

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 UNION OF CONCERNED SCIENTISTS**

The Union of Concerned Scientists (“UCS”) appreciates the efforts of the Federal Energy Regulatory Commission (“FERC” or “Commission”) to provide space for public input, in the form of both written and oral comments, on how the commission should establish and operate the office of public participation (“OPP” or “Office”) pursuant to section 319 of the Federal Power Act (FPA) (16 U.S.C. § 825q–1). These comments are prepared in response to the Notice Inviting Public Comments (“Notice”) issued on February 22, 2021.<sup>1</sup>

Our comments are organized as follows:

- I. About UCS,
- II. Background,
- III. The office’s function and scope as authorized by section 319 of the FPA,
- IV. The office’s organizational structure and approach, including the use of equity assessment tools,
- V. Participation by tribes, environmental justice communities, and other affected individuals and communities, including those who have not historically participated before the Commission,
- VI. Intervenor compensation; and,
- VII. Additional comments.

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<sup>1</sup> Notice of Workshop and Req. for Panelists, Docket No. AD21-9 (Feb. 22, 2021), Accession No. 20210222-3079 (“Feb 22 Notice re OPP”).

## **I. About UCS**

UCS is a national nonprofit organization dedicated to advancing responsible public policies in areas where science and technologies play a critical role. Established in 1969, UCS has created a unique alliance between many of the nation's leading scientists and thousands of committed people. The UCS Climate & Energy Program focuses on energy systems that are clean, affordable, and reliable. UCS energy experts are established in their field and highly regarded by industry peers as conducting objective and robust analysis. Our experts are regularly called upon by Department of Energy (DOE) run national labs, the National Association of Regulated Utility Commissioners (NARUC), the National Association of State Utility Consumer Advocates (NASUCA), National Association of State Energy Offices (NASEO), state legislators, and public utility commissions to serve on advisory boards, conduct peer review, and present our latest analytical findings.

UCS has a long-established expertise on technical issues facing FERC and the wholesale markets; as well as the stakeholder processes that take place at Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs). For example, UCS has been a voting member of NEPOOL, the FERC sanctioned stakeholder advisory group of ISO-NE for the past 21 years. UCS also has nearly two decades of experience engaging in stakeholder processes in MISO, PJM, and CAISO.

UCS is headquartered in Cambridge, Massachusetts, and has offices in Oakland, Chicago and Washington, D.C.

## **II. Background**

In December 2020, Congress directed FERC to provide a report, by June 25, 2021, detailing its progress towards establishing the OPP. Section 319 of the FPA directs the Commission to establish the OPP to “coordinate assistance to the public with respect to

authorities exercised by the Commission,” including assistance to those seeking to intervene in Commission proceedings (16 U.S.C. § 825q-1). A February 22, 2021 notice announced a Commissioner-led workshop to be held on April 16, 2021, from 9:00 a.m. to 5:00 p.m. Eastern time, and requested speaker nominations by March 10, 2021.

Commission staff held listening sessions to hear from several sets of interested stakeholders. The sessions were intended to give members of the public an opportunity to provide their thoughts and ideas on how the Commission should create the OPP to encourage and facilitate public participation. The Commission held a listening session for landowners and communities effected by infrastructure development on March 17. FERC also held a listening session for environmental justice communities and tribal interest on March 22 and two listening sessions for tribal governments, both on March 24. One listening session was open for energy consumers and consumer advocates, held on March 25. Finally, an evening listening session was held for all stakeholder groups on April 19. UCS Senior Analyst and Electricity Markets Manager, Joseph Daniel, spoke at that event outlining the comments [here](#).

FERC also held a workshop on April 16 which included 5 panels discussing a range of pertinent issues. In its initial request for comments, FERC requested for commentors to weigh in on four items:

- 1) The office’s function and scope as authorized by section 319 of the EPA;
- 2) The office’s organization 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 that have not historically participated before the commission; and,

4) Intervenor compensation.

The remainder of our comments are organized to address those requests, in that sequence.

