshop of the Creation of the Office of Public Participation, Panel 3: Energy and Environmental Justice, April 16, 2021, pg. 154, lines 18-24, FERC Docket No. AD21-9-000; John Howat, Senior Policy Analyst, National Consumer Law Center, Panel 1: Affected Communities; April 16, 2021, pg. 73, lines 4-18, FERC Docket No. AD21-9-000; Attorneys General of Massachusetts, Connecticut, Delaware, Maryland, Michigan, Minnesota, Oregon, Rhode Island, and Wisconsin, and the Maine Office of the Public Advocate and Maryland People’s Counsel 2021

<sup>209</sup> Deb Evans, Workshop of the Creation of the Office of Public Participation, Panel 1: Affected Communities, April 16, 2021, pg. 18, lines 5-10, FERC Docket No. AD21-9-000.

<sup>210</sup> Kyle Stephens, Vice President, Regulatory Affairs for Boardwalk Pipelines, LP, on behalf of the Interstate Natural Gas Association of America, Workshop of the Creation of the Office of Public Participation, Panel 4: Coordinating Public Assistance, April 16, 2021, pg. 197, lines 18-22, FERC Docket No. AD21-9-000.

<sup>211</sup> Ohio Farm Bureau Federation, “Re: Docket AD21-9-000,” Docket No. AD21-09-000, April 22, 2021, 20210422-5174.

<sup>212</sup> National Whistleblower Center 2021.

- “Take measures to protect the anonymity or confidentiality of individuals who wish to remain anonymous or confidential and make such disclosures to the office;”
- “Take measures to protect disclosures by not making them public or sharing them without the whistleblower’s consent;”
- “Explicitly address disclosures of wrongdoing and threats to public health and safety when determining agency action;” and
- “Prohibit and refer to the Inspector General for investigation of any evidence of retaliation for communicating with FERC.”<sup>213</sup>

Several commenters also supported the inclusion of an ombudsperson to facilitate the resolution of concerns raised by the public, where possible, to help the OPP remain neutral and responsive to public concerns. The “Organization and Staffing” section of this report discusses this recommendation in more detail.

### Commenting, Intervening, and Public Meetings

Stakeholders provided recommendations to improve the process for commenting and intervening, as well as public meetings and hearings. Cross-cutting recommendations include:

- issue a document summarizing all feedback received;<sup>214</sup>
- identify how input will be utilized and communicate to stakeholders how their input has shaped decision making;<sup>215</sup> and
- more clearly identify relevant deadlines to comment or become an intervenor.

**Commenting:** Many stakeholders (and affected landowners in particular) agreed that the current process to intervene and submit public comments through eComment and eFiling should be simplified to increase accessibility and ease of use. In joint comments, several environmental organizations described the existing commenting process as “cumbersome and confusing,” remarking that it is “impossible to comment without knowing the docket number and it is not easy to find the docket number on the FERC website.”<sup>216</sup>

To streamline the process, several environmental organizations recommended removing registration and email verification requirements.<sup>217</sup> Others suggested the use of dedicated emails to receive comments, rather than an online portal. Other recommendations included that FERC allow multiple avenues for public commenting, including phone, email, and in-person at field offices.<sup>218</sup> Many also recommended increasing the minimum length of the comment period, with many specifying a minimum of 60 days.<sup>219</sup>

<sup>213</sup> Government Accountability Project, “Recommendations for the Execution of Docket #AD21-9-000: Establishment of the Office of Public Participation,” Docket No. AD21-9-000, April 23, 2021, 20210423-5046.

<sup>214</sup> E.g., Charles E. Sullivan, Jr. 2021; The United South and Eastern Tribes Sovereignty Protection Fund 2021.

<sup>215</sup> The United South and Eastern Tribes Sovereignty Protection Fund 2021.

<sup>216</sup> Hydropower Reform Coalition et al. 2021.

<sup>217</sup> CleanAirNow, Kansas City 2021.

<sup>218</sup> Conservation Law Foundation 2021; Sierra Club n.d.

<sup>219</sup> Rebekah Hinojosa 2021; Susanne DesRoches, Deputy Director of Infrastructure and Energy, New York City Office of Resiliency, New York City Office of Sustainability, Workshop on the Creation of the Office of Public Participation, Panel 1: Affected Communities, April 16, 2021, pg. 72, lines 2-7.

