

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

The Office of Public Participation

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Docket No. AD21-9-000

COMMENTS OF THE ELECTRIC POWER SUPPLY ASSOCIATION

The Electric Power Supply Association (“EPSA”)¹ respectfully submits these comments in response to the Notice of Virtual Listening Sessions and a Public Comment Period issued on March 5, 2021, by the Federal Energy Regulatory Commission (“FERC” or “Commission”) in the above-referenced docket. EPSA commends the Commission for the numerous forums on encouraging and facilitating greater public participation in Commission proceedings and, by these comments, offers its input on how the Commission should establish and operate the Office of Public Participation (“OPP”), pursuant to section 319 of the Federal Power Act (“FPA”). As discussed below, EPSA agrees that an OPP can fulfill a valuable role in educating the public about participation in Commission proceedings and providing technical assistance to individuals and groups interested in participating. With respect to funding participation by parties for whom the costs of participation would otherwise constitute a financial hardship, EPSA believes that some of the approaches discussed at the Listening Sessions and the April 16 Workshop² could be workable and would only

¹ EPSA is the national trade association representing competitive power suppliers in the U.S. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

² See full list and information for Virtual Listening Sessions and notices convening the April 16 “Office of Public Participation Workshop” at the FERC event page for this proceeding at: <https://ferc.gov/news-events/events/workshop-regarding-creation-office-public-participation-04162021>

emphasize the importance of clear eligibility standards that will provide upfront clarity about the availability of funding and thereby allow potential participants to make informed decisions about the extent of their participation.

I. COMMENTS

The record developed in the numerous forums held in this proceeding and the written comments should provide a useful basis for the report on implementing an OPP that the Commission is required to submit to Congress by June 25, 2021.³

Implementation of an OPP will, in turn, facilitate access to, and participation in, FERC processes, practices, and proceedings – which are complex even for seasoned FERC practitioners and “repeat customers,” like EPSA – consistent with the intent of FPA Section 319. As demonstrated by the array of public Listening Sessions convened by the Commission, there are several communities and members of the public that have legitimate and compelling interests in matters before the Commission and that would benefit from assistance with, and education on, their efforts to participate in FERC proceedings. These affected communities and individuals have not historically participated before the Commission. In an effort to help the Commission establish an OPP that will best serve such individuals and groups, EPSA offers the following comments.

A. The Function and Scope of the Office

Section 319 of the FPA contemplates the establishment of an OPP, whose director “shall coordinate assistance to the public with respect to authorities exercised by the Commission,” and “shall also coordinate assistance available to persons

³ Notice of Workshop and Request for Panelists, *The Office of Public Participation*, Docket AD21-9-000 (issued February 22, 2021).

intervening or participating or proposing to intervene or participate in proceedings before the Commission.”⁴ As discussion at the workshop indicated, this assistance should include appropriate outreach and education as well as direct assistance for participation to affected and interested communities so that they may intervene and meaningfully participate in FERC proceedings. Importantly, while Section 319 conditions the availability of funding for a party’s participation in a Commission proceeding (e.g., attorney’s fees) on such participation “substantially contribut[ing] to the approval, in whole or in part, of [its] position,”⁵ no such requirement applies to OPP assistance with intervention and participation. Accordingly, prospective participants should be able to obtain assistance from OPP for public intervention and participation without any showing regarding the actual or potential impact of their participation. Facilitating broader participation will lead to better informed decision-making by the Commission and a fuller ventilation of all relevant issues.

EPSA agrees that it is important that the OPP provide education and assistance to the public – the mission of this office is to assist, facilitate, and educate the public for proceedings before the agency. The development of informational and educational material and forums to explain the mechanics of FERC proceedings and how they proceed should be a priority for OPP. Making FERC, its processes, its authorities, and its outcomes understandable to all interested persons and communities should be job one.

⁴ 16 U.S.C. § 825q-1(b)(1) (2018).

⁵ 16 U.S.C. § 825q-1(b)(2) (2018).

Some have suggested that the OPP should also proactively identify members of the public that may or will be impacted by any pending proceeding.⁶ As a general matter, EPSC does not believe the sort of extensive outreach contemplated by some workshop and listening session participants is feasible or appropriate. To be sure, there will be cases where the affected individuals and groups can be identified – landowners and communities along project right-of-ways, for instance – and it is reasonable for the Commission and/or the OPP to develop, or improve existing, processes for outreach to such individuals and groups. But other Commission proceedings, such as policy and rulemaking matters or rules for organized wholesale electricity markets, have implications for thousands, even millions, of people and groups. Identifying persons or communities impacted by broad policy or rulemaking considerations, or multi-state regional market rules, would pose a nearly insurmountable challenge and could raise serious fairness and even due process issues to the extent the OPP’s outreach were perceived as selective or favoring a particular viewpoint in a given case. Fundamentally, such an approach would misdirect the resources that will be available to OPP. Reaching out to identifiable affected persons, and responding to and assisting those who contact FERC for assistance, will serve the public and allow for more robust and comprehensive representation in FERC proceedings. It is also assumed that the newly announced Environmental Justice senior staff position will build relationships with Environmental

⁶ See e.g., Statement of Tyson Slocum, Energy Program Director for Public Citizen - Panel 2: The Office’s Structure and Functions, April 16 Workshop;
Statement of John Howat, Senior Policy Analyst for National Consumer Law Center – Panel 1: Affected Communities, April 16 Workshop;
Statement of Rebecca Tepper, Chief Energy and Environmental Bureau of the Massachusetts Office of the Attorney General – Panel 4: Coordinating Public Assistance, April 16 Workshop. “Case teams and the OPP could work together at the beginning of a proceeding to identify the relevant stakeholders and consider options for reaching them and encouraging and facilitating their participation.”

