

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

COMMENTS OF EARTHJUSTICE

Earthjustice, and the signatory parties,¹ would like to thank the Federal Energy Regulatory Commission (“Commission” or “FERC”) for providing the opportunity to members of the public to submit written and oral comments to the record regarding the way in which the Commission should establish and operate the Office of Public Participation (“OPP” or “Office”). FERC’s solicitation of public input is a prudent first step in launching the Office. Earthjustice submits the following comments on its own behalf, and on behalf of the signatory parties.

In December 2020, Congress directed the Commission to provide a report, by June 25, 2021, detailing its progress towards establishing the OPP.² Section 319 of the Federal Power Act (“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.³ In March 2021, FERC provided a series of notices designed to solicit

¹ [SIGNATORY PARTIES]

² 166 Cong. Rec. H8,378 (daily ed. Dec. 21, 2020) (joint Appropriations Committee Report of House of Representatives and Senate on FY2021 Omnibus and COVID Relief and Response Act (HR133)).

³ 16 U.S.C. § 825q-1.

public input on the design of the Office, which included a public comment deadline of April 23, 2021.⁴

FERC proceedings are fraught with barriers to meaningful participation for landowners, environmental groups, environmental justice communities, and tribal groups. Among other issues, FERC's dockets are highly technical in nature, often rendering them inaccessible to the general public unless a participant can invest a significant amount of time and resources. This has historically resulted in resource constrained groups having limited engagement at FERC. While the technical nature of the proceedings are not going to change, the additional support potentially provided by the OPP will have a significant impact in mitigating some of these barriers.

While long overdue, the funding of the OPP presents an opportunity to help correct the existing inherent power imbalance present in FERC proceedings under both the Natural Gas Act ("NGA"), and FPA. The recommendations below focus on ways in which the OPP can improve FERC outreach, responsiveness, administrative and technical support capabilities, accountability, and ultimately FERC's decision-making. The OPP can only be successful in its mission if it supports public engagement across the board, with a particular focus on local communities, landowners, environmental justice groups, and tribal entities. The

⁴ Notice of Workshop and Req. for Panelists, Docket No. AD21-9 (Feb. 22, 2021), Accession No. 20210222-3079 ("Feb 22 Notice re OPP").

recommendations below are intended to encourage the design of robust, durable, and well-resourced Office that can effect meaningful change from the status quo.

TABLE OF CONTENTS

INTRODUCTION 3

DISCUSSION 4

I. Background and Statutory Framework for the Office..... 4

II. Overarching Considerations for the OPP’s Design..... 7

III. Organization and Structure of the OPP 10

A. Leadership and Organizational Placement 11

B. Staffing Structure 12

C. Necessary Immediate Steps 17

D. Budget Considerations 20

IV. Function and Scope of the OPP..... 23

A. The OPP Should Implement Outreach and Education Initiatives..... 24

B. The OPP Should Provide Technical Assistance to the Public 40

C. The OPP Should Facilitate Systemic Changes to Remove Barriers to Public Participation..... 44

D. The OPP Should Audit and Report on Public Participation at the Commission 59

E. The OPP Should Forgo Taking on Advocacy Responsibilities..... 61

V. The Intervenor Compensation Program 63

INTRODUCTION

Earthjustice is a Section 501(c)3 nonprofit public interest environmental law organization that works to protect people’s health, to preserve magnificent places and wildlife, to advance clean energy, and to combat climate change. We provide free legal representation for hundreds of clients. Achieving greater diversity, equity,

and inclusion in everything we do is inextricably linked to our mission to protect our planet and defend the rights of all people to a healthy environment. This work begins with ensuring the public can adequately participate in all stages of government decision-making. Earthjustice has specifically engaged on numerous Commission dockets ranging from NGA pipeline certifications to FPA wholesale electricity dockets.