**Intervening:** Recommendations include those intended to simplify the intervenor process and to extend the deadlines to do so. Many stated that the current window to request intervenor status, which is often 21 days (and sometimes shorter), is impractical. On this topic, most stakeholders recommended that any affected landowners or other stakeholders that will be impacted by a project should be given automatic intervenor status.<sup>220</sup> Fewer commenters recommended that FERC instead extend the deadline to intervene, such as to 60 or 90 days after initial notice.<sup>221</sup>

Commenters also recommended that the OPP improve its resources regarding intervention. The Niskanen Center recommended creating one complete source collecting and organizing information about intervention (which is currently incomplete and spread across multiple sources, such as notice of applications, landowner pamphlets, and information sheets).<sup>222</sup> Other suggestions pertained to FERC’s website, with some recommending that FERC improve its website to improve the ease of requesting to be an intervenor and that FERC’s filing system be improved to automatically distribute intervenors’ filings to any required service lists.<sup>223</sup>

**Public Meetings:** A few commenters recommended changes to FERC’s current format for public meetings. Workshop panelist Rebekah Hinojosa recommended moving public meetings to “open-mic format to allow for public participation,” remarking that the current format “does not foster open communication.”<sup>224</sup> Similarly, panelist Dr. Susan Tierney recommended “changing FERC’s current public meeting format so that members are not any more separated into small groups, but really hear from each other and learn from each other.”<sup>225</sup> Additional recommendations included not requiring invites to attend certain meetings and loosening ex parte communication rules for certain parties, such as Tribes, to allow for more meaningful consultation and enable parties to ask questions.<sup>226</sup>

## Budget

A small number of commenters provided input on the overall budget of the OPP, while a larger set of commenters focused on the budget and funding for an intervenor compensation (a specific area of comment requested by FERC). Commenters gave suggestions on what the OPP budget should be and how the OPP budget should be funded.

## Proposed Estimates

Few stakeholders provided recommended annual budgets for the OPP. In 1981, the FPA set an initial budget of no more than \$2.4 million for the OPP. This equates to roughly \$7.25 million today, accounting for inflation. Earthjustice et al. stated that this amount should be considered a floor for the OPP’s budget and that it equates to “roughly 36 full time employees at an average cost of \$200,000 per year for salary and benefits.” However, Earthjustice et al. recommended that the OPP should plan and budget for

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<sup>220</sup> The Pipe Line Awareness Network for the Northeast, Inc. (PLAN), “Comments of Pipe Line Awareness Network for the Northeast, Inc.,” Docket No. AD21-09-000, April 23, 2021, 20210423-5021, Berkshire Environmental Action Team 2021, Jill Averitt 2021, Friends of Buckingham and Preserve Montgomery County, VA 2021; Francis Eatherington, landowner, “Comments on the Office of Public Participation,” Docket No. AD21-09-000, March 17, 2021, 20210317-5137; Clarence Adams 2021.

<sup>221</sup> The Niskanen Center n.d.

<sup>222</sup> The Niskanen Center n.d.

<sup>223</sup> E.g., Francis Eatherington 2021; Richard Eichstaedt 2021;

<sup>224</sup> Rebekah Hinojosa, Gulf Coast Campaign Representatives, Sierra Club, Workshop on the Creation of the Office of Public Participation, Panel 1: Affected Communities, April 16, 2021, pg. 22, lines 13-17.

<sup>225</sup> Dr. Susan Tierney, Senior Advisor, The Analysis Group, Workshop on the Creation of the Office of Public Participation, Panel 4: Coordinating Public Assistance, April 16, 2021, pg. 166, lines 6-9.

<sup>226</sup> Dr. Susan Tierney 2021, pg. 166, lines 9-12; Richard Eichstaedt 2021.

additional staff to “cover all the FERC practice areas and geographic areas.” Earthjustice et al. stated that an appropriate staffing budget should be in the range of \$10 to \$16 million for 50 OPP staff. For separate operational expenses, Earthjustice et al. noted as “a rough point of comparison” that the SEC’s Office of the Investor Advocate has a \$2 million budget for non-personnel expenses.

Earthjustice et al. did not provide a recommended estimate for the intervenor compensation program but noted that it will require a “large budget separate from the OPP’s staffing and operation budget.” Again, for comparison, Earthjustice et al. highlighted the California Public Utilities Commission program, which awards roughly \$12 million per year in intervenor compensation over roughly 100 decisions “for comparatively less expensive proceedings and a narrower docket than at FERC.”

One commenter noted that a recent report issued by the National Academies of Sciences, Engineering, and Medicine committee recommended Congressional appropriations of \$8 million per year for the OPP.<sup>227</sup>

### Sources of Funding

Congress recently directed FERC to “assume that funding for the Office of Public Participation will be derived through annual charges and filing fees.”<sup>228</sup> Several commenters expressed support for this approach. For example, Earthjustice et al. stated the importance of funding the OPP and the intervenor compensation program “through FERC’s existing funding mechanism as codified in 42 U.S.C. Section 7171(j).”<sup>229</sup> Recommendations regarding funding sources for intervenor compensation are discussed separately in the “Intervenor Compensation” section of this report.

