

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

The Office of Public Participation)
)
) **Docket No. AD21-9-000**

**COMMENTS OF THE
ELECTRICITY CONSUMERS RESOURCE COUNCIL (ELCON)**

The Electricity Consumers Resource Council (ELCON) respectfully submits comments in this proceeding on how the Federal Energy Regulatory Commission (FERC or Commission) should establish and operate an Office of Public Participation (OPP) pursuant to Section 319 of the Federal Power Act (FPA) (16 U.S.C. § 825q-1).

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. ELCON members own and operate hundreds of major facilities and are significant consumers of electricity in the footprints of all organized markets and other regions throughout the United States. Reliable electricity supply at just and reasonable rates is essential to our members' operations.

INTRODUCTION

ELCON supports robust public participation in Commission proceedings. Participants representing a variety of different viewpoints can present a more extensive range of perspectives to the Commission and lead to more reasoned agency decision making. Congress has directed the Commission to establish an Office of Public

Participation so that there is a formalized process in place to achieve the benefits of enhanced public participation.¹

ELCON urges, however, that the Commission proceed in a measured, thoughtful, and cost-effective manner. Congress did not require that all aspects of the processes and procedures of the OPP be locked in at the outset. In particular, the statute requires that the OPP be established with a Director who “shall coordinate assistance to the public” including to intervenors and participants before the Commission under the Federal Power Act.²

Congress distinguished between these mandatory functions of the OPP and its discretionary role to consider a mechanism whereby 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 Commission proceedings.³ As discussed in these comments, a compensation mechanism would raise a number of very difficult procedural and substantive issues – any such mechanism would need to be carefully structured to ensure that it is administered fairly and consistently, does not taint the credibility of the Commission’s substantive decision-making, and is a necessary and appropriate use of the Commission’s limited resources.

Accordingly, ELCON believes the Commission should adopt a multi-stage process. First, the Commission should establish and staff the OPP and pursue the statutorily-mandated activities to identify and pursue any reasonable and necessary outreach and procedural reforms to assist public participation. After the OPP assesses the results of its mandatory functions, the OPP could consider whether any compensation mechanism is needed (and, if so, what form it should take).

¹ The 2021 Omnibus Appropriations Bill included a provision requiring FERC to report on progress in creating the OPP, which was originally mandated by Congress in 1978 but has not been implemented to date. As FERC states: “Congress directed the Commission to provide, by June 25, 2021, to the Committees on Appropriations of both Houses of Congress a report on the Commission’s progress towards establishing the Office of Public Participation, including an organizational structure and budget for the office, beginning in fiscal year 2022.” See <https://ferc.gov/news-events/events/workshop-regarding-creation-office-public-participation-04162021>.

² 16 U.S.C. § 825q-1(b)(1).

³ 16 U.S.C. § 825q-1(b)(2).

Further, we ask the Commission to prioritize the OPP to focus its work on the electricity sector, given that Congress placed the OPP statute within the FPA, not the Natural Gas Act. Finally, ELCON reiterates its position that FERC should study the cost of delivered power and implores the Commission to use any OPP resources to that end.

I. THE COMMISSION SHOULD BIFURCATE THE MANDATORY AND DISCRETIONARY FUNCTIONS OF THE OPP

In addressing the OPP in Section 212 of the Public Utilities Regulatory Policy Act of 1978 (PURPA), codified at 16 USC § 825q-1, Congress very carefully distinguished between the mandatory requirements on the Commission, using the term “shall,” and the discretionary aspects of the OPP, using the term “may.” ELCON urges the Commission to follow the distinction in the statute.

In terms of mandatory obligations, the statute states that the Commission “shall” establish the OPP and that it “shall” be administered by a Director, with additional mandates intended to ensure that the Director has a degree of independence.⁴ Congress then specified the mandatory duties of the OPP in subsection (b)(1) of the statute:

The Director shall coordinate assistance to the public with respect to authorities exercised by the Commission. The Director shall also coordinate assistance available to persons intervening or participating or proposing to intervene or participate in proceedings before the Commission.⁵

By contrast, subsection (b)(2) of the statute identifies optional, discretionary functions of the OPP, and requires a rulemaking if the Commission were to decide to pursue them:

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

⁴ For example, the Director is to have a four-year term and may only be removed for “inefficiency, neglect of duty, or malfeasance in office.”

⁵ 16 USC 825q-1(b)(1) (emphasis added).