Under normal circumstances Earthjustice participates in FERC proceedings on behalf of a specific client or clients; however, for the purposes of this comment, Earthjustice is submitting the comment on its own behalf with additional parties signing-on. We have included as an attachment a description of the multi-pronged process Earthjustice undertook to gather and synthesize the data that informs the comments and recommendations.⁵ While Earthjustice's comments are informed in large part by the feedback we received in the stakeholder process that we initiated, we want to be clear that we do not purport to be representing the views of any particular community or interest beyond ourselves and other groups who are signed on to this comment letter.

DISCUSSION

I. Background and Statutory Framework for the Office

Decades after the OPP was first referenced in federal statute, FERC is now moving forward with the creation and funding of this new Office to “coordinate

⁵ See Attach. A (to facilitate candid feedback from stakeholders Earthjustice committed to keeping the information it solicited anonymous, and Earthjustice will honor that commitment).

assistance to the public with respect to authorities exercised by the Commission,” including assistance to those seeking to intervene in Commission proceedings, pursuant to Section 319 of the FPA.⁶

FERC is required to submit a report to Congress by June 25, 2021, on the Commission’s progress towards establishing the office, including an organizational structure and budget for the office, beginning in fiscal year 2022.⁷ FERC convened listening sessions in March and hosted an April 16 technical conference with written comments, as provided here, due April 23. FERC is specifically seeking input on: (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.

In this comment, Earthjustice provides considerations and recommendations for each of the requested areas. The comment begins with a broad discussion of the overarching considerations that informed Earthjustice’s recommendations. Next, the comment provides recommendations about the OPP’s organizational structure covering leadership, organizational placement, staffing needs, short- and long-term steps for launching the office, and budget considerations. Earthjustice then

⁶ 16 U.S.C. § 825q-1.

⁷ See *supra* note, at 2.

recommends three core functions of the OPP, implementing outreach and education programs, providing technical assistance to participants, and facilitating systemic changes across other FERC offices. Within each of these functions, Earthjustice identifies and discusses immediate needs to improve public participation. The comment concludes with staunch support for and recommendations on the intervenor compensation program.

Throughout the comment, Earthjustice identifies key barriers to existing public participation and provides specific recommendations to address them. The first key barrier is the general public's lack of familiarity and experience with FERC which puts the public at an immediate disadvantage for knowing they can and how to participate. To address this, the OPP will need to proactively educate the general public about FERC, develop outreach materials for impacted landowners, conduct outreach to environmental justice communities and tribal governments and entities, and provide education about Independent System Operator ("ISO")/Regional Transmission Operator ("RTO") functions and participation. The next key barrier is the difficulty of navigating the procedural rules and actual process for engaging in formalized FERC proceedings. Earthjustice provides recommendations for the OPP to collect and provide resources (e.g. list of attorneys and experts and motion templates), administer public records, and reform its website to be more useable by the public. Another key barrier is the inadequacy and lack of substantive engagement regarding existing public engagement processes. These inadequate processes include the landowner engagement for infrastructure projects, the process

for receiving and reporting complaints, public meetings, pipeline seminars, compliance with cooperative record keeping requirements, stakeholder engagement for NGA/FPA projects, reviewing remanded National Environmental Policy Act (“NEPA”) documents, and the tribal consultation process which all should be evaluated and reformed to better include and respond to public engagement. The final key barrier is lack of resources to hire the needed legal representation and experts to critically engage in FERC proceedings with the OPP, which can be addressed through the development of a robust intervenor compensation program.

II. Overarching Considerations for the OPP’s Design

On January 20, 2021 President Joe Biden issued an executive order calling for “a systematic approach to embedding fairness in decision-making processes.”⁸ The order requires that agencies engage in “efforts to remove systemic barriers to and provide equal access to opportunities and benefits” for underserved and resource-constrained communities and individuals.⁹ It is within this larger framework that FERC has undertaken this worthy effort to create its Office of Public Participation.

This is a particularly challenging endeavor for FERC considering there is a widespread recognition that “[e]xisting administrative structures to connect agencies to the public are ill-suited for this task.”¹⁰ And in this context, FERC is

⁸ Exec. Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 2021 WL 197413, at *1 (Jan. 20, 2021).

⁹ *Id.* at *2.