## Conclusion

Through dozens of hours of spoken input and thousands of pages of written comment, FERC received myriad recommendations for how to establish, run, and fund the Office of Public Participation. Commenters included organizations that have intervened in hundreds of FERC proceedings and individuals who first learned of FERC’s existence when an energy project was proposed on their land or in their community. Recommendations spanned from the broad and sweeping, such as revamping the outreach process for affected stakeholders, to the narrow but no less important, such as ensuring key materials are translated. Across all comments, stakeholders pushed FERC to establish an OPP that would improve the public’s and key stakeholders’ ability to engage with complex FERC issues.

Key recommendations included:

- The OPP must have both the authority to have real influence in FERC’s decision making and the independence to serve as an objective entity to assist the public. The OPP should ensure the public meaningfully informs decision making.

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<sup>227</sup> Dr. Susan Tierney, “Comments of Susan F. Tierney, Ph. D., Senior Advisor, Analysis Group,” Docket No. AD21-09-000, April 16, 2021, 20210428-4001; National Academies of Sciences, Engineering, and Medicine, *Accelerating Decarbonization of the U.S. Energy System*, February 2021, National Academies Press, <https://www.nap.edu/catalog/25932/accelerating-decarbonization-of-the-us-energy-system>.

<sup>228</sup> U.S. Congress, “Consolidated Appropriations Act of 2021,” Division D – Energy and Water Development and Related Agencies Statement, <https://www.appropriations.senate.gov/imo/media/doc/Division%20D%20-%20Energy%20and%20Water%20Statement%20FY21.pdf>.

<sup>229</sup> Earthjustice et al. 2021.



- Increasing the overall accessibility of FERC to the general public through procedural and administrative updates will be an important and central part of the OPP's work. Stakeholders provided recommendations to reduce barriers to participation, through actions such as improving the website, reforming outreach, and expanding engagement with local communities.
- Educational, technical, and financial assistance can help to level the playing field and provide additional resources to stakeholders without extensive experience with FERC. Resources can include educational assistance, technical assistance, and intervenor compensation.
- Specific stakeholder groups, including landowners, marginalized groups, and Tribal governments may be best served by dedicated or special assistance. While the OPP can and should provide resources to all parties, certain stakeholder groups may particularly benefit from OPP resources.

## Appendix A: The Niskanen Center’s Intervenor Compensation Fund Model Budget

Intervenor Compensation Fund  
Model Affected Landowner Participation Budget

Task	Resource	Hour explanation	Hours	Cost
DEIS Comments	Lawyer - 1	At least 4 weeks of work for each attorney, and at least 3 attorneys required for a typical Section 7 pipeline proceeding to represent landowners and landowner groups. Reading and analyzing DEIS, which often is thousands of pages long, drafting and filing comments with any relevant exhibits, consulting and enlisting necessary experts..	160	\$32,000.00
	Lawyer - 2		160	\$32,000.00
	Lawyer - 3		160	\$32,000.00
DEIS Comments Total			480	\$96,000.00
Expert	Expert - Appraisal 1	Independent Land Appraisal for first group of representative landowners and properties along a given pipeline.	0	\$15,000.00
	Expert - Appraisal 2	Independent Land Appraisal for second group of representative landowners and properties along a given pipeline.	0	\$15,000.00
	Expert - Need Determination	Full analysis of market need for an interstate gas pipeline supplying a domestic market that landowners will need in a typical section 7 proceeding.	0	\$15,000.00
	Expert - Safety Evaluation	Expert review and report of pipeline safety issues for a small group of landowners, which would ultimately be applicable to all landowners along the given pipeline, assuming nothing structurally is different in different parts of the same pipeline	0	\$20,000.00
	Expert - Water	Writing report on potential groundwater contamination from pipeline installation and operation, impacts on water sources, agricultural drainage, irrigation, and water surfaces and wetlands would require at least 3 weeks of work to review DEIS, review and gather data on relevant land and water, and conduct analysis and draft and finalize report.	0	\$25,000.00
Expert Total			0	\$80,000.00
Request for Rehearing	Lawyer - 1	At least 2 weeks of work for each attorney. Landowner attorneys have 30 days from the date of a FERC Certificate Order to file their Request for Rehearing on behalf of landowners, which involves complex legal and factual issues, and is the basis for any subsequent court challenge to FERC's decision.	80	\$16,000.00
	Lawyer - 2		80	\$16,000.00
	Lawyer - 3		80	\$16,000.00
Request for Rehearing Total			240	\$48,000.00
<b>Grand Total</b>			<b>720</b>	<b>\$234,000.00</b>