

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

**Petition To Initiate A Rulemaking To Establish The Office Of Public Participation As  
Established By Congress And To Fund Its Work**

Pursuant to Rule 207 of the Commission's Rules of Practice and Procedure<sup>1</sup>, the undersigned organizations hereby petition FERC to implement 16 USC § 825q-1 by initiating a rulemaking to carry out the instructions from Congress to establish the Office of Public Participation and fund its work.

In 1978 Congress initiated sweeping changes to the Federal Power Act when it passed Public Law 95-617, the "Public Utility Regulatory Policies Act of 1978" (PURPA). Title II ("Certain Federal Energy Regulatory Commission and Department of Energy Authorities"), Section 212 ("Public participation before Federal Energy Regulatory Commission") of PURPA ordered the creation of an Office of Public Participation at FERC. The full text follows:

**16 USC § 825q-1. Office of Public Participation**

(a)

(1) There shall be an office in the Commission to be known as the Office of Public Participation (hereinafter in this section referred to as the "Office").

(2)

(A) The Office shall be administered by a Director. The Director shall be appointed by the Chairman with the approval of the Commission. The Director may be removed during his term of office by the Chairman, with the approval of the Commission, only for inefficiency, neglect of duty, or malfeasance in office.

(B) The term of office of the Director shall be 4 years. The Director shall be responsible for the discharge of the functions and duties of the office. He shall be appointed and compensated at a rate not in excess of the maximum rate prescribed for GS-18 of the General Schedule under section 5332 of title 5.

(3) The Director may appoint, and assign the duties of, employees of such Office, and with the concurrence of the Commission he may fix the compensation of such employees and procure temporary and intermittent services to the same extent as is authorized under section 3109 of title 5.

(b)

(1) 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.

(2) 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.

(3) Nothing in this subsection affects or restricts any rights of any intervenor or participant under any other applicable law or rule of law.

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<sup>1</sup> 18 CFR § 385.207(a)

(4) There are authorized to be appropriated to the Secretary of Energy to be used by the Office for purposes of compensation of persons under the provisions of this subsection not to exceed \$500,000 for the fiscal year 1978, not to exceed \$2,000,000 for the fiscal year 1979, not to exceed \$2,200,000 for the fiscal year 1980, and not to exceed \$2,400,000 for the fiscal year 1981.<sup>2</sup>

It is important to note that (b)(4)—describing Congressional appropriations—applies only to the Office’s duties providing direct compensation to the public, and not for creating the Office itself: “There are authorized to be appropriated to the Secretary of Energy to be used by the Office for purposes of compensation of persons under the provisions of this subsection...” The obligation to create the office, including the function of the office to compensate the public, is not contingent on any funding at all. The provision just established the funding authorization for compensation to public intervenors under subdivision (b)(2) only for the first four years of operation, which would have required appropriations. But the creation of the office itself, including funds to compensate public intervenors, does not require the appropriation of those funds.

In 1978, FERC relied on Congressional appropriations (with the Department of Energy serving as the conduit) for all of its funding. That changed with the Omnibus Budget Reconciliation Act of 1986, when Congress dictated that FERC “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>3</sup> It follows that now FERC can itself finance not only the Office of Public Participation, but also compensation to intervenors or participants in proceedings.

Congress made clear how important this provision would be to allow the public to participate before FERC. Senator Howard Metzenbaum, speaking on the floor of the Senate on consideration of the conference report, specifically discussed the Office of Public Participation’s authority under (b)(2) for FERC to provide compensation for reasonable fees associated with consumer groups intervening before the Commission:

*For the first time, the Congress has assured the electric consumers of this country that their voice will be heard. And Mr. President, I should point out that not only will the consumer’s voice be heard, but the conference report provides that if the individual or individuals who “substantially contribute” to the ultimate determinations of the hearings may be compensated for their efforts. This is a great victory for the consumer, who will finally be able to compete on an even footing with the utility industry of this Nation. I would like to commend my colleagues on the Conference Committee for preserving this provision.*<sup>4</sup>

The U.S. House of Representatives, too, voted to approve language in the Conference Report emphasizing the intent of Section 212:

*The House bill contained a provision creating an Office of Public Counsel and provided that the Director of the Office would administer and distribute a fund to compensate certain intervenors unable to afford to participate in proceedings before the Commission. The conferees agreed to adopt this provision with some modifications and to require the Director of the Office to*

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<sup>2</sup> [www.law.cornell.edu/uscode/text/16/825q-1](http://www.law.cornell.edu/uscode/text/16/825q-1)

<sup>3</sup> Pub. L. No. 99-509, Title III, Subtitle E, § 3401, "Federal Energy Regulatory Commission Fees and Annual Charges," (codified at 42 U.S.C. 7178), [www.gpo.gov/fdsys/pkg/STATUTE-100/pdf/STATUTE-100-Pg1874.pdf](http://www.gpo.gov/fdsys/pkg/STATUTE-100/pdf/STATUTE-100-Pg1874.pdf)

<sup>4</sup> Congressional Record—Senate, October 9, 1978, at 34763.