¹⁰ Brian D. Feinstein, *Identity Conscious Administrative Law*, George Washington Law Review, at 3 (forthcoming Feb. 23, 2021) (“Feinstein”).

certainly no exception. Traditional measures, “which range from notice-and-comment rulemaking to greater presidential control—are intended to enhance agencies’ popular responsiveness. In practice, however, they often privilege powerful and unrepresentative voices, thus moving policy away from popular preferences.”¹¹ Indeed, Earthjustice reviewed numerous stories from across a spectrum of stakeholders who consistently communicated that the existing opportunities for public engagement at FERC were not sufficiently accessible or were otherwise ill-suited to facilitate meaningful public comment.¹²

A fundamental question FERC must be asking itself in every step of this design process for OPP is: how is this specific design decision for the OPP going to make FERC more accessible to the public that it serves – particularly community stakeholders impacted by its decisions?

Through this process FERC has recognized that there is room to improve accessibility and engagement with the public at nearly all points of contact. There is a broadly accepted view that FERC can be extremely difficult and costly to navigate through the existing formal processes. FERC’s specific request to hear input from tribal groups and environmental justice and frontline communities demonstrates a appreciation that these groups have historically had limited engagement with the Commission responsible for regulating the energy they consume, and that there are clear opportunities for FERC to improve outreach and communication with these

¹¹ *Id.*

¹² *Id.*

groups.¹³ As evinced through recent congressional hearings,¹⁴ FERC has developed a reputation—particularly on NGA jurisdictional issues—of being too industry friendly, unresponsive to local or landowner concerns, and indifferent to expanding outreach to over-burdened communities and tribal entities. Some of these groups face historical and systemic socioeconomic disparities, environmental racism, disproportionately high pollution burden, disproportionate energy burdens, and other injustices. Limiting the vision of the OPP to aggregating existing participatory structures under one office at FERC will not provide the corrective force necessary to better balance FERC’s process and improve its decision-making. The OPP represents an important opportunity to better support public engagement in the regulatory review process – particularly from communities historically underrepresented at FERC – which will result in better decision-making.

By providing the necessary tools the OPP can facilitate more meaningful public participation from underrepresented groups and individuals, which inevitably leads to better agency decision-making. This can occur through targeted outreach and notice to overburdened communities, providing easier access to administrative and technical assistance mechanisms that assist in navigating the FERC process, and developing and widely distributing educational material specific

¹³ See Feb. 22 Notice re OPP at 1 (seeking input on the “participation by tribes, environmental justice communities, and other affected individuals and communities”).

¹⁴ See, e.g., H. Comm. On Oversight and Reform, *Pipelines Over People: How FERC Tramples Landowner Rights in Natural Gas Projects*, Subcommittee on Civil Rights and Civil Liberties (Dec. 9, 2020).

to the needs and interests of these groups. Many of the measures suggested below are rooted in these substantive-equality principles.

III. Organization and Structure of the OPP

Section 319 gives the Commission significant discretion in organizational and structural design of the OPP. Recognizing its license in this area, the Commission requested comments on the OPP's organizational structure and approach.

Based on its research of comparable federal and state organizations and survey of agency experts, Earthjustice has developed recommendations for the OPP's organizational structure built around the concepts of independence and authority. To begin, Earthjustice recommends establishing the OPP as a self-standing office on equal footing with other offices within the Commission. Next, Earthjustice provides recommendations about the OPP's internal organization that focus on staffing needs and geographic distribution. Earthjustice then identifies critical steps for launching the office immediately. Finally, Earthjustice provides important considerations and financial data to support budget development for the coming fiscal year.

In developing structural and organizational recommendations, Earthjustice focused on the principles of independence, authority, durability. To be effective the OPP needs to be a part of the Commission and able to work within the agency. Yet, it is important to insulate the OPP and its implementation of its Congressional duties from the politics of different Chairs or Commissions by building in elements of structural independence into the OPP. Additionally, the OPP needs the authority to support its efforts despite internal resistance against change. Finally, the success

of the OPP requires the long-term durability of cultural and systemic changes by the OPP to be broadly ingrained into FERC. These principles are an important lens in structural design of the OPP and are reflected in Earthjustice's individual recommendations.

