

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

The Office of Public Participation)))	Docket No. AD21-9-000
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COMMENTS OF PJM INTERCONNECTION, L.L.C.

Pursuant to the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Notice of Virtual Listening Sessions and a Public Comment Period (“Notice”),¹ PJM Interconnection, L.L.C. (“PJM”) hereby submits its comments expressing support for the Commission’s efforts to promote greater public participation and greater representation in proceedings before the Commission through the Office of Public Participation (“OPP”). Specifically, the Commission’s objective of enhancing the voices of marginalized and/or underrepresented consumers in such proceedings is laudable and appropriate to maintain consumer and citizen confidence in the outcomes of the administrative proceedings before the Commission.

PJM also addresses the inquiry set forth in Item 7 of the Notice seeking comments on whether and how to structure a program to provide compensation for reasonable attorney’s fees, expert witness fees, and other costs (collectively, “fees and costs”) when requested by intervening litigants in “significant” matters before the Commission under section 319 of the Federal Power Act (“FPA”). PJM’s purpose is to suggest potential design criteria for such a program to help the program meet the statute’s stated objectives in a fair manner.

¹ *The Office of Public Participation*, Notice of Virtual Listening Sessions and a Public Comment Period, Docket No. AD21-9-000 (Mar. 5, 2021); *see also The Office of Public Participation*, Second Supplemental Notice of Workshop, Panel 5, Docket No. AD21-9-000 (Apr. 9, 2021); *The Office of Public Participation*, Notice Extending Time for Comments, Docket No. AD21-9-000 (Apr. 23, 2021).

I. COMMENTS

A. *PJM supports enhanced opportunities for Commission-funded participation in Commission proceedings.*

PJM supports enhanced opportunities for participation in Commission proceedings, particularly for those people in our region that historically have been underrepresented or marginalized – and that often lack the economic means or legal wherewithal to successfully participate.

Such participation should be funded through an allocation of the Commission’s budget or a direct appropriation to the OPP. Indeed, the legislative history of section 319 and subsequent Congressional appropriation legislation indicate that if the Commission is to award compensation for fees and costs, such fees and costs are to be paid for by the Commission from its own budget or through a separate direct appropriation to the OPP.² PJM supports the Commission’s use of funds it has received through Congressional appropriations (or existing annual charges and filing fee assessments) to further the OPP’s mission. A Commission-funded compensation mechanism is appropriate because the public policy objective is to facilitate and incentivize public participation in matters pending before the Commission, not to sanction public utilities that may, on occasion, make concessions, change course, or otherwise not prevail in a Commission proceeding.

² The words of Section 319 make clear that the Commission, not any litigant, is to “provide compensation” for these fees and costs. Congressional appropriations bills make clear Congress’s intent. It appears that Congress last appropriated funds for compensation for fees and costs through the 1981 fiscal year, 16 U.S.C.A. § 825q-1(b)(4), and the Commission has denied requests for fees and costs because of the lack of financial support from Congress. *See San Diego Gas & Elec. Co.*, 97 FERC ¶ 61,275, 62,236 (2001). And even more recently, the Committee Report that gave rise to this docket assumes that the section 319 implementation funds may be derived through annual charges and filing fees assessed by the Commission, and not from any other source. House of Representatives, Report 116-449, 116th Congress, 2d Session, Activity Report of the Committee on Energy and Commerce of the House of Representatives Energy and Water Development and Related Agencies Appropriations Bill, 2021, at 151 (accompanies H.R. 7613).

B. The Commission should not compensate litigants that piggyback on other advocates' work or that avoid the RTO stakeholder process.

Section 319 of the FPA expressly permits a compensation award only if the participant “substantially contribute[s] to the approval, in whole or in part, of a position advocated by such person” in a “significant” proceeding before the Commission.³ Thus the Commission should provide clear standards around what “substantial contribution” means. Clear guidance in a proposed rule could help avoid the laudable purposes of the program from being overtaken by requests from private attorneys seeking an easy revenue source by “piggybacking” or “free-riding” on the positions advocated by other similarly-situated interests participating in the proceeding. Clear guidance in this area would help to fulfill the statute’s requirement that the Commission award compensation for fees and costs in only “significant” cases to litigants whose positions “substantially contribute” to the outcome.⁴

In addition, parties should be encouraged to raise their views in the stakeholder process, and not lie in wait. Careful design of the compensation program is needed so as to not create a perverse incentive for litigants to stay silent in the stakeholder process in order to reserve arguments for use in challenges before the Commission on the filings resulting from the stakeholder process in the hopes of receiving compensation.

³ 16 U.S.C.A. § 825q-1(b)(2).