### **III. The office's function and scope as authorized by section 319 of the FPA;**

UCS believes that by designing the function and scope of the OPP as we detail below, the Office will help the Commission achieve its mission:

- The primary function and scope of the OPP should be to facilitate the participation of individuals and or groups that are representing the public interest, are traditionally under-represented in FERC decision-making processes but that are impacted by FERC action, and that lack resources and or expertise to effectively engage FERC.
  - UCS recommends to the Commission that one of the OPP's additional functions be to serve as a source of independent information.
  - Though the OPP should be proactive it should remain policy neutral and project neutral.
  - UCS doesn't believe that the office itself should play the role of a consumer advocate or actively intervene on behalf of the public.
  - The OPP should, however, be allowed to provide the Commission with information and analysis on how Commission rulings/proposals might impact the ability of the public to participate in proceedings.
- a) The primary role of OPP should be to facilitate the participation of individuals and or groups that are representing the public interest, are traditionally under-represented in FERC decision-making processes but that are impacted by FERC action, and that lack resources and or expertise to effectively engage FERC. As noted by several

stakeholders during the listening sessions, advocates want their own voices to be heard, and not for a government office to speak on their behalf. This notion of the OPP to primarily facilitate the participation of individuals and or groups representing the public interest is supported by other advocates, including tribal governments,<sup>2</sup> consumer advocates,<sup>3</sup> and environmental justice community representatives.<sup>4</sup> While UCS and other organizations have a long history of effectively engaging FERC, the capacity to participate in FERC proceedings and dockets is not universal. Comments during the listening sessions provide compelling evidence that there is a considerable barrier to entry for participating in FERC interventions.

*It's critical that the OPP be structured in a way that not only allows low-income consumers to participate, but provides the necessary information, resources and support to allow low-income consumers to be on equal footing with major companies, industrial groups and other well-resourced litigants to provide and participate in the complex, competitive market cases.<sup>5</sup>*

The barriers to entry and asymmetry in capacity results in an unintentional bias wherein the Commission only hears from those that have capacity and resources to engage in these processes. This means that, unless you are paid to do this work or you are a volunteer that does this on a regular basis, you are unlikely to be heard by the Commission. FERC is charged with establishing rates, terms, and conditions of

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<sup>2</sup> FERC. Tribal Governments Listening Session on the Creation of the Office of Public Participation. Docket No. AD21-9-000. Wednesday, March 24, 2021. Comments of Stacy Scott

<sup>3</sup> FERC. Energy Consumers and Consumer Advocates: Listening Session on the Creation of the Office of Public Participation. Docket No. AD21-9-000. Thursday, March 25, 2021. Comments of Elizabeth Marx.

<sup>4</sup> FERC. Environmental Justice Communities and Tribal Interests Listening Session Docket No. AD21-9-000 Monday, March 22 2021. Comments of Robert Sullivan.

<sup>5</sup> FERC. Energy Consumers and Consumer Advocates: Listening Session on the Creation of the Office of Public Participation: Docket. No. AD21-9-000. Thursday, March 25, 2021. Comments of Elizabeth Marx.

service that are just and reasonable and not unduly discriminatory or preferential.<sup>6</sup>

FERC cannot possibly expect to do that job without all the facts, without information from local communities that are directly impacted by energy infrastructure either because they end up paying for it and/or because of where it is located. The best possible way for FERC to accomplish its mission is to set up a well-funded office of public participation with ample resources.

- b) The lack of access is not limited to formal interventions in rulemakings and other proceedings. In addition to UCS's numerous in-house experts, we work with a group of external experts through an affiliation known as the Science Network. The UCS Science Network is a community of more than 25,000 scientists, engineers, economists, public health specialists, and other experts across the country working to educate the public and inform decisions critical to our health, safety, and environment. UCS has successfully and regularly facilitated Science Network experts in providing public comments at state level regulatory agencies, like Public Utility Commissions and Air Quality Boards, as well as providing comments to federal agencies like the EPA. In some venues, filing public comment is as simple as sending an email with the docket number or uploading a document to website. However, FERC's process for providing public comments is far more complicated. As a direct result, UCS hasn't been able to facilitate connecting our network of external experts into proceedings, including this one. Filing comments at FERC requires complying with multiple steps, email verification, and selecting from multiple options (ex. an "eComment" vs a "eFiling"). Verification emails can get sent to spam folders or

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<sup>6</sup> 16 U.S. Code § 824e

screened into “quarantine” by email services like Reflexion. For those that are paid to do this work, or provide comments on a regular basis, these few extra steps are not an insurmountable barrier. Eventually, we learn how to navigate the system. However, these barriers create a bias wherein the commission only hears from certain types of groups. For those only looking to engage in one proceeding and/or are not paid to do this work, the extra steps and complicated processes can dissuade important voices from filing comments. These barriers are one reason why certain groups are under-represented. As was articulated by Brydon Ross, VP of State Affairs for Consumer Energy Alliance:

*I can say from personal experience filing comments or requesting to be an intervenor on FERC's website can be a confusing process for first time users. Especially for many lay people who are not attorneys, and organizations that simply want to be informed or make their voice heard.<sup>7</sup>*

- c) UCS recommends to the Commission that one of OPP’s additional functions be to serve as a source of independent information. This would include developing informational assessments that could assist public interest groups, and producing basic analysis and briefs on high level issues/topics, such as “What is an RTO?” It would also include primers on various processes that take place at FERC like, “How does a pipeline get approved,” and “how does transmission get sited.” It should also work to provide the public with information that will assist them in learning how, when, and where to engage at FERC. This could be achieved through blogs, reports, webinars, and/or trainings on topics like, “the difference between intervening and offering public comments,” or “examples of complaints community groups can raise

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<sup>7</sup> FERC. Energy Consumers and Consumer Advocates: Listening Session on the Creation of the Office of Public Participation: Docket. No. AD21-9-000. Comments of Brydon Ross.

to FERC and their legal precedents.” Some of these materials would be ‘evergreen’ and not require updates while others would require updates as rules and procedures progress. While some of this information already exists on the FERC website, it is often hard to find unless you know where to look.<sup>8</sup> Furthermore, much of the existing information is not tailored to be accessible or actionable for the general-public. And most of it is only available in English making it more difficult for non-English speaking stakeholders to access. By having staff that are charged with and experienced in the pursuit of public participation, and who are regularly engaged with the public, the OPP will be able to best assess the needs of public stakeholders and tailor the informational materials accordingly. As noted by Elizabeth Marx, Executive Director of the Pennsylvania Utility Law Project:

*“If structured well, the Office of Public Participation could allow for greater transparency and opportunity for meaningful customer participation. The FERC OPP could 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.”<sup>9</sup>*

- d) The OPP should remain policy and project neutral, and not play the role of a consumer advocate or actively intervene on behalf of the public. OPP staff should be allowed to analyze what communities might be impacted by a proposed energy project in pursuit of helping the agency conduct outreach. Those communication and outreach efforts, however, should not afford the OPP from being able to assert if a local community supports or opposes a project or rule change. Local communities

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<sup>8</sup> <https://www.ferc.gov/industries-data/resources>

<sup>9</sup> FERC. Energy Consumers and Consumer Advocates: Listening Session on the Creation of the Office of Public Participation: Docket. No. AD21-9-000. Thursday, March 25, 2021. Comments of Elizabeth Marx.

must be allowed to speak for themselves and the OPP's role should be helping ensure that the Commission hears from those communities. This should ultimately lead to Commissioners making more robust, fair, and just decisions.

- e) The OPP should be allowed to provide the Commission with information and analysis on how FERC's rulings/proposals might impact the ability of the public to participate in proceedings. For example, if the Commission were to initiate a rulemaking that would alter the comment periods, the OPP would have direct experience on how such timelines will impact public participation. Additionally, through the course of its work, we expect that the OPP will gain insights on which barriers to participation are proving the most difficult to overcome. The OPP should have mechanisms to provide those insights directly to the Commission as a way of helping facilitate FERC in its mission to serve the public interest.

**IV. The office's organizational structure and approach, including the use of equity assessment tools;**

UCS recommends that FERC set up the OPP so that it retains autonomy and independence. This needs to include an advisory board with regular check-ins to ensure that the office is maximizing its effectiveness. To effectively carry out its mission and core functions, the OPP staff should include legal and technical experts, as well as outreach specialists. The OPP should also have the capacity to reach directly into communities through the use of field staff and staff with multi-lingual skills and experience (and/or resources to produce materials in non-English languages). Below, we provide additional context and details for these recommendations on the staffing structure and size of the OPP, and recommendations on how to effectively use equity assessment tools.