Limiting the scope of the Office to aggregating and formalizing existing public participation structures will not achieve the goals espoused by FERC leadership for the OPP. Federal agencies, as with any large entity, are naturally resistant to change. Therefore, it is key that the Office engender buy-in from existing and new staff, such that the culture and values of the Office are accepted and fully ingrained into the overall operational structure of FERC.

A. Leadership and Organizational Placement

By statute, the OPP will be led by a Director appointed by the Chairman with approval of the Commission for a term of four years.¹⁵ The Director is given some structural independence from the politics of the Chair and the Commission by having for-cause removal protection.¹⁶ Beyond these basics, section 319 is silent on the OPP's structural organization.

The OPP should be a self-standing office on par with other offices within the Commission, such as the Office of Enforcement. Like some of the FERC offices, the Director should report directly to the Chairman. The OPP will work on subject matter across the Commission and needs to be on an equal organizational footing

¹⁵ 16 U.S.C. § 825q-1(a).

¹⁶ 16 U.S.C. § 825q-1(a)(2)(A).

with the other offices. Intra-agency dynamics will play a large role in the OPP's ability to affect systemic changes across the Commission. To cement the OPP's standing within the Commission as having high policy-making responsibilities, the Director should be classified as a "Senior Executive Service."¹⁷ This would formalize the Director's position as a high-ranking internal staff member among the heads of other offices within FERC and lend the OPP internal status and power.

In addition to intra-agency power considerations, the OPP needs to be its own office to do cross-cutting work. The OPP will need to cover the full range of FERC authorities—energy markets, reliability, pipeline infrastructure, hydropower infrastructure, etc.—and cannot effectively do so if housed under or otherwise within another office.

B. Staffing Structure

To successfully implement the OPP's purpose and functions, the OPP should have a large staff. There is a significant amount of interest by the public in energy infrastructure projects and other FERC functions and responding to that interest creates a sizable workload. A responsive OPP will require programmatic staff focused on public participation across each project area at the Commission. The OPP will also need on-the-ground staff with familiarity and access to specific geographic areas and individual projects. Several commenters in the April 16, 2021

¹⁷ The requirement for a Senior Executive Service to be classified above GS-15 is consistent with Section 319's cap at the maximum rate for GS-18.

workshop asserted that an appropriate number of staff for this Office would be roughly 50 staff members.

As two points of comparison, SBA’s Office of Advocacy has one of the largest federal comparable programs with a staff of 51 across different working areas.¹⁸ The Office of Rail Public Counsel contracted with 25 private practitioners for local outreach services in addition to 11 core staff.¹⁹ Based on the scope and breadth of responsibilities described below, an appropriately staffed OPP should be comparably sized to these two programs, and a total staff of 50 would be well within the range of reasonable options.

To build out the office, the OPP could consolidate existing staff with a public participation role. These roles include, but are not limited to: hotline staff in the Office of External Affairs, landowner hotline staff in the Office of General Counsel, and eLibrary and eDocket support staff under the Office of Secretary, and other staff responsible for public outreach in the Office of Energy Projects. Many of those interviewed discussed the potential overlap of responsibilities between the OPP and other offices as well as the importance of thoroughly evaluating opportunities for

¹⁸ U.S. Small Business Administration (“SBA”) Office of Advocacy, *Background Paper Office of Advocacy 2017–2020*, at 120 (Jan. 2021) (“Background Paper Office of Advocacy 2017-2020”), <https://cdn.advocacy.sba.gov/wp-content/uploads/2021/02/09101916/Background-Paper-Office-of-Advocacy-2017-2020-web.pdf>.

¹⁹ Nathan I. Finkelstein & Collister Johnson, Jr., *Public Counsel Revisited: The Evolution of a Concept for Promoting Public Participation in Regulatory Decision-Making*, 29 Admin. L. Rev. 167, 172 (1977).

alignment and clarifying expectations among FERC staff. This topic is discussed further in these comments.