Justice community representatives and spokespeople and therefore can assist the OPP with this outreach.

Importantly, the statute does not provide for the OPP to engage in public advocacy or to directly assist parties in taking substantive positions before the Commission.⁷ This should not detract from the OPP's to provide technical assistance regarding FERC processes and requirements or to indirectly support parties' in taking substantive positions through the provision of intervenor funding where eligible. It should, however, will inform the substance of educational outreach and materials.

Finally, it will be critical to ensure that the OPP's operations are structured in a way that avoids ex parte concerns between the OPP and other FERC Offices, including the Environmental Justice senior official, the Chairman's office, and commissioners' offices. Consistent with the purpose of the Commission's ex parte regulations, a structure that prevents the OPP from serving, or being perceived to serve, as a conduit between parties in contested proceedings and decisional employees will "ensur[e] the integrity and fairness of the Commission's decisional process."⁸ It will also benefit persons seeking the OPP's assistance to understand upfront that the scope of that assistance does not extend to advocacy within the Commission and that they will do

⁷ See *for comparison* statutory functions for the SEC Office of Investor Advocate, "According to Exchange Act Section 4(g)(4), 15 U.S.C. § 78d(g)(4), the Investor Advocate shall: (A) assist retail investors in resolving significant problems such investors may have with the Commission or with SROs; (B) identify areas in which investors would benefit from changes in the regulations of the Commission or the rules of SROs; (C) identify problems that investors have with financial service providers and investment products; (D) analyze the potential impact on investors of proposed regulations of the Commission and rules of SROs; and (E) to the extent practicable, propose to the Commission changes in the regulations or orders of the Commission and to Congress any legislative, administrative, or personnel changes that may be appropriate to mitigate problems identified and to promote the interests of investors." Report on Activities: Fiscal Year 2020, Office of the Investor Advocate, U.S. Securities and Exchange Commission, p. ii.

⁸ 18 C.F.R. § 385.2011(a) (2020).

better to present their substantive arguments in their pleadings and other on-the-record communications.

B. The Structure and Organization of the Office

Facilitating meaningful participation by the public to ensure that all views are fully represented in FERC proceedings is an important task for the Commission and will require an office staffed sufficiently to meet that mission. Staff will be needed to develop useful (and understandable) materials and educational tools, improve website platforms, interact with affected citizens or communities, respond to inquiries from the public, offer assistance as requested and as needed, and receive feedback or concerns from members of the public.

Consistent with the mission and scope of the new office, EPISA supports the designation of an ombudsperson to interact with the public as a neutral agent and facilitate informal resolution of concerns where possible. Creation of the OPP will improve FERC's interaction with the public but it will take time to build trust and confidence among those who have found engaging with FERC difficult in past proceedings, or may be reticent to discuss concerns they may be encountering at the agency or in their community. An ombudsperson can be a neutral person able to communicate with interested parties on a confidential basis that facilitates mutually acceptable resolutions and offers responses to difficult complaints or concerns.

EPISA does not support proposals that an advisory board be established to oversee OPP and to report on its activities. In EPISA's view, such a board would simply add an unnecessary layer of bureaucracy⁹ to the office and create confusion as to the

⁹ See e.g., The Federal Advisory Committee Act (FACA) ([Pub.L. 92-463](#), 86 [Stat. 770](#), enacted October 6, 1972).

reporting structure. Doing so will needlessly interfere with the OPP's mission and hamstring its interactions within the Commission. The Commission itself can and should survey the public through its representative, organizations, and communities to determine the engagement, usefulness and reach of the OPP. Vesting this function in an advisory board will simply engender controversy around an office whose purpose is to ease barriers to participation and advocacy before the Commission. Inevitably, any advisory board that might be established will be perceived to exclude or over-represent some interested community, representative, or viewpoint, and having such a board will thereby stoke existing skepticism and mistrust among some affected communities and persons with the Commission. OPP will be best served by transparency and inclusion. EPISA suggests that there be a regular reporting vehicle akin to FERC's Office of Enforcement Annual Report to allow for the transparent assessment of OPP activities by any and all interested persons.