- a) Autonomy and independence are important. Even the perception that the office is not independent could undermine the effectiveness of OPP. Staff need to be effective in conducting outreach to communities, many of whom have been directly harmed by previous Commission decisions. As noted in the listening sessions, FERC's decision to approve energy infrastructure, without fully evaluating the environmental justice impacts, has resulted in harm.<sup>10</sup> This sentiment has not been limited to the listening sessions. Even though the office has not even been formed, local communities expressed skepticism in its ability to represent their interests in the press.<sup>11</sup> It stands to reason then that those communities and individuals might not trust the Commission. By creating the OPP that has autonomy and independence, the OPP's staff will be able to work with these communities, gain their trust, and support their participation and contribution to Commission proceedings.
- b) One way for the OPP to maintain its independence is by setting up an advisory board (or steering committee board). This notion of an advisory board is well supported by other advocates including Public Citizen, WE ACT, Clean Air Now, Fort Peck Assiniboine and Sioux Tribes in northeast Montana, the Tulalip Tribe, the Confederated Tribes for Coos, Lower Umpqua, and Siuslaw Indians, U.S. Sage Nation, Industry Energy Consumers, Pennsylvania Utility Law Project, the Greater New Orleans Interfaith Climate Coalition, and others. UCS agrees with the testimony of WE ACT that such an entity should include representation of traditionally under-

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<sup>10</sup> See, generally, Energy Consumers and Consumer Advocates: Listening Session on the Creation of the Office of Public Participation: Docket. No. AD21-9-000. Thursday, March 25, 2021 and Landowners and Communities Affected by Energy Infrastructure: Listening Session on the Creation of the Office of Public Participation: Docket. No. AD21-9-000. Thursday, March 26, 2021.

<sup>11</sup> <https://rtoinsider.com/rto/public-skeptical-ferc-participation-office-195795/>

represented interests such as environmental justice groups, tribes, consumer advocates, low-income community advocates, rural community advocates and renewable energy advocates.<sup>12</sup> UCS further concurs with the testimony of WE ACT and others in their recommendation that the EPA's National Environmental Justice Advisory Council be a model for an OPP advisory board.<sup>13</sup>

- c) The OPP should have field staff. Logistically, it makes sense for those staff to initially be located at existing FERC field offices like New York, Atlanta, Chicago, Portland, and San Francisco. Eventually, additional field offices will likely need to be opened. The purposes of the field offices are to provide direct, local access to the OPP, build stronger relationships with impacted communities, and foster greater public participation by reaching a wider audience. Outreach staff at OPP should be tasked with being proactive in their efforts to increase public participation which will require going to community events and being plugged-in to local proceedings. It would be unreasonable to assume that OPP staff will be able to successfully reach those communities without staff in those communities. Field offices should be located in areas that will foster a connection between field staff and local communities where energy infrastructure is being built. The proximity will best facilitate connections and relationship building between field staff and the local communities. Therefore, priority locations for new field offices should be in areas where energy infrastructure is likely to be built in the coming years.

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<sup>12</sup> See, e.g., FERC, *Workshop Regarding the Creation of the Office of Public Participation*, Pre-filed statement of Kerene Tayloe, WE ACT for Environmental Justice. Docket No. AD21-9-000 April 16, 2021.

<sup>13</sup> *Id.*

d) The OPP staff should include legal and technical experts; also outreach specialists. If OPP staff are only experts in technical and legal fields then the office runs the risk of writing reports that sit on shelves and are never read. That is why the office needs outreach staff, many of which should be in the aforementioned field offices. This will help make sure that any research OPP conducts gets into the hands of the people that need it.

e) Staffing at OPP should be no less than 50 and should include:

- Director and Deputy Director
- Environmental Justice (EJ) Managing Director and Senior Advisor
- Tribal Government/Indigenous Community Director, Deputy, and Senior Advisor staff
- Representatives at each FERC regulated ISO/RTO
- Outreach Managers
- Supervisory Attorneys
- Managing Attorneys
- FPA/NGA technical assistance attorneys
- Public Interest Attorney Referral Program review staff
- Most-In-Need administration
- Intervenor funding liaison
- Intervenor funding administrative processing for ALJ division
- Energy analysts and senior energy analysts
- Outreach staff included dedicated field staff for emerging RTOs and natural gas infrastructure

- General admin/support
- f) UCS recommends that FERC direct the OPP to conduct geospatial and demographic analysis using both ‘off-the-shelf’ and custom analytical tools. One example of an off-the-shelf tool is the EPA’s EJSCREEN tool.<sup>14</sup> According to EPA:

*EPA uses EJSCREEN as a preliminary step when considering environmental justice in certain situations. The agency uses it to screen for areas that may be candidates for additional consideration, analysis or outreach as EPA develops programs, policies and activities that may affect communities. In the past, the agency employed EJ screening tools in a wide variety of circumstances.<sup>15</sup>*

EPA’s application of the tool includes informing outreach and engagement practices and aspects of implementing permitting, enforcement, and compliance. FERC could use the tool in a similar fashion. As indicated by the tool’s name, it is a screening analysis that can be used for conducting rapid and/or bulk analysis. For decision making, the OPP should explore alternatives, including having custom made tools or hiring consultants to conduct these types of independent analysis. OPP staff should not use these tools for drawing conclusions or recommendations, but rather to provide meta statistics and objective analysis that aids stakeholder participation and informs Commissioners in their decision-making process.