The Commission should take special care to ensure hiring for the OPP is done in a way that facilitates a diverse candidate pool and leads to a more representative staff. It is well documented that there is a dearth of Black representation amongst government regulators.²⁰ For example, “African Americans are substantially underrepresented among financial regulators, accounting for only 3 percent of appointees to financial regulatory agencies and 4 percent of these agencies’ senior staff throughout history.”²¹ There is no question that in the context of public participation the benefits of staffing the OPP in a way that reflects the public it serves would be beneficial, as “shared characteristics between constituents and elected officials—which political scientists term ‘descriptive representation’—fulfills a ‘host of psychological needs that are no less important for being intangible’ including a greater sense of engagement, access, and efficacy.”²² Therefore, the OPP ought to be staffed in such a way that reflects the communities in which it is conducting outreach.

1. Decisional and Non-Decisional Staff

One critical consideration for staffing the OPP is whether staff will be considered decisional or non-decisional, and the impacts that has on ex parte communication. Decisional staff often have an advisory role and have a greater

²⁰ Feinstein at 68–70.

²¹ *Id.* at 69.

²² *Id.* at 69–70.

potential to work collaboratively with commissioners and staff leadership. Although decisional staff are free to discuss process with the public, they are subject to ex parte rules and are limited in communicating with the public about specific issues before the Commission. The inability of the public to speak to an outward facing voice at the Commission that can provide substantive responses to various inquiries has been a continual source of frustration.²³

In contrast non-decisional staff are not subject to ex parte rules and would be able to communicate with the public on any matter and at any stage in a proceeding. However, communication between non-decisional staff and the Commission would be more limited and subject to more formality. Considering intra-agency effectiveness, decisional staff are important, but considering direct access to the public, non-decisional staff would be preferable.

Recognizing the importance of both decisional and non-decisional staff to the success of the OPP's mission, the OPP should structure its staff to have a mix of both decisional and non-decisional staff. The Commission already uses various mixed models for staffing. One model is to have an office of decisional staff, but to designate individual staff members as non-decisional for specific matters. Another model is to split the staff between decisional staff that advise the Commission and non-decisional staff that work on specific cases as in the Office of Enforcement.

²³ See Tr. of the 03/17/2021 Public Comment Meeting re Landowners and Communities Affected by Infrastructure Development under AD21-9, Docket No. AD21-9 (Mar. 26, 2021) ("Mar. 17, 2021 Tr.").

Communicating with the public is essential to many of the functions of the OPP such as providing technical assistance and implementing outreach and education programs. Recognizing this importance, the OPP should ensure that there are permanent non-decisional staff widely available to be responsive to the concerns and questions of the public. One potential division would be for staff focused on facilitating systemic changes at FERC to be decisional and staff providing on-the-ground education and assistance being non-decisional.

2. Geographic Location of Staff

Pursuant to our stakeholder outreach, we have heard that direct and consistent community presence by OPP staff must be a key component of its public engagement. Although this can be accomplished through staff traveling to various sites, it will be more effective for some on-the-ground OPP staff to be permanently located across the country near impacted communities. FERC already has staff housed in different RTOs, and recently opened a new field office in Houston. There is widespread agreement by stakeholders that permanently housing staff in disparate locations across different regions would facilitate the type of relationship building necessary to effectively reach out to underserved communities and other local groups. Both the SBA's Office of Advocacy²⁴ and Interstate Commerce Commission's ("ICC") Office of Rail Public Counsel²⁵ set a precedent for having public participation staff spread throughout broad geographic regions.

²⁴ Background Paper Office of Advocacy 2017-2020, at 83.

²⁵ Theodore S. Bloch & Robert J. Stein, *The Public Counsel Concept in Practice: The Regional Rail Reorganization Act of 1973*, 16 Wm. & Mary L. Rev. 215 (1974).

There are a variety of opportunities to house OPP staff in existing regional FERC offices including regional offices, hydropower field offices, RTO field offices, and the Liquefied Natural Gas (“LNG”) office in Houston. Alternatively, OPP could place staff in regional and field offices of other federal agencies. In consideration of the experience FERC already has in staff placement outside of its headquarters, FERC should deploy a portion of OPP’s staff across the country. In addition to locating some OPP staff outside of FERC headquarters, it is important to ensure adequate funding for additional staff experts and FERC leadership to be able to travel and be accessible to the public.

