

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

The Office of Public Participation)

Docket No. AD21-09-000

OPENING WORKSHOP COMMENTS OF
THE NATIONAL CONSUMER LAW CENTER

Thank you for inviting John Howat, Senior Energy Analyst at the National Consumer Law Center, to provide comments as a panelist on Panel 1: Affected Communities, at the Office of Public Participation (OPP) Workshop, held on April 16, 2021. Since 1969, the nonprofit National Consumer Law Center (NCLC) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitative practices, help financially stressed families build and retain wealth, and advance economic fairness.

As advocates for low-income utility customers, we offer the following written comments which expand upon the themes presented by Mr. Howat during the April 16 Workshop. In these comments, we address questions posed by the Federal Energy Regulatory Commission (FERC or Commission): "(1) the office's function and scope as authorized by section 319 of the FPA; (2) the office's organizational structure and approach, including the use of equity assessment tools; (3) participation by tribes, environmental justice communities, and other affected individuals and communities, including those who have not historically participated before the Commission; and (4) intervenor compensation."

At the outset, we agree that the role of OPP, as indicated in 16 U.S.C. § 825q-1, is to coordinate assistance for the public and those who seek to intervene or participate in Commission proceedings. The role of OPP would be focused on outreach, education and assistance for a range of stakeholders, some technical assistance, and the distribution of intervenor funding. We do not anticipate that OPP would provide direct representation or would be directly involved in writing or filing documents, but instead would provide education and assistance as needed.

1) OPP can facilitate public input into Commission decisions

Decisions at the Commission have tremendous bearing on the day to day lives of those most susceptible to the consequences of unaffordable home energy services, an unhealthy environment, and climate change. If structured well, the Office of Public Participation could allow for greater opportunity for meaningful consumer participation from those affected by the Commission's decisions. Input from consumers and a diverse range of stakeholders can strengthen the Commission's own decision-making process.

The OPP should assist consumers and community organizations that might have difficulty drafting comments or other input on 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 (e.g., those that would arise in siting proceedings). OPP should provide assistance to such groups. Further, OPP may have a role in educating participants about the outcomes of proceedings and FERC decisions, so that participants can learn how the Commission reviewed and analyzed their input, and how to continue to advocate before the Commission in the most effective manner.

Relevant both here and in the "Public education" topic below, OPP should have a particular focus on reaching diverse communities, particularly low-income communities, those with limited English skills, and geographic areas particularly impacted by FERC-jurisdictional infrastructure projects such as transmission lines, natural gas pipelines and power plants.

2) Public Education and Outreach

The OPP should encourage a process that is accessible to consumers through clear communications that are designed to reach and inform consumers, including communications for consumers with limited English proficiency and consumers with disabilities.

In order to accomplish this, there are several different staff roles that would be key to promoting greater public engagement. The OPP should have experts in outreach and communications, as well as lawyers and technical staff who can understand the arcana of FERC proceedings and translate that arcana for the outreach and communications staff as well as the public. Other staff could provide the technical assistance to groups who would actually intervene or participate in FERC proceedings. Since environmental justice concerns are a priority in numerous communities across the country, staff with experience in environmental justice issues and contacts in such organizations will play a key role in ensuring that there is diverse representation of viewpoints before FERC.

The OPP should offer educational workshops, webinars or sessions to help consumers and advocates learn about how to intervene in FERC proceedings, how to apply for intervenor compensation, how to file documents, and other FERC matters. OPP could also provide education about other involved entities such as RTOs/ISOs, state utility commissions and their roles, and other parties to proceedings.

Outreach could be conducted on an ongoing basis, with targeted outreach efforts to reach affected communities before proceedings begin. For instance, as an avenue for ongoing outreach, OPP could offer an email newsletter, with an option for a printed newsletter to be mailed, to inform community members about upcoming educational opportunities and about FERC proceedings that may affect their region. For targeted outreach, the OPP could initiate outreach to communities that may be affected by upcoming FERC proceedings by notifying municipalities, Community Action Agencies, faith organizations, and other trusted organizations in those communities.

3) Energy Poverty, Racial Justice, Environmental Justice

The decisions of the Commission, based on records that too often lack meaningful input from vulnerable and affected communities, have tremendous bearing on equity, home energy security, health and wellbeing of those living with low incomes and in communities affected by the agency's siting and pricing decisions. A thoughtfully-designed and adequately-funded Office of Public Participation – through provision of intervention technical assistance to marginalized communities -- is needed to begin to reverse the inequities that are baked into the current system.