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.⁶

ELCON urges the Commission to adopt this bifurcation in its establishment and implementation of the OPP. The Commission need not address all aspects of the OPP in one fell swoop. The Commission should first focus on what it must do – establish and staff the OPP and initiate efforts to assist the public in interacting with the Commission and in participating in Commission proceedings. ELCON does not prejudge what those efforts might entail, but other participants in this proceeding have identified what they view as substantial needs for public outreach efforts: improved communication, workshops and other educational activities, simplifying the FERC website, easing the procedures for submitting public comments, and other technical assistance.⁷ Even these seemingly straightforward activities will require considerable and careful implementation efforts. In particular, it is vital to ensure that the OPP maintains neutrality, both in fact and in appearance.

After the Commission has established the OPP, initiated the mandatory activities, and assessed their efficacy, it could then consider whether there is value in a compensation mechanism for intervention and participation before the Commission. As discussed below, compensation raises a host of very difficult issues that would need to be carefully considered, and it is appropriate that Congress required a rulemaking if the Commission were to consider exercising the discretionary provisions within the statute.

⁶ 16 USC 825q-1(b)(2) (emphasis added).

⁷ See archived video and panelist testimony: <https://ferc.gov/news-events/events/workshop-regarding-creation-office-public-participation-04162021>.

II. A COMPENSATION MECHANISM WOULD RAISE CHALLENGING ISSUES

A rulemaking to implement the discretionary mechanism referenced in the statute to compensate intervenors and participants in Commission proceedings would raise a host of challenging issues. At the outset, it is important to note that FERC electricity proceedings have a much different character now than when the statute was enacted in 1978, prior to the organized markets. Today, there are also well-funded public interest organizations that closely track developments at FERC and actively participate in virtually all of the significant FERC proceedings, either individually or jointly through coalitions. Particularly as the compensation mechanism language in the statute is not mandatory, the Commission should first establish that a compensation mechanism is in fact necessary before codifying it in new regulations.

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.”⁸ It is more than enough of a challenge to sort through and define these criteria.⁹ In any event, however, the statute is clear that a compensation award may be made only after the fact, and only to a prevailing party.

⁸ 16 USC 825q-1(b)(2).

⁹ Minnesota, for example, has a five-factor test as to whether the participant materially assisted the commission deliberation and a detailed requirement to show financial hardship:

(c) In determining whether an intervenor has materially assisted the commission's deliberation, the commission must consider, among other factors, whether:

- (1) the intervenor represented an interest that would not otherwise have been adequately represented;
- (2) the evidence or arguments presented or the positions taken by the intervenor were an important factor in producing a fair decision;
- (3) the intervenor's position promoted a public purpose or policy;
- (4) the evidence presented, arguments made, issues raised, or positions taken by the intervenor would not have been a part of the record without the intervenor's participation; and
- (5) the administrative law judge or the commission adopted, in whole or in part, a position advocated by the intervenor.

Moreover, the statute does not address how the procedures for compensation would be established to preserve the independence, integrity, and neutrality of the Commission. The Commission's awards should be transparent and consistent, so as to promote the legitimacy of award decisions, protect against abuse, and minimize any perception of favoritism. ELCON believes that these objectives would be promoted by establishing: (i) rigorous claims procedures including documentation of expenses and public notice and comment; (ii) independence of the award decision maker from other public outreach functions and from the policy decision maker in the proceeding; and (iii) a per-participant cap on the amount of the compensation award.

ELCON is not aware of any other similar federal compensation mechanism currently in active use, however, so in the absence of precedents the Commission should tread with special caution and thoughtfulness.¹⁰ The procedures that the handful of states with rate case compensation mechanisms have adopted can be a source of ideas; for example, were the Commission to establish a compensation mechanism, the Administrative Law Judges could be designated as the initial compensation award decision maker with the ultimate step of a commission vote, similar to what California has done,¹¹ and a cap on the award amount could be established, as various states have done.¹²

However, ELCON reiterates that any consideration of a compensation mechanism is premature. It is the objective of the mandatory elements of the OPP—outreach, education, and technical assistance efforts—to reduce the burdens of public

(d) In determining whether the absence of compensation would present financial hardship to the intervenor, the commission must consider:

- (1) whether the costs presented in the intervenor's claim reflect reasonable fees for attorneys and expert witnesses and other reasonable costs; and
- (2) the ratio between the costs of intervention and the intervenor's unrestricted funds.

Minn. Statutes 216B.16 Subd. 10(c), (d).