C. Necessary Immediate Steps

In launching the OPP, the Commission needs to take several immediate steps to start the Office’s work quickly and set-up all its functions to begin operating as soon as possible. These initial steps have structural and organizational implications and considerations.

As an initial point, the Commission should prepare a charter for the OPP that formalizes the OPP’s position in the agency and role in processes across the agency. The Commission needs to establish how the OPP will work with other offices and how public participation issues and tasks will be referred and handled between these offices. These organizational considerations will need to reflect the OPP’s function of facilitating systemic change across different offices within the Commission. One form this process could take is issuing a policy statement about processes and expectations like the Commission did with the evolution of

enforcement responsibilities handled by in establishing as the Office of Enforcement.²⁶

The Commission should also immediately hire a Director for the OPP and begin staffing the office. Congress appropriates funds to FERC in a lump sum and the agency maintains executive flexibility within that lump-sum appropriation to make adjustments for changing programmatic needs. Congress does not subdivide the lump-sum appropriation and neither the House nor Senate reports provide subdivisions either. Under the Government Accountability Office process, subdivisions are therefore set forth in the FERC budget documents which divides the appropriations request by goals and objectives. The Commission already performs public participation functions, and can consolidate those functions, staff, and resources to the OPP without shifting funds between relevant object class subdivisions under the Fiscal Year (“FY”) 2021 budget.²⁷

This funding process was the same one used by FERC in creating the Houston division of the Office of Energy Projects in FY 2019 despite it not being included in the Congressional Budget Documents for that year. This office shifted 20 existing staff, hired 8 new staff, and required the acquisition of additional office

²⁶ See *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 (2008).

²⁷ See Government Accountability Office, *Soc. Sec. Admin.—Appl. of Reprogramming Notification Requirement*, B-329964 (Oct. 8, 2020), <https://www.gao.gov/products/b-329964> (finding that SSA’s shifting of funds within a lump-sum appropriation to create a new office within the agency was permissible) and Dep’t of Com. Office of Inspector Gen., B-330108 (Dec. 23, 2020) (finding the DOC’s shifting of funds within a lump-sum appropriation while reorganizing its audit, evaluation, and administrative functions was permissible), <https://www.gao.gov/products/b-329964>.

space in Houston.²⁸ Similarly, the Commission will be able to shift existing staff to start the OPP during this fiscal year. Additionally, it will be able to fund the start of its functions as continuations of its existing public outreach and education work. As such, funding is no barrier to the creation of the Office.

The OPP and Commission will need to start preparing its budget request for FY 2022 with an eye towards building out all of the OPP's functions and the intervenor compensation program. The OPP should prepare its own budget and submit it to the Chair to be included in and consolidated with the overall budget request. This will give the OPP slightly more structural independence from the Commission and allow it to be responsive to changing conditions as it grows and matures. The ICC's Office of Rail Public Counsel had a variation of this where its budget requests were filed directly to Congress without prior review by ICC staff.²⁹ Although the OPP needs some structural independence, it still must be situated within FERC to be effective. Consequently, the added independence of preparing its own budget is important, but it should still be part of the Commission's overall budget request.

The OPP's budget will cause an increase in the overall FERC budget to account for hiring to expand public participation staff and taking on additional public participation functions. In particular, intervenor compensation will represent

²⁸ FERC, *FERC Reorganizes to Create New LNG Division, Open Houston Regional Office* (July 23, 2019), <https://www.ferc.gov/news-events/news/ferc-reorganizes-create-new-lng-division-open-houston-regional-office>.

²⁹ Finkelstein & Johnson, *supra* note 19, at 188, 171.

a large portion of the OPP's budget and will need to be planned for. Once the budget is appropriately planned for it can be added into the Commission's regular budget request. It is important that the OPP and the intervenor compensation program are funded through FERC's existing funding mechanism as codified in 42 U.S.C. § 7171(j).

