

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

The Office of Public Participation)
) Docket No. AD21-9
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Comment of the Harvard Electricity Law Initiative¹

The Commission has a unique opportunity to shape the Office of Public Participation. Because the Commission has never appointed a Director to lead the Office, the Office’s mission is undefined and unfulfilled. In finally establishing the Office, this Commission could also propose the Office’s initial agenda.

Over the past several months, the Commission has built a record that could guide the inaugural Director’s efforts to develop the Office. In this comment, we urge the Commission to propose including RTO monitoring in the Office’s portfolio, and we sketch out what that function might entail. Providing visibility into RTO decisions and processes could assist state regulators and officials, non-public utilities, companies providing advanced energy technologies, landowners affected by transmission development, and numerous other RTO-adjacent parties. While directed to the public, the Office’s RTO monitoring could enhance transparency in transmission operations and planning, building on the Commission’s long-standing efforts to open what it once called the “black box of transmission system information.”²

The Commission Should Respect the Independence of the Office

Congress drafted section 319(b)(1) in broad terms, delegating discretion to the Director of the Office to define the Office’s specific functions. Pursuant to section 319(b)(1),³ the Director must

¹ The Harvard Electricity Law Initiative is an independent organization based at Harvard Law School’s Environmental & Energy Law Program. These comments do not represent the views of Harvard University or Harvard Law School.

² Order No. 889, 61 Fed. Reg. 21,737, 21,740 (1996) (finding that “open[ing] up the black box of transmission system information” would “ensure that the utility does not use its access to information about transmission to unfairly benefit its own or its affiliates’ sales”).

³ 16 U.S.C. § 825q-1(b)(1).

“coordinate assistance” to two separate groups. For “the public,” the Director must coordinate assistance “with respect to authorities exercised by the Commission.” The Director must also “coordinate assistance” to people “intervening or participating or proposing to intervene or participate in proceedings before the Commission.” For this latter group of intervenors/participants, section 319(b)(2) allows the Commission to reimburse various costs of participation under certain circumstances.

In its initial “report [to Congress] detailing how it will establish and operate the Office,”⁴ the Commission should refrain from defining the key terms in section 319. Congress decided that the Director, and not the Commission, should determine how to fulfill the Office’s responsibilities. Following her appointment by the Chair, the Director “shall be responsible for the discharge of the functions and duties of the Office.”⁵ To fulfill the Office’s responsibilities, the Director “may appoint, and *assign the duties of*, employees of such Office.”⁶ The Commission’s oversight is limited to approving employee compensation and certain expenses.⁷ To safeguard the Office’s independence, the Chair may remove the Director from her position only for “inefficiency, neglect of duty, or malfeasance,” the same removal standards that apply to Commissioners.⁸

As this proceeding marks a case of first impression, the Commission should avoid inappropriately limiting the Office’s potential functions. The Commission’s work will continue to evolve, and the Office may need to adapt accordingly. Adopting a flexible understanding of section 319(b)(1) will allow the Office to respond to industry and regulatory changes and would respect the Office’s independence. A restrictive interpretation by the Commission, particularly at the outset,

⁴ Senate Report, Division D – Energy and Water Development and Related Agencies Appropriations Act, 2021, at p. 117 (requiring the Commission to submit “a report detailing how it will establish and operate the Office of Public Participation required under section 319 of the Federal Power Act, beginning in fiscal year 2022. As part of the report, FERC shall provide an organizational structure and budget for the office sufficient to carry out its statutory obligations.”).

⁵ 16 U.S.C. § 825q-1(a)(2)(B).

⁶ 16 U.S.C. § 825q-1(a)(3)(emphasis added).

⁷ 16 U.S.C. § 825q-1(a)(3).

⁸ Compare 16 U.S.C. § 825q-1(a)(2)(A) and 42 U.S.C. § 7171(b)(1). Under these removal standards, the Commission may not remove the Director over policy disagreements. See *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S.Ct. 2183, 2206 (2020) (noting that the Court has “implicitly rejected an interpretation [of these removal standards] that would leave the President free to remove an officer based on disagreements about agency policy”).

might jeopardize the Office's independence. The Office should be free to implement its own reading of the statute. Ultimately, the Office's independence from the Commission may be critical for its effectiveness.⁹

The Commission can nonetheless take advantage of two opportunities to influence the Office's initial direction without constraining the discretion of future Directors. First, the Commission's forthcoming report to Congress could serve as a set of recommendations to the inaugural Director. Second, the Chair, with the approval of the Commission, must "appoint[]" the inaugural Director¹⁰ who will be responsible for launching the Office.