**V. Participation by tribes, environmental justice communities, and other affected individuals and communities, including those who have not historically participated before the Commission;**

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<sup>14</sup> <https://www.epa.gov/ejscreen>

<sup>15</sup> <https://www.epa.gov/ejscreen/how-does-epa-use-ejscreen>

As noted in the sections above, UCS recommends that the primary role of the OPP should be to facilitate the participation of individuals and groups that are representing the public interest and priorities but lack the resources to effectively engage before the Commission. The OPP should explicitly focus on ensuring that the Commission is engaging and receiving feedback from communities that are most affected by the outcomes of a proposed permit or rulemaking but may have been historically underrepresented in decision-making processes.

To facilitate this, the OPP should focus on transparency and open access to information and a robust outreach process to identify and engage impacted communities. Additionally, the OPP should champion a process where the Commission's decisions are not solidified until the full comment period has finished, thereby giving impacted communities the same weight and consideration as better-funded special interest groups.

Opportunities for comments are usually announced in English and in technical language intended for highly specialized audiences. In contrast, impacted communities' expertise often comes from lived experience not easily translated into technocratic language.<sup>16</sup> To help facilitate a transparent and inclusive process with open access to information, and to ensure that the public, environmental justice and other affected communities' expertise is taken into equal consideration, the OPP should do the following:

- a) Make sign language interpretation and simultaneous translation (in languages most relevant to the affected communities) available for all virtual and in-person listening sessions, hearings and materials. Additionally, interpreters should be

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<sup>16</sup> MacKinney, Taryn, G. Reed, J. Carter, G. Goldman. 2020. "Public Participation in Rulemaking at Federal Agencies, Recommendations for 2021 and beyond." Union of Concerned Scientists. Available online: [https://www.ucsusa.org/sites/default/files/2020-09/public-participation-in-rulemaking-at-federal-agencies\\_0.pdf](https://www.ucsusa.org/sites/default/files/2020-09/public-participation-in-rulemaking-at-federal-agencies_0.pdf)

available upon request to ask questions during proceedings. As noted by participants, the lack of access to simultaneous translation and sign language interpretation was a glaring omission in the listening sessions scheduled by FERC and had the impact of limiting participation from communities that may already be marginalized in these processes. This was point was made very clear by Eric Litchey, a third year Law Student at Vermont Law School, representing Bayou City Water Keepers, that pointed out that in their community:

*“We speak about 140 different languages here, with English, Spanish, and Vietnamese being the most predominate. The one metric, 53 percent of families in Houston speak only English, 37 percent of families only speak Spanish at home. And so to truly serve the people affected by the massive projects on the first jurisdiction, the OPP must recognize this diversity and linguistic diversity in particular.”<sup>17</sup>*

- b) The OPP should consult impacted communities to decide which language translation services will be necessary to allow for maximum access to information and participation from community members.
- c) Ensure that for all proposed permits and any Notice of Proposed Rulemaking, background information and instructions on commenting, are presented in clear terms, translated into relevant languages and easily accessible and available:<sup>18</sup>
  - i. From the agency website
  - ii. At local community centers, collages and schools,

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<sup>17</sup> FERC. Environmental Justice Communities and Tribal Interests: Listening Session on the Creation of the Office of Public Participation. Docket No. AD21-9-000 Monday, March 22 2021. Comments of Eric Litchey.

<sup>18</sup> MacKinney, Taryn, G. Reed, J. Carter, G. Goldman. 2020. “Public Participation in Rulemaking at Federal Agencies, Recommendations for 2021 and beyond.” Union of Concerned Scientists. [https://www.ucsusa.org/sites/default/files/2020-09/public-participation-in-rulemaking-at-federal-agencies\\_0.pdf](https://www.ucsusa.org/sites/default/files/2020-09/public-participation-in-rulemaking-at-federal-agencies_0.pdf)