National and local data demonstrate that, even before the onset of the COVID-19 pandemic, low-income households, and particularly households of color, disproportionately experienced home energy security challenges, including unaffordable bills, loss of vital service, foregoing basic necessities to pay home energy bills, and maintenance of unhealthy indoor temperatures. For example, according to the most recent data from the U.S. Energy Information Administration's Residential Energy Consumption Survey (RECS), households in the Northeast Census Region with annual income at or below \$20,000 in 2015 were required to devote over 14 percent of gross household income for services to keep the lights on and stay warm indoors during the winter. This home energy burden was over 7 times higher than households with annual income over \$120,000, even though average low-income home energy usage is less than half that of upper-income households.¹

High home energy burdens bring stress and insecurity to low-income households. In the South Census Region, nearly 39% of households with income at or below \$20,000 reported forgoing basic necessities to pay for energy services, compared to 1.5% of households with

¹ U.S. Department of Energy, Energy Information Administration, 2015 Residential Energy Consumption Survey microdata (<https://www.eia.gov/consumption/residential/data/2015/index.php?view=microdata>).

incomes over \$140,000.² Similarly, households in the West with income at or below \$20,000 were 5 times more likely than upper-income households to report keeping their homes at unhealthy temperatures.³

There are profound racial justice ramifications of FERC Decisions, and the OPP should play a role assisting marginalized communities to participate and advocate for affordable energy pricing and resource decision-making. Again, national data portray racial justice impacts that are in part driven by FERC decision-making. For example, Black households lose home heating service at almost 2.5 times the rate of white-headed households. Disparities persist even when controlling for income. According to the RECS, among households in the Northeast with annual income at or below \$20,000, African American headed households were more than twice as likely as their white counterparts to experience loss of heating service.⁴ As noted above, the OPP must prioritize outreach and technical assistance to communities of color in support of a mission to reverse racial disparities in the allocation of costs and benefits associated with energy resource planning, siting and pricing.

As noted above, the allocation of energy system costs and benefits in the U.S. is beset by profound racial and economic inequities. President Biden, in his Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government stated the following:

Entrenched disparities in our laws and public policies, and in our public and private institutions, have often denied that equal opportunity to individuals and communities. Our country faces converging economic, health, and climate crises that have exposed and exacerbated inequities, while a historic movement for justice has highlighted the unbearable human costs of systemic racism.

... It is therefore the policy of my Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. Affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government.⁵

² Id.

³ Id.

⁴ Id.

⁵ 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/>), January 20, 2021.

Consistent with this statement, NCLC respectfully urges that the Commission require energy project siting applicants conduct thorough assessments of the equity impacts of the project. Such assessments should include analysis of disparate impacts by race and ethnicity on energy burdens and affordability, health, and community economic security. The assessments should be incorporated into applications filed before the FERC, and subjected to full adjudicatory process, including discovery and cross-examination from interested and affected parties. In the event that impacts that exacerbate existing racial and ethnic inequities are identified by project proponents or intervenors, approval should be contingent upon inclusion of measures to fully mitigate equity impacts. Existing environmental impact assessment protocols and structures may be useful to inform the development and implementation of equity impact assessment at the FERC.⁶ The Office of Public Participation should be charged with the responsibility to provide intervenors with technical assistance in understanding and evaluating equity impact assessment details.

We further urge FERC to look closely at the Federal Communication Commission (FCC) Office of Native Affairs and Policy (ONAP), established by FCC Order adopted on July 29, 2010⁷ to establish a designated office solely devoted to work with tribal governments. ONAP is responsible for ensuring robust government-to-government consultation with federally recognized Tribes, Alaska Native Villages, and Native Hawaiian Organizations. ONAP also works within the FCC to develop and implement policies for assisting Native communities and conducts regional and national Tribal consultation and Tribal training workshops to help build understanding and knowledge of FCC policies and programs and regularly represents the Commission at national and regional inter-Tribal conferences. The FCC ONAP also oversees the Native Nations Communication Task Force. This task force recently released, “Recommendations for Improving Required Tribal Engagement Between Covered Providers and Tribal Governments: Report to the Federal Communications Commission from the Tribal Members of the Task Force,” (Adopted Dec. 30, 2020).⁸ The FCC’s efforts to improve its government-to-government engagement with federally recognized Tribes, Alaska Native Villages, and Native Hawaiian Organizations is a work in progress, but the FCC has taken concrete steps within its own institutional structure to be intentional about recognizing the sovereign status of Tribal nations.