Once the immediate administrative needs are met, the OPP should start conducting an initial survey of existing public participation programs. The OPP should thoroughly assess the gaps and overlap of duties for public participation across different FERC offices. This review should be a bottom-up review that brings in the voices of staff members implementing public participation functions currently. Additionally, OPP staff should spend time tracking specific contentious proceedings to better understand difficulties faced by the public in participating. Based on this evaluation, the OPP should identify near- and long-term strategies to bring about change in Commission processes and communication methods to improve public participation.

Finally, the OPP should begin critical rulemakings and program development for its different functions. In particular, the intervenor compensation program requires better definition. The work on that program should begin as soon as is feasible.

D. Budget Considerations

To successfully implement its various functions, the OPP will need to be adequately funded. Earthjustice offers the following considerations for preparing an appropriately sized budget.

As a starting point, the 1981 statutes that created the OPP set an initial budget of \$2.4 million, which translates to approximately \$7.25 million today. This amount should be considered a floor for the OPP's budget. The amount equates to roughly 36 full time employees at an average cost of \$200,000 per year for salary and benefits. As discussed above, the OPP has significant staffing needs to cover all the FERC practice areas and geographic areas. Compared to other programs, the OPP should plan and budget for additional staff.

The SBA's Office of Advocacy's staff size of more than 50 staff, had a budget of roughly \$9.2 million.³⁰ The Office of Rail Public Counsel had a \$2 million budget in 1977 which is close to \$9 million today for a staff of 36.³¹ In 2020 and 2021 the SEC Office of Investor Advocate had a budget of \$6 million, of which approximately \$4 million was dedicated to its staffing needs for 12 employees.³² Based on these comparisons, an appropriate staffing budget should be in the range of \$10 to \$16 million for 50 OPP staff.

³⁰ It should be noted that SBA's Office of Advocacy has a different mission than the OPP.

³¹ Finkelstein & Johnson, *supra* note 19, at 190.

³² See U.S. Securities and Exchange Commission, *Fiscal Year 2021 Congressional Budget Justification Annual Performance Plan*, <https://www.sec.gov/files/secfy21congbudgjust.pdf>.

In addition to the staffing needs, the OPP will need additional funds for operations. These expenses will need to reflect the on-the-ground work of the OPP whether in the form of a sizable travel budget or a budget for housing staff in various locations across the country. The OPP may be able to find some savings by being able to pull from existing IT or communications budgets. Otherwise, the OPP budget will need to reflect standard operations budgets. As a rough point of comparison, the SEC's Office of the Investor Advocate had a \$2 million budget for non-personnel expenses.

The intervenor compensation program will require a large budget separate from the OPP's staffing and operation budget. The intensity of FERC cases, uncertain and often-extended timeline of FERC decisions, and technical and legal complexity of proceedings can create costs of millions of dollars per intervenor in a case. The number and breadth of cases at FERC multiplies these individual expenses into a significant funding need for the intervenor compensation program. The California PUC awards roughly \$12 million per year in intervenor

compensation over roughly 100 decisions³³ for comparatively less-expensive proceedings and a narrower docket than at FERC.³⁴

IV. Function and Scope of the OPP

Congress gave the OPP the broad mandate to “coordinate assistance to the public with respect to authorities exercised by the Commission” and “coordinate assistance available to persons intervening or participating or proposing to intervene or participate in proceedings before the Commission.”³⁵ In light of that broad mandate, the Commission requested input on the functions and scope of the OPP.³⁶

Based on its own experience and the experiences of other organizations, individuals, and communities who engage at FERC, Earthjustice has identified a list of core functions that the OPP should engage in to facilitate public participation consistent with FPA Section 319. First, the OPP should focus on improving information dissemination, both by implementing new outreach and engagement

³³ Tyson Slocum, *FERC Office of Public Participation: A Transformative Opportunity for Public Interest Advocacy*, Public Citizen (Feb. 10, 2021), <https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/TysonWEACT.pdf>; California Public Utilities Commission on Finance and Administration, *Report on Strategic Directive 10 Decision-Making Process* (Jan. 15, 2020), [https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/Transparency/Commissioner_Committee_Meetings/finadmin/2020/SD-10%20Decision-Making%20Process%20\(v6\)%201.12.20.pdf](https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/Transparency/Commissioner_Committee_Meetings/finadmin/2020/SD-10%20Decision-Making%20Process%20(v6)%201.12.20.pdf).