¹⁰ Any similar federal mechanism seems to be in uncommon use at most. ELCON notes the April 16, 2021 testimony of Prof. Jacobs that federal enthusiasm for such programs “waxes and wanes;” the historic programs that she cites appear largely inactive.

¹¹ Cal. Public Utilities Code 1804(b).

¹² To give one example, in Minnesota “compensation may not exceed \$50,000 for a single intervenor in any proceeding.” Minn. State. 216B.16 Subd. 10(b).

participation. Until those efforts are implemented, it is not known whether a compensation mechanism will be necessary and appropriate, and, if so, what form it should take.

III. THE OPP'S ORGANIZATIONAL STRUCTURE SHOULD INCLUDE AN ADVISORY BOARD

In its notice of this proceeding, the Commission asked whether an advisory board should be a part of the structure of the OPP. ELCON supports an advisory board that could bring issues and ideas to the OPP based on in-the-field experiences, identify action items, and assist in assessing the results of the OPP's initiatives. Such an advisory board should represent the full range of stakeholders. Representatives of large industrial consumers should be included, and ELCON would welcome the opportunity to participate.

IV. THE COMMISSION SHOULD FOCUS THE OPP ON ELECTRICITY RATHER THAN NATURAL GAS ISSUES

In enacting PURPA Section 212, Congress was entirely focused on electricity-related proceedings. PURPA specifically directed that the OPP provision be codified as Section 319 of the FPA, even though PURPA also contained amendments to the Natural Gas Act and could have codified the public participation provisions there as well. This was not a mistake. Senator Howard Metzenbaum, speaking on the floor of the Senate on consideration of the conference report, specifically observed that "For the first time, the Congress has assured the electric consumers of this country that their voice will be heard."¹³

The Commission should recognize that Congress did not have natural gas proceedings in mind in mandating establishment of the OPP. Electricity and natural gas proceedings have a considerably different character, involve different parties, and raise different issues. At a minimum, very different public participation mechanisms

¹³ Congressional Record—Senate, October 9, 1978, at 34763.

may be appropriate for each sector, and the Commission should ensure, for example, that any costs incurred regarding natural gas issues are not imposed on the electricity sector. The presence at the April 16, 2021 workshop of landowners affected by the development of natural gas pipelines¹⁴ and opponents of natural gas production¹⁵ indicates that the Commission intends the OPP's work to extend beyond FPA issues. If the Commission wants to use the OPP to address natural gas issues, it should first seek clarification from Congress on how much weight to give them.

As ELCON has argued in other Commission dockets, electricity consumers deserve a forum in which the complex and unique issues of the electricity sector can be explored. Specifically, regarding how the Commission's policies affect the cost of delivered power, ELCON stated:

In a sense, many of us are flying blind when it comes to...determining the total cost of delivered power and its key drivers. However, FERC can and should resolve this issue by undertaking a comprehensive study of the system-wide drivers of the cost of delivered power...¹⁶

ELCON believes a focused study of the cost of delivered power – including the impacts of Commission policies on customers' electric bills – should be a top priority for the OPP based on the statute. To be clear, it is ELCON's position that the Commission should perform such a study with or without the OPP. However, if the Commission finds that its present organizational structure does not provide the resources necessary to carry out a study of the cost of delivered power, ELCON implores the Commission to use any new OPP resources for that purpose.

Given that Congress was entirely focused on electricity-related proceedings in enacting PURPA Section 212, resolving pressing questions from electricity consumers should be central to the OPP's mission.

¹⁴ Panel 1 featured Deb Evans and Ron Schaaf, *Affected Landowners, Pacific Connector Gas Pipeline*.

¹⁵ Panel 1 also featured Ted Glick, *Organizer, Beyond Extreme Energy*.

¹⁶ Comments of ELCON, American Chemistry Council, and American Forest & Paper Association, Docket No. RM20-10-000 *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act* at 8-9.

CONCLUSION

In proceeding with its establishment and initial implementation of the OPP, the Commission should adopt the measured, stepwise approach discussed in these comments to ensure that the OPP is effective, efficient, and reflects the Congressional intent in mandating the OPP. In particular, the compensation mechanism is discretionary and should not be adopted at least as an initial matter. Further, the OPP's work should focus on electricity issues because that was Congress's intent in placing the statute in the FPA. ELCON looks forward to continuing to work collaboratively with the Commission and other stakeholders on public participation issues.

Respectfully submitted,



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Dated: April 23, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing document upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.:

April 23, 2021

/s/ W. RICHARD BIDSTRUP

W. Richard Bidstrup