4) Encouraging participation through intervenor funding

⁶ For instance, as a first step the Commission could use existing tools such as the Environmental Protection Agency’s EPA’s EJSCREEN, at <https://www.epa.gov/ejscreen>, and state screening tools in affected regions.

⁷ Establishment of the Office of Native Affairs and Policy in the Consumer and Governmental Affairs Bureau, Order, FCC 10-411 (2010), available at <https://www.fcc.gov/document/establishment-office-native-affairs-and-policy-consumer>; see also Office of Native Affairs and Policy et al, Issue Further Guidance on the Tribal Government Engagement Obligation Provisions of the Connect America Fund, Public Notice, 26 FCC Rcd 8176(2012), available at <https://docs.fcc.gov/public/attachments/DA-12-1165A1.pdf>.

⁸ Available at <https://www.fcc.gov/native-nations-communications-task-force>.

The Commission is authorized, under 16 U.S.C. § 825q-1(b)(2), to “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.” In order to award such compensation, the Commission must determine that “the proceeding is significant, and such person’s intervention or participation in such proceeding without receipt of compensation constitutes a significant financial hardship to him.” 16 U.S.C. §825-q-1(b)(2)(A)&(B).

The Commission has already received extensive comment that exercising the discretion allowed under the just-cited provisions is essential if the Congressional intent to provide “assistance to the public with respect to authorities exercised by the Commission” will be adequately carried out. Commission proceedings are often legally and factually complex, requiring the presentation of expert testimony and assistance of experienced counsel. On the one hand, companies appearing before the Commission are able to, and in fact do, spend untold millions on their lawyers and experts, almost always in pursuit of project approvals that have environmental impacts on local communities or on approval of rate requests that increase the financial burdens on consumers. On the other hand, local groups directly impacted by utility infrastructure projects for which companies seek Commission approval and groups trying to protect consumers from increased rates often are not heard, given the high barriers to having an impact on Commission decisions. It is therefore critical that the Commission exercise its authority under section 825q-1 if the public is to have any hope of operating on a level playing field with industry.

Intervenor funding must be adequate in amount to allow consumers and advocates to participate meaningfully, and thus must include compensation for “reasonable attorney’s fees, expert witness fees, and other costs of intervening or participating” in proceedings, as allowed by section 825q-1(b)(2). The process to know that a party is potentially eligible for compensation, and the final determination and award of compensation, must be sufficiently streamlined so that groups can decide to take on the costs of intervening or otherwise participating.

We suggest that the California Public Utilities Commission’s (CPUC’s) intervenor compensation program provides a model that the Commission would be wise to emulate and improve upon.⁹

In California proceedings, a party intervening in a CPUC proceeding who wishes to obtain compensation must file a Notice of Intent to claim compensation within 30 days of the

⁹ The California Public Utilities Commission has a succinct and helpful summary of the Intervenor Compensation Program here: <https://www.cpuc.ca.gov/icompl/>. A detailed Intervenor Compensation Program Guide can be found here:file:///C:/Users/chara/Downloads/UPDATED%20Icomp%20Program%20Guide%20(April%202017).pdf. The program is authorized by statute, Cal. Pub. Util. Code §1802 *et seq.*

initial Prehearing Conference, or such other deadline established by the presiding Administrative Judge.¹⁰ Requiring a Notice of Intent both serves the interest of the CPUC and other parties, by making it transparent who may seek compensation at the conclusion of the proceeding, and also provides substantial benefits to intervenors, who are able to ascertain early in the proceeding whether they are categorically eligible for compensation.¹¹

At the conclusion of a proceeding (or significant portion thereof, which results in a CPUC decision), an intervenor seeking compensation must submit a detailed claim and demonstrate that its “presentation makes a substantial contribution to the adoption, in whole or in part, of the commission’s order or decision.” Moreover, the petitioning intervenor must show that “participation or intervention without an award of fees or costs imposes a significant financial hardship.”¹² This ensures that the only parties who actually receive compensation have in fact significantly contributed to the commission’s decision, even if, at the front end, the party was found to be categorically eligible for compensation after having filed a Notice of Intent.