- iii. At local elected officials' offices (mayors, aldermen, state representatives),
  - iv. To local community organizations that can help disseminate information to local community members.
  - v. Mailed to all households in impacted/affected communities
- d) Require efforts that identify and engage communities and deliberately address barriers to participation, doing this before formal Commission proceedings are initiated and substantive deliberation has begun. "These efforts may require the creation of new entities—for example, task forces that engage directly with community leaders to better understand local impacts or trusted intermediaries who represent local needs and can build trust and communication between agencies and communities"<sup>19</sup>. The OPP should also hire field staff with experience working with tribal, environmental justice and other impacted communities to spearhead engagement efforts.
- e) Engage and involve stakeholders much earlier, including long lead times before any public hearings, workshops and comment period deadlines. This seemingly basic effort would facilitate increased participation because, as was observed by Eric Litchey, 3-L Law Student at Vermont Law School, representing Bayou City Water Keepers, "Getting direct notification of public meetings would greatly improve not only the limited English communities' involvement and participation in public meetings, but every community's involvement and participation."<sup>20</sup> This

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<sup>19</sup> *Id.*

<sup>20</sup> FERC. Environmental Justice Communities and Tribal Interests: Listening Session on the Creation of the Office of Public Participation. Docket No. AD21-9-000 Monday, March 22 2021. Comments of Eric Litchey.

should particularly apply to communities that are most likely to be affected by projects. Unlike other stakeholders and FERC staff, most members of impacted communities are not technical experts, nor are they compensated for their time and engagement in the Commission's decision-making processes. Therefore, it should be recognized that additional time is necessary for individuals and impacted community organizations to become familiar with the facts, engage with experts and with their own community members to give comments and feedback to the Commission. These accommodations should be tailored to meet the individual and sometimes unique needs of different types of stakeholders. For example, tribal governments are sovereign entities and engaging them should reflect their specific requests to be engaged as a sovereign entity, as detailed by tribal government representatives during the listening session, current FERC processes do not reflect "government-to-government consultation..." and that FERC consultation needs to start "early in the process and consistently through the entire permitting process to address all of the Tribal concerns related to potential impacts to Tribal communities and Tribal resources."<sup>21</sup>

- f) Provide multiple venues for public engagement, such as in-person public hearings (once it is safe to do so), online or virtual meeting options, written comments and workshops.
  - i. Locations for in-person meetings or hearings should be chosen with care, considering access by impacted communities, not by convenience of FERC offices or staff.

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<sup>21</sup>FERC. Tribal Governments: Listening Session on the Creation of the Office of Public Participation. Docket No. AD21-9-000. Wednesday, March 24, 2021 (part 2). Comments of Stacy Scott

- ii. Provide options for listening sessions, workshops and public hearings outside of the typical 9am to 5pm working hours.
  - iii. Both phone and video conference options should be provided in addition to in-person meetings to enable participation by community elders, individuals with limited access to childcare and people with limited mobility.
  - iv. The OPP should consider holding multiple stakeholder workshops, where impacted community representatives are able to ask questions and have conversations with FERC staff in addition to providing comments and feedback.
- g) Communicate information regarding FERC meetings and activities in a culturally competent manner, including:
- i. Engaging with and providing information to community leaders and organizations, including direct outreach to tribal communities and non-federally recognized indigenous communities, in addition to tribal governments. This particularly important for tribal governments whom are federally recognized as sovereign nations and should be engaged as such. As articulated by Brenda Joe McManama, Campaign Organizer with the Indigenous Environmental Network:

*regardless of the outcome of this process in establishing an OPP, we want to ensure that FERC honors the established policy of meaningful participation with indigenous people -- community and Tribal members, which is separate from FERC's duties and responsibilities to consult with federally-recognized Tribes. And additionally, that participation in this process or establishment of such a mechanism by which indigenous EJ organizations, indigenous community members or Tribal governments may*

*engage within the OPP will not be a substitute for pre-prior and informed consent in any instance for project-specific decisions. We also want to remind all concerned that consultation is not consent.*<sup>22</sup>

- ii. Being sensitive to preferences and needs of specific communities,
  - iii. And utilizing newer technological avenues like social media.<sup>23</sup>
2. To increase transparency and trust, the OPP should also consider that during the comment period:
- a) Public commenters who include scientific or technical research disclose their funding sources and sponsoring organizations, as OSHA does. This would ensure proper context for all submitted comments.<sup>24</sup>
  - b) The Commission and OPP “preemptively publish records of all research, sources, and correspondences—including meetings and phone calls—used to inform the rule-drafting phase. These records should be publicly available in the rulemaking docket within a reasonable timeframe after the research, correspondences, or other source retrieval occurred, and before publication of the rule proposal”.<sup>25</sup>
  - c) The Commission publish all redlined versions of permits or rules, which clearly document edits and changes and provide clear, simple explanations and justification for every major change proposed by FERC.<sup>26</sup>

## **VI. Intervenor compensation;**

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<sup>22</sup> FERC. Environmental Justice Communities and Tribal Interests: Listening Session on the Creation of the Office of Public Participation. Docket No. AD21-9-000 Monday, March 22nd 2021. Comments of Brenda Joe McManama.