The Commission Should Propose Including RTO/ISO Monitoring in the Office's Portfolio

The public has a significant interest in RTO/ISO (RTO) stakeholder and planning processes. While many RTO processes are open to the public, as a practical matter they are inaccessible. RTO proceedings are conducted in impenetrable technical language and pursuant to their own unique rules and procedures. On the latter issue, a recent report commissioned by New England governors summarizes that "the governance structure and practices within each ISO/RTO are *exceedingly complicated*."¹¹

The Office could coordinate assistance to the public by documenting RTO processes and proceedings. Currently, no publicly available records exist of RTO proceedings.¹² An interested party, assuming it had sufficient expertise, would have to regularly attend RTO meetings to obtain the sort of information that is publicly obtainable about Commission proceedings through

⁹ See pre-filed testimony of Professor Sharon Jacobs, Panel 5: Intervenor Funding, Apr. 16, 2021 (citing Senate Committee on Governmental Affairs, Study on Federal Regulation, Vol. III: Public Participation in Regulatory Agency Proceedings ix (1977)).

¹⁰ 16 U.S.C. § 825q-1(a)(2)(A).

¹¹ Cali C. Clark, William R. Cotton, Katherine S. Fisher, Christopher A. Parent, Exeter Associates, [Governance Structure and Practices in FERC-Jurisdictional ISOs/RTOs](#) (Feb. 2021) (emphasis in the original) (prepared for the New England States Committee on Electricity, or NESCOE).

¹² Some RTO stakeholder committees post meeting notes. But these shorthand accounts are incomprehensible to anyone who has not been carefully following the issues and proceedings.

eLibrary.¹³ The instant availability of Commission orders and filings in Commission dockets undoubtedly assists state regulators and legislators, industry investors, municipal and cooperative utilities, advocates, interested members of the public, and numerous other groups. Many of these groups are unable to participate in RTO proceedings and have little visibility into RTO decisionmaking processes.

Summaries of RTO decisions and proceedings published by the Office would assist the public. For example, RTO transmission plans determine locations of new infrastructure, which directly affects local land use and consumer rates and more broadly influences the regional resource mix and economic development. These are matters of public concern. RTO transmission planning processes are the only Commission-jurisdictional forum for considering these issues. The Office might publish both general explanations of RTO planning processes and provide routine updates about ongoing planning cycles.

These publications could benefit the public in numerous ways. For state regulators and legislators, RTO planning processes culminate in transmission expansion plans that can affect a utility's operations, finances, and its resource portfolio. The Office's summaries and updates might facilitate more effective utility oversight. For industry players who either are not RTO members or cannot afford to participate in planning processes,¹⁴ the Office's publications might provide insights that affect investments and strategic planning.¹⁵ The Office might also contact affected landowners about proposed projects. As Professor Shelley Welton testified at the April workshop, "research consistently shows that earlier participation is more valuable, at the stage

¹³ Several participants in this proceeding have testified that the Commission's eLibrary is designed for regulatory veterans and suggested that the Commission or the Office improve access for new users.

¹⁴ Even sophisticated industry participants might benefit from the Office's assistance. In a recent Commission proceeding, municipal and cooperative utilities stated that they are unable to participate in planning processes run by Commission-regulated utilities. Kansas Power Pool, Motion to Intervene and Comments, Docket No. ER20-3025-000, at 4 (Oct. 20, 2020) (explaining that their members "lack the necessary resources to participate in the Host TO's processes at the level [they] may desire").

¹⁵ The Commission has long recognized that transmission has "strategic importance." FEDERAL POWER COMMISSION, 1964 NATIONAL POWER SURVEY at 27 (1964).

before a proposed project or rule is formally before the [decision maker].”¹⁶ Because the Commission does not review transmission plans, the RTO planning process may be the only formal opportunity for participation before a utility applies for siting permission.¹⁷

To develop its materials, the Office might coordinate outside personnel. Commission staff that already listen to RTO proceedings might support the Office’s RTO monitoring. The Office might also collate materials provided by RTO staff and stakeholders and draw from the growing body of literature on RTO decisionmaking.¹⁸ Key lessons from these reports might inform the Office’s efforts to update the public on RTO planning and other stakeholder processes.