⁴ See *San Diego Gas & Elec. Co.*, 97 FERC ¶ 61275, 62,236 (2001) (“even assuming the funds were available and CARE’s request were not premature, the Commission denies the request on its merits because, as the Presiding Judge noted, ‘[t]he public interest [already] is represented by Commission Staff and state agencies and private interests are represented by interested parties who retain separate counsel.’ Granting CARE’s request for administrative aid would be pointless, given the Commission’s lack of jurisdiction over certain aspects of its complaint, and the abundant representation by other parties regarding the other matters raised by CARE.”).

C. In designing any compensation program, the Commission should recognize that Commission-approved Regional Transmission Organizations are a unique form of public utility.

In crafting any compensatory program, there are also several reasons why the Commission should consider how such a program interacts with Commission-approved Regional Transmission Organizations (“RTOs”). First, it is important to observe that RTOs do not have investors or shareholders and thus do not have the dominant motivating interest that a for-profit utility has of returning a profit for its investors. A Commission-approved RTO with the required characteristics and functions, including independence and a robust stakeholder process, is truly a public service entity. Indeed, Congress enacted section 319 more than twenty years *before* independent RTOs with their requisite stakeholder processes came into existence. Thus, section 319 never contemplated the unique role RTOs play in providing for consideration of various viewpoints or their unique independence. To the extent that the Commission is contemplating funding the OPP based upon additional assessments against public utilities (whether through increased fees or assessments against the RTOs as litigants), the Commission should recognize that RTOs are already serving the public interest, and funding a significant share of the FERC’s electricity programs.⁵ Lacking shareholders and other investors, such fees will initially be paid by market participants, but ultimately will be borne by consumers.

Second, an RTO like PJM is required to have a “decision making process that is independent of control by any market participant or class of participants.”⁶ PJM’s stakeholder process serves this function and affords the opportunity to present diverse viewpoints and to offer public comment on matters affecting system reliability, planning, and the PJM markets,

⁵ See *Annual Charges Assessments for Public Utilities*, Notice of Inquiry, 123 FERC ¶ 61,063, at PP 19, 22 (2008).

⁶ Order No. 2000 at pages 193-194; *see also* 18 C.F.R. § 35.34 (“Regional Transmission Organizations”).

while proposals are under development.⁷ To enhance this public process, PJM's Tariff already provides for and funds the Consumer Advocates of the PJM States⁸ ("CAPS"), which is an organization that "benefit[s] PJM's ratepayers by increasing its responsiveness to the needs of customers and other stakeholders and by making the stakeholder process more inclusive, transparent, and robust."⁹ PJM's Tariff also provides for the engagement and funding of an independent market monitoring function,¹⁰ which injects an additional independent viewpoint into PJM's decision making, often focused upon advancing consumer efficiencies and interests. PJM remains committed to enhancing opportunities for interest groups to participate in PJM stakeholder processes where such voices have not frequently been heard.

In addition, members of the public (non-lawyers and lawyers alike) may participate in PJM's stakeholder processes. Thus, the filings PJM submits to the Commission are already, in most cases, the byproduct of an extensive stakeholder input process. Thus, any compensation

⁷ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at page 193-194 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at PP 84, 440, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g and clarification*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 Fed. Reg. 49,842 (Aug. 11, 2011), FERC Stats. & Regs. ¶ 31,323 (2011) at PP 108, 502 ("Order No. 1000"), *order on reh'g*, Order No. 1000-A, 77 Fed. Reg. 32,184 (May 31, 2012), 139 FERC ¶ 61,132 (2012), *order on reh'g*, Order No. 1000-B, 77 Fed. Reg. 64890 (Oct. 24, 2012), 141 FERC ¶ 61,044 (2012), *review denied sub nom. S. Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014), *reh'g en banc denied*, No. 12-1232 (D.C. Cir. Oct. 17, 2014).

⁸ *PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,147 (approving CAPS funding mechanism), *reh'g denied*, 157 FERC ¶ 61229 (2016) ("CAPS Rehearing Order"); *see also* Open Access Transmission Tariff ("Tariff"), Schedule 9-CAPS. CAPS is, by its own description, "a non-profit organization whose members represent over 65-million consumers in the 13 PJM States and the District of Columbia. ... CAPS' engagement is necessary to ensure that consumers' voices are heard." CAPS further describes its mission as "actively engag[ing] in the PJM stakeholder process and at the Federal Energy Regulatory Commission to ensure that the prices we pay for reliable, wholesale electric service are reasonable." *See* CAPS Website, accessible at: <http://pjm-advocates.org/> (last accessed: Apr. 22, 2021).

⁹ CAPS Rehearing Order at 2.

¹⁰ Tariff, Attachment M; *see also* Tariff, Schedule 9-MMU ("MMU Funding").

program should be carefully crafted with consideration of public participation opportunities that an RTO already supports and funds, and in recognition of an RTO's unique position in independently advancing the public interest.

II. CONCLUSION

PJM supports the Commission's efforts to constitute and fund the Office of Public Participation. PJM thanks the Commission for this opportunity to submit these comments.

May 7, 2021

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Dated at Audubon, PA, this 7th day of May, 2021.

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