*coordinate all other assistance provided by the Commission to intervenors in proceedings before the Commission*

*The creation of the Office of Public Participation, it should be emphasized, does not relieve the Commission of its obligations under other provisions of law to provide for public participation.*

*Paragraph (3) states that nothing in this section shall affect or restrict any rights of any participant in any proceeding under any other applicable law or rule of law. Payment of funds pursuant to this section does not permit the Director or the Commission to control the nature of the legal representation or manner of handling of a case in any proceeding. Payment of costs of participation are not intended to be used as a method to dictate who should represent a participant or intervenor.*

*The conferees intend that nothing in this section affects any authority the Commission may have with respect to providing assistance to the public with regard to matters before the Commission.<sup>5</sup>*

An Office of Public Participation is needed now, more than ever. As “the electric industry gradually transformed itself from one populated by mostly self-sufficient vertically integrated utilities compensated by cost-based rates, to competitive markets characterized by open transmission access, partial disaggregation of generation and transmission, and market-based rates,”<sup>6</sup> more ratemaking is decided in FERC-jurisdictional markets than in state utility regulatory commissions. But while state utility commissions often feature robust procedures and public money dedicated for household consumer representation, no equivalent exists at FERC, leaving entities representing the interests of households at a severe financial disadvantage compared to interests representing the owners of power plants, power marketers and transmission owners.

At the time of Senator Metzenbaum’s floor statement, his reference to “the utility industry of this Nation” was fairly uniform: in 1978 the utility industry was largely homogenous, comprised primarily of vertically integrated utilities. Today, of course, restructured wholesale markets have dramatically transformed the structure and ownership of public utilities, with utilities sometimes controlled by financial entities utilizing multifarious corporate structures and complex trading practices, all requiring the navigation of ever-changing, complex RTO tariffs that set the rates ultimately paid by household consumers.

Indeed, FERC increasingly relies on notice and comment procedures for the purposes of ratemaking through the development of RTO tariffs, which are dominated by groups representing the interests of generators, power marketers and transmission owners. These interests have millions of dollars at their disposal to hire lawyers and consultants in an effort to influence tariff outcomes that maximize their profit-making opportunities. Public interest organizations representing the interests of household consumers do not. Such notice and comment procedures rarely result in cases set for formal, evidentiary hearings, and, as a result,

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<sup>5</sup> Congressional Record—House, October 10, 1978, at 35012.

<sup>6</sup> *Enhancement of Electricity Market Surveillance and Analysis through Ongoing Electric Delivery of Data from Regional Transmission Organizations and Independent System Operators*, FERC Order No. 760, 77 FR 26674 (May 7, 2012), FERC Stats. & Regs. ¶ 31,330, at P 2 (2012).

the Office of Administrative Litigation, tasked with representing the public interest, plays no role in these proceedings.

Some have argued that perhaps the duties of an Office of Public Participation have been replaced by the RTO/ISO Market Monitors. This is inaccurate. RTO/ISO Market Monitors are not consumer advocates. FERC's *Policy Statement on Market Monitoring Units*<sup>7</sup> states that Market Monitors have four primary functions: recommend rule and tariff changes "that promote wholesale competition and efficient market behavior;" review and report on wholesale market performance; provide support to the RTO/ISO in market administration; and refer potential market violations to FERC staff. There is no express requirement that Market Monitors serve as advocates on behalf of household consumers, and, in fact, RTO Market Monitors often take positions at odds with those taken by household consumer advocates.

The Office of Public Participation is also needed to provide support to communities involved with FERC-jurisdictional hydro and natural gas infrastructure proposals.

While FERC-jurisdictional markets have become ever more complex, the bedrock requirement of the Federal Power Act remains stubbornly simple: "It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of [such] matters... is necessary in the public interest."<sup>8</sup> Congress recognized, even in a far-simpler era, that an Office of Public Participation was needed to ensure the public interest was represented.

### **Conclusion**

We request the Commission implement 16 USC § 825q-1 by initiating a rulemaking to carry out the instructions from Congress to establish the Office of Public Participation and fund its work.

Filed March 7, 2016

Signed:

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<sup>7</sup> [www.ferc.gov/whats-new/comm-meet/052505/E-5.pdf](http://www.ferc.gov/whats-new/comm-meet/052505/E-5.pdf)

<sup>8</sup> 16 USC § 824(a)

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