<sup>23</sup> MacKinney, Taryn, G. Reed, J. Carter, G. Goldman. 2020. “Public Participation in Rulemaking at Federal Agencies, Recommendations for 2021 and beyond.” Union of Concerned Scientists.  
[https://www.ucsusa.org/sites/default/files/2020-09/public-participation-in-rulemaking-at-federal-agencies\\_0.pdf](https://www.ucsusa.org/sites/default/files/2020-09/public-participation-in-rulemaking-at-federal-agencies_0.pdf)

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

The statutory text of the Federal Power Act (FPA) explicitly grants the Commission discretion to provide intervenor funding and the Commission should do so. In fact, particularly given the myriad barriers to participation in FERC decision making that were articulated in the listening sessions, it is difficult to envision the OPP effectively elevating traditionally under-represented voices before the Commission without intervenor compensation for parties that would otherwise face financial hardship for their participation. Further, to meet the spirit of the OPP to elevate typically under-represented voices in Commission decision-making, intervenor funding must be responsive to several key principles:

1. Accessibility: application for intervenor funding must not be onerous to the individual or entity applying.<sup>27</sup> Individuals or entities should be able to receive pre-approval for intervenor funding such that, if upon the Commission's order they are deemed to have made a meaningful contribution to the Commission's deliberations in a "significant" proceeding (as required by the FPA), the provision of compensation is reasonably certain to occur in a timely manner. As Jennifer Bosco, of the National Consumer Law Center, pointed out during the listening session, there is a necessity for the funding to be accessible through streamlined and consumer-friendly process(s).<sup>28</sup>

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<sup>27</sup> For example, California's intervenor compensation legislation specifically declares the intent of the legislature that, "The process for finding eligibility for intervenor compensation be streamlined, by simplifying the preliminary showing by an intervenor of issues, budget, and costs," and that intervenor funding be awarded in a timely manner. California Public Utilities Code, §1801.3 (c) and (e).

<sup>28</sup> FERC. Energy Consumers and Consumer Advocates: Listening Session on the Creation of the Office of Public Participation: Docket. No. AD21-9-000. Thursday, March 25, 2021. Comments of Jennifer Bosco.

2. Transparency: The process for determining eligibility must be transparent and understandable to potential applicants. Criteria for eligibility must be clear, and the decision-making process to award intervenor compensation must be understandable to the individual or entity applying. A record of decisions must be formalized and easily available to the public to provide accountability to the process and further clarity for future applicants.
3. Certainty: Pre-approval to establish an individual or entity as meeting the public interest and financial thresholds is necessary to provide some level of certainty to potential intervenors,<sup>29</sup> as is a straightforward and transparent process to determine if the entity seeking compensation substantially contributed to the approval, in whole or in part, of a position advocated by such entity and that the proceeding in question is “significant.” Larger organizations with staff and resources that might be inclined to engage in multiple dockets can often navigate complexity. David Kolata, of Illinois Citizen Utility Board, described this well in their public comments at the listening sessions, pointing out that smaller organizations with less access to resources and funding are likely to be risk averse, without clearly understood rules, those organizations won’t be able to take advantage and will miss out in the opportunity to participate.<sup>30</sup>

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<sup>29</sup> State with intervenor funding provisions recognize this need for certainty. For example, Maine requires that a determination that an intervenor is eligible for compensation pending the outcome of the proceeding shall be made by the commission at the earliest practicable time in the commission proceeding. Maine Revised Statutes, Title 35-A, Section 1310.2. We recommend the Commission provide additional certainty by which potential intervenors can determine eligibility for future interventions through a showing of public interest and financial eligibility.

<sup>30</sup> FERC. Energy Consumers and Consumer Advocates: Listening Session on the Creation of the Office of Public Participation: Docket. No. AD21-9-000. Thursday, March 25, 2021. Comments of David Kolata.