Additionally, suggestions that multiple regional offices be established across the country is not useful or feasible. It will be necessary for OPP staff to travel to interact with certain persons and communities, and this will no doubt be reflected in the proposed budget. That noted, an extensive amount of feedback to the Commission on the creation of OPP raised concerns regarding barriers to rural communities and parties, both as to the means for communication and the ability to hold in person interactions. As FERC is a national agency, and proceedings take place for a set period of time in all regions of the country, siting regional offices will always be several proceedings behind or close to community A but no community B. This occurs with urban communities as well – even within just one state, is an office sited in Pittsburgh,

Philadelphia, Scranton or Allentown to provide access for Environmental Justice and social equity communities? That noted, OPP should assign certain staff with responsibility for certain regions as is done in other FERC offices like the Office of Energy Market Regulation and Office of Energy Projects. This will allow OPP staff to build relationships and trust with certain communities and get to know a region and the proceedings of note that are engaging public representatives.

C. Intervenor Funding

As required by FPA Section 319, the Commission is tasked with developing an intervenor funding mechanism to provide compensation for reasonable fees related to retention of attorneys and expert witnesses and the costs of intervening and participating in FERC proceedings if that participation “substantially contributed to the approval, in whole or in part, of a position advocated by such person.”¹⁰ Further, the statute requires the Commission to determine if the proceeding “is significant,” and if the party’s participation would constitute a “financial hardship” without compensation.¹¹

Speakers at the Listening Sessions and April 16 Workshop outlined several approaches to compensation – for instance setting up a fund in advance of participation and allowing parties to establish eligibility for payments from that fund, or making a determination at the conclusion of a proceeding about the public participant’s impact on the outcome and granting after-the-fact reimbursement. Each approach has benefits and drawbacks. Regardless of the specific approach, EPSA believes that 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. Participation will be chilled if

¹⁰ 16 U.S.C. § 825q-1(b)(2)(A).

¹¹ 16 U.S.C. § 825q-1(b)(2)(B).

would-be participants are asked to “gamble” on whether they will receive funding. The Commission should, therefore, provide for the development of very clear eligibility standards to be applied in all instances, which should include specific criteria to demonstrate a “significant financial hardship” without receipt of compensation.

For example, in establishing standards for “significant financial hardship,” the Commission will want to account for the fact that there are “non-profit” entities that do not lack the financing needed to participate in regulatory proceedings. For example, trade associations, like EPSA, are typically “non-profit” entities, but they have the means to participate in proceedings which directly affect their members, which have a financial stake in the outcome of such proceedings. Further, clarity around these showings helps prospective participants who may need to make engagement decisions in advance of any certainty regarding funding, as well as the attorneys, expert witnesses or others these prospective participants might engage to assist them. Further, without pre-determined standards and metrics, the process and resulting funding decisions can be viewed as inappropriately subjective. For this reason, it would be reasonable that the Administrative Law Judge’s office participate in, if not administer, any funding process and determinations as is done in some state intervenor funding programs.

Another funding issue to be addressed is the establishment of a process to address multiple intervenors who are advocating similar positions in a proceeding or related proceeding. By definition, the OPP will not have an unlimited budget, and the goal should be to bring different perspectives to as many FERC proceedings as possible. Funding participation of multiple like-minded intervenors in a single proceeding will undermine the OPP’s ability to achieve that goal. In order to avoid excluding

interested persons, would-be participants should be strongly encouraged to cooperate and collaborate to the maximum extent possible, and the funding criteria should make clear that cooperation and collaboration will be rewarded. A further benefit of encouraging cooperation and collaboration will be the minimization of duplicative pleadings and argument.

Additionally, several speakers, particularly Listening Session participants, raised concerns with Non-Government Organizations and similarly situated organizations receiving funding. In many instances, these organizations are well funded, and, in some instances, these organizations are funded by entities with significant financial stakes in the outcomes or with policy or legal agendas that are already well represented. Overall, EPSA agrees with concerns expressed that funding these types of organizations will reduce funds available to the sort of grassroots groups and affected citizens groups that the OPP is meant to support. While all will be advantaged by more perspectives represented before the Commission, there will be limited funds and it is not reasonable to set up a public participation model that dwarfs the agency and its work.

Finally, EPSA wishes to clarify the record on one point. Several Listening Session and Workshop speakers stated that “companies” participating in FERC proceedings recover their regulatory and legal costs from customers through rates. While that statement may be accurate where traditional utilities are concerned, it is simply not the case for many sectors of the energy industry. EPSA members, for example, are Independent Power Providers (IPPs) and merchant generation owners that participate in competitive wholesale markets, obtain revenue solely from market prices and have no mechanism for passing through costs of participating in regulatory

proceedings. While participation in FERC proceedings is a cost of doing business, IPPs must choose when, where, and how extensively to participate in federal regulatory proceedings. These choices are even more limited for trade associations representing competitive companies.¹²

II. CONCLUSION

WHEREFORE, EPSA respectfully requests that the Commission consider these comments.

Respectfully submitted,

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¹² To be clear, EPSA is not suggesting that EPSA or its members should be eligible for OPP funding. To the contrary, as indicated above, EPSA would urge the Commission to recognize that many “non-profit” organizations, like EPSA, are adequately funded and should not be eligible for OPP funding. EPSA’s only point here is that, contrary to certain statements at the forums conducted in this proceeding, its members and other “companies” in the sector do not enjoy guaranteed recovery of their costs of participating in Commission proceedings.