The California model provides some other provisions which we urge the Commission to emulate. First, the CPUC is directed to set compensation rates (e.g., hourly rates for attorneys and experts) that “take into consideration the market rates paid to persons of comparable training and experience who offer similar services.”¹³ This ensures that intervenors are able to retain attorneys and witnesses sufficiently skilled to effectively participate in what are often legally and technically complex proceedings, placing them on an equal playing field with attorneys and experts companies employ. Second, California law imposes on the affected utility or utilities in a proceeding the cost of any intervenor awards allowed, which in turn the utility can collect from its ratepayers.¹⁴ This is more than fair since the companies would normally recover the costs of their own lawyers and experts in rates, and the intervenors are acting in the interest of those ratepayers. Third, in order to receive compensation, the intervenor does not need to show that they were the only party to address the issue in question, or that the CPUC relied solely on that intervenors’ presentations to decide the issue. Rather, “participation by a customer that materially supplements, complements, or contributes to the presentation of another party, including the commission staff, may be fully eligible for compensation if the participation makes

¹⁰ The requirement to file a Notice of Intent is contained in Cal. Pub. Util. Code §1804. The actual Notice of Intent form can be found here: <https://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=6442453041>.

¹¹ Cal. Pub. Util. Code §1802 narrowly defines the types of groups that are categorically eligible for compensation. E.g., only certain types of defined “customers” are eligible (§1802(b)), and the party must demonstrate that it would experience a “significant financial hardship” to participate in the absence of compensation (§1802(h)).

¹² Cal. Pub. Util. Code §1803.

¹³ Cal. Pub. Util. Code §1806.

¹⁴ Cal. Pub. Util. Code §1807(a): “An award made under this article shall be paid by the public utility that is the subject of the hearing, investigation, or proceeding, as determined by the commission, within 30 days. Notwithstanding any other law, an award paid by a public utility pursuant to this article shall be allowed by the commission as an expense for the purpose of establishing rates of the public utility by way of a dollar-for-dollar adjustment to rates imposed by the commission immediately on the determination of the amount of the award, so that the amount of the award shall be fully recovered within one year from the date of the award”.

a substantial contribution to a commission order or decision.”¹⁵ Thus, an intervening party in a proceeding before this Commission should not be denied compensation simply because FERC staff itself intervened in or contributed to a particular proceeding.

This Commission unquestionably has the authority to “assess and collect fees and annual charges [from the companies it regulates] in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year.” 42 U.S.C. §7178(a). Further, to the extent the Commission exercises its discretion pursuant to 16 U.S.C. § 825q-1(b)(2) and allows for intervenor compensation, those would be “costs” that could be recovered under §7178(a).

One challenging issue that the Commission should address is how to support intervention from groups without the ability to fully bear the initial costs of hiring lawyers and experts up front, and who therefore cannot wait until the conclusion of a proceeding to recover their costs. We propose two potential solutions. For proceedings in which the party seeking compensation needs to do no more than offer comments, the Commission could require the party to file a statement outlining what its comments would cover, and its financial need for assistance. The Commission could rule promptly on such a filing, and establish a schedule of flat fees a party could recover if its showing is sufficient (as to the substance of the comments and the party’s financial need) and its participation is limited. For more complex proceedings, 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. While it can be argued that providing limited up-front funding would not guarantee that the party contributes significantly to a proceeding, a detailed Notice of Intent would likely allow the Commission to determine whether a party is likely to so contribute. To limit the financial impact of providing funding to groups whose contribution does not eventually prove to be significant, the Commission could place some limits on the ability to the party to obtain partial up-front funding in the future.¹⁶

We thus strongly urge the Commission to adopt a robust intervenor compensation program that is accessible and that allows interested intervenors to meaningfully participate in Commission proceedings.

In conclusion, we applaud the creation of the OPP, and hope to continue to engage with the Commission as this process moves forward.

¹⁵ Cal. Pub. Util Code §1802.5.

¹⁶ We note that ratepayers already bear the cost of company lawyers and witnesses whose presentations and arguments do not significantly contribute to a Commission decision and which, in some cases, are outright rejected by the Commission.

Respectfully submitted,

National Consumer Law Center, on behalf of our low-income clients

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Date: April 23, 2021