4. Inclusion: Intervenor compensation should be broadly available to a wide range of individuals and entities with an interest in Commission decision-making. Final criteria should be developed in an inclusive manner and be informed by a wide range of stakeholders, in particular those that have traditionally been underrepresented before the Commission but that are impacted by Commission action. In general, industry and trade groups should be excluded from eligibility, well-established nonprofit organizations with a national presence and funding in the tens, if not hundreds, of millions of dollars should also be excluded from eligibility on the basis that intervention does not represent a significant financial hardship for such entities and that they do not represent traditionally underrepresented voices before the Commission. However, exceptions should be provided if a compelling case is made for a particular entity who maintains a significant interest in the proceeding, whose voice is not otherwise represented and cannot be represented unless intervenor compensation is provided.
5. Workability: It is important that any intervenor compensation structure be responsive to the needs of individuals and entities seeking to intervene in a meaningful way. This includes being responsive to the need for attorneys, experts, and other outside assistance to ensure adequate representation before the Commission. Attorneys and experts consultants are not typically of a mind to commit significant time and effort to a client without a guarantee of payment for services. Even if pre-approval is given to individuals and entities that they are eligible to receive intervenor compensation, and even if identification of those proceedings that are “significant” or not is easily accomplished, this dynamic is at

odds with the statutory text that limits compensation to those intervenors that “substantially contributed to the approval, in whole or in part, of a position advocated by such” - a determination that cannot be made until a Commission order is produced and that injects significant uncertainty into the ultimate reward of compensation.

To that end, intervenor compensation eligibility and award should allow such arrangements as third parties to co-sign contracts with attorneys and consultants or to assume the risk that intervenor compensation will be denied. This will allow interested individuals and entities to contract with the necessary experts to meaningfully intervene but still receive intervenor compensation if they would otherwise meet the threshold that intervention without compensation would be a financial hardship.

6. Efficiency: The OPP should be tasked with recognizing synergies and common interests among interested intervenors and recommending (but not mandating) joint intervention when appropriate to allow for the sharing of attorneys and experts and the common pursuit of the same or effectively similar positions.

The OPP should also have the responsibility to provide basic information and in-kind services to potential intervenors to (1) provide information of process, administrative requirements, and facts of the Commission deliberation to inform the decision on whether to proceed with intervention, and (2) minimize the time and expense to attorneys and experts to provide these initial services to intervenors. Consume advocates, like Citizens Utility Boards, have pointed out

the value of these types of services as being an important barrier to helping reduce information asymmetry and leveling the playing field.<sup>31</sup>

7. Adequacy: Funding for intervenor compensation must be adequate to ensure an opportunity for a wide range of voices and participation by all parties that are impacted by Commission action. Artificial limits on funding awards should be avoided, particularly given the significant complexity and potential impact of FERC actions. To avoid political interference, funding should be derived from fees and penalties assessed by the Commission in accordance with its primary funding sources generally. An assessment of whether funding is adequate to meet the desire for typically under-represented voices to participate in Commission proceedings should be included in any regular reporting to the Commission or Congress on the activities of the OPP and its successes/challenges. As noted by the Executive Director of the Pennsylvania Law Project, “Intervenor funding will need to be sufficient to allow consumers and advocates to participate in proceedings with a streamlined process and consumer-friendly application process to access this needed funding.”<sup>32</sup>

## **VII. Additional comments.**

UCS strongly recommend that FERC issue additional rulemaking processes (including conferences and eventual notices of proposed rulemaking) associated with the final steps of establishing and funding the OPP. Specifically, UCS recommends setting up one notice of

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<sup>31</sup>FERC. Energy Consumers and Consumer Advocates: Listening Session on the Creation of the Office of Public Participation: Docket No. AD21-9-000.. Thursday, March 25, 2021. Comments of David Kolata.

<sup>32</sup>FERC. Energy Consumers and Consumer Advocates: Listening Session on the Creation of the Office of Public Participation: Docket No. AD21-9-000 Thursday, March 25, 2021. Comments of Elizabeth Marx

proposed rulemaking dedicated to intervenor funding and an additional notice on the office's function, scope, structure (including advisory board), and approach. UCS believes that these additional rulemaking processes will ensure that the office is formed in a way that is durable and representative of the needs of the communities that have historically been underrepresented at FERC.

Finally, UCS would also like to call attention to the fact that FERC has added a Spanish Language listening session to be held on May 4, which is over one week past the April 23 filing deadline for these comments. UCS believes that it would be reasonable for the commission to extend the deadline of the public comment period.

Respectfully submitted on this 23 day of April 2021.

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