In addition to publishing educational materials about RTO decisions and processes, the Office might also field inquiries from the public about RTO activities or practices and, where appropriate, publish its responses. For this task, the Office might narrow its understanding of “the public” and respond only to inquiries from entities or individuals that are not RTO members.

¹⁶ Pre-Filed Testimony of Shelley Welton, Panel 4: Coordinating Public Assistance, Apr. 16, 2021 (citing Michael Sant’Ambrogio & Glen Staszewski, *Public Engagement with Rulemaking, Final Report to the Administrative Conference of the United States*, at 25 (2018)).

¹⁷ Several participants in this proceeding have suggested that where the Commission has siting authority pursuant to Title I of the Federal Power Act or the Natural Gas Act the Office should contact affected landowners early in the process. The Office could extend this service to transmission projects planned pursuant to a Commission-jurisdictional process but sited by another regulatory body.

¹⁸ See *supra* note 11. See also Mark James, Kevin B. Jones, Ashleigh H. Krick, and Rikaela R. Greane, *R Street Policy Study No. 112: How the RTO Stakeholder Process Affects Market Efficiency* (2017); Kyungjin Yoo and Seth Blumsack, *The Political Complexity of Regional Electricity Policy Formation*, COMPLEXITY (2019); Kyungjin Yoo and Seth Blumsack, *RTO Governance Structures Can Affect Capacity Market Outcomes*, Proc. 43rd Hawaii International Conference on System Sciences (2020); Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, CALIF. L. REV. (2021); Christina Simeone, *Good Governance: Exploring RTO/ISO Governance Reforms through PJM Interconnection*, ENERGY L. JOURNAL (forthcoming 2021); Hannah Wiseman, *Regional Cooperative Federalism and the U.S. Electric Grid*, GEORGE WASHINGTON L. REV. (forthcoming 2021); Stephanie Lenhart, *Comparative Review of Regional Transmission Organization Governance: An Assessment of Stakeholder Engagement Design and Public Interest Accountability* (forthcoming 2021).

The Office’s RTO Monitoring Would Be Consistent with Commission Statements about RTO Governance and Could Further an Important Commission Policy Goal

Educational materials published by the Office and provided privately in response to inquiries from non-RTO members would inform state regulation, investment decisions, and non-public utility planning. The Office’s work could also facilitate participation of affected landowners in state and federal transmission siting processes. Office staff would not participate directly in RTO proceedings or provide any non-public information. The “record” developed by the Office would be for informational purposes only.

The Office’s RTO monitoring functions would not overlap with existing RTO market monitors. Market monitors report to RTO boards and “assist the Commission” in ensuring just and reasonable rates.¹⁹ The Office’s RTO monitoring would be directed to the public, not the Commission. While market monitors have access to confidential information, the Office would use only publicly available information to fulfill its mission.

The Office might also participate in Commission proceedings, but unlike market monitors, the Office would not take a position on the matter before the Commission. Instead, the Office would aim to provide context about the matter before the Commission by filing information about relevant stakeholder or other RTO decisionmaking processes. An unbiased perspective may be particularly valuable to the Commission. As Commission Christie recently explained, RTOs are “far more vulnerable to rent-seeking than a true market” because “participants themselves are setting the rules.”²⁰ In this environment, the Office’s neutral views on rule-setting processes might inform the Commission’s decision.

The Office’s RTO monitoring functions would not require the Commission to expand its jurisdiction over RTO governance. As discussed, the Office’s primary RTO monitoring task would be to provide information about RTO proceedings. This function would be consistent with the

¹⁹ Order No. 719, 73 Fed. Reg. 64,100 at PP 339, 354 (2008).

²⁰ Commissioner Mark Christie, Opening Remarks, Technical Conference on Capacity Markets and Resource Adequacy (Mar. 23, 2021).

Commission’s approach to RTO stakeholder processes. Commission staff routinely monitor RTO stakeholder meetings, and RTOs should provide the same access to Office personnel. Should RTOs attempt to block Office staff from monitoring meetings, the Director could either continue the Office’s RTO monitoring functions without direct observation of particular stakeholder meetings,²¹ or ask the Commission to revisit its recent determination that rules governing attendance of stakeholder meetings are beyond the Commission’s jurisdiction.²²

The Office’s monitoring might improve RTO efforts to meet the Commission’s responsiveness criteria.²³ The Commission has concluded that RTO stakeholder processes “affect[] the setting of rates, terms, and conditions of jurisdictional services of the type that the Supreme Court has held falls within the Commission’s jurisdiction.”²⁴ With that understanding, the Commission has required each RTO to demonstrate that its board is “responsive to customers and other stakeholders.”²⁵ By educating a broader audience on RTO processes, the Office’s work could lead to additional opportunities for stakeholder feedback to RTO boards.

The Office’s RTO monitoring would also further the Commission’s decades-long effort to foster transparent transmission operations and planning. In Order No. 2000, the Commission recognized that unduly discriminatory transmission service would persist “unless the market can be made . . . transparent with respect to information.”²⁶ The Commission’s landmark reform to its Open-Access Mandate was motivated “by the need to ensure open, transparent and non-discriminatory access to transmission service.”²⁷ The Commission’s remedies aimed to increase transparency in transmission operations and address the “lack of coordination, openness, and

²¹ Some RTO meetings are already closed to the public, and even off-limits to non-privileged RTO members. For example, the PJM Transmission Owners Agreement Administrative Committee is a forum for PJM staff and transmission owners. Should other RTOs move stakeholder meetings behind closed doors to avoid Office staff monitoring, the Commission might need to step in.

²² *RTO Insider v. NEPOOL*, 167 FERC ¶ 61,021 at PP 48–51 (2019).

²³ The Office might help RTOs meet the Commission’s responsiveness criteria. *Id.* at PP 506–09 (describing the four criteria: inclusiveness, fairness in balancing diverse interests, representation of minority interests, and ongoing responsiveness).

²⁴ *PJM Interconnection*, 157 FERC ¶ 61,229 at P 11 (2016).

²⁵ Order No. 719, 73 Fed. Reg. 64,100 at P 477 (2008).

²⁶ Order No. 2000, 89 FERC ¶ 61,285, at pg. 16 (1999).

²⁷ Order No. 890, 118 FERC ¶ 61,119 at P 42 (2007).

transparency” in transmission planning.²⁸ In Order No. 1000, the Commission issued rules designed to further improve transparency in transmission planning.²⁹

By shining a light on RTO processes, the Office would enhance transparency of decisionmaking, which in turn could improve transmission service.³⁰ As Chairman Glick explained:

The public and, by extension, the press have a legitimate interest in how . . . [the] stakeholder process is considering these matters of public interest. . . To paraphrase Justice Louis Brandeis, sunlight is the best disinfectant and it is hard for me to understand how barring public and press scrutiny will further NEPOOL’s mission or, ultimately, its legitimacy as the forum for considering how ISO-New England’s actions affect its stakeholders. Rather than trying to hide its discussions from the public, NEPOOL and its members would be better served by permitting public and press attendance, so that all entities—including those that cannot spend the time or money needed to attend all NEPOOL meetings—can remain informed of the discussions regarding the important issues under NEPOOL’s purview. That result would lead to a more robust discussion of the issues and, ultimately, to better public policy.³¹

Conclusion

In its forthcoming report to Congress, the Commission should propose including RTO monitoring in the Office’s portfolio. The Office’s RTO monitoring could assist state regulators, industry participants who are unable to attend RTO meetings, and landowners affected by transmission development. Enhancing transparency of RTO decisionmaking could also further one of the Commission’s most important policy goals.

Respectfully Submitted,

/s/ Ari Peskoe
Ari Peskoe
Harvard Electricity Law Initiative
6 Everett St., Suite 4133
Cambridge, MA 02138
617.495.4425
apeskoe@law.harvard.edu

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²⁸ *Id.* at P 425.

²⁹ Order No. 1000, 136 FERC ¶ 61,051 at PP 70, 150–52, 328, 345, 368, 465 (2011).

³⁰ *See, e.g., PJM Interconnection*, 157 FERC ¶ 61,229 at P 11 (2016) (“[S]takeholder input is an essential element of a just and reasonable regional transmission planning process”).

³¹ *RTO Insider v. NEPOOL*, 167 FERC ¶ 61,021 (Glick, concurring) (emphasis added).