³⁴ For a comparatively smaller program, in 2018, the budget authorization for the Michigan Utility Consumer Participation Board (“UCPB”) was \$37,500 for administration costs and \$712,500 for authorized grants. The 2019 budget authorization for the UCPB was \$750,000. Of that amount, \$658,081 was available for awarding FY 2019 grants and \$37,500 was allocated for administrative costs.

³⁵ 16 U.S.C. § 825q-1(b)(1).

³⁶ Feb. 22 Notice re OPP.

initiatives and by facilitating existing public engagement at the Commission. Second, the OPP should provide technical assistance to shepherd community organizations and individuals through the complex intervention process. Third, the OPP should facilitate systemic changes by other offices at the Commission to remove existing barriers to public participation. In addition to these core functions, the OPP should have an auditing and reporting function to track public participation at the Commission and ensure continuous improvement.

For each of these functions, Earthjustice identifies and discusses a number of changes that the OPP should be responsible for that cross-cut along all areas of public participation. These recommendations are the outgrowth of feedback from surveys and interviews, as well as internal research on best practices for public participation. These specific recommendations offer clarity on how the OPP would implement each of its functions and highlight the need for each function to facilitate better public participation. Many of the recommendations involve a combination of different functions and show the connection between these functions, both with one another and the OPP's overall mission. Additionally, these recommendations serve as a starting point for the OPP to develop its near- and long-term goals.³⁷

A. The OPP Should Implement Outreach and Education Initiatives

One of the major barriers to public participation at the Commission is the highly complex and technical nature of the agency and its functions. It is common for organizations and individuals to have never heard of FERC before being

³⁷ The recommendations below are not presented in matter of importance.

impacted by a proposed project.³⁸ Groups and individuals that are new to FERC must educate themselves about the agency's authority and jurisdiction, how to engage with the agency, the rules and process for making their voices heard in a proceeding, the relevant standards that FERC may consider, and the best way to persuasively present information to the Commission. In addition to these foundational issues, a new group must also find ways to tackle the highly technical nature of the data of both federal infrastructure development and wholesale energy regulation. It is all too easy for members of the public to be discouraged from participation in the face of these compounding barriers. There is no question that in comparison to regulated entities, community groups and individuals are engaging from a significantly disadvantaged starting point.

In comparison, industry stakeholders who repeatedly appear before the Commission can focus solely on the specific issues in a particular proceeding where they have developed special knowledge and skills. To assist the public as directed by Section 319, the OPP will need to affirmatively provide education and outreach to lessen this imbalance. Although the Commission website has some introductory materials, facilitating wider public participation will require proactive continued education with interested groups.

The OPP's outreach and education function will need to take on different forms. As a foundational point, the OPP will need to build out easily accessible education materials introducing the public to FERC. Specifically, the OPP needs to

³⁸ See Mar. 17, 2021 Tr.

clearly lay out FERC's various processes and how different members of the public can participate in those processes. These materials must be robust and highly detailed, while maintaining a degree of accessibility for the layperson.

Additionally, the OPP should provide education on the technical aspects of FERC's subject matter including hydropower projects, pipeline projects, and wholesale energy regulation. This type of education lends itself well to online materials, although the OPP will also need to consider access for individuals without stable or consistent internet. The Federal Communications Commission maintains a webpage outlining its rulemaking process in detail, which serves as a good example for the type of materials that would help facilitate public participation at FERC.³⁹

These materials alone, without additional resources and support, are not enough to facilitate public participation at FERC. The OPP should conduct outreach to communities and interested groups that are likely to be impacted by proposed infrastructure projects and wholesale market reforms early in the process. The OPP should direct groups to its existing education materials, provide additional education directly, and host live events to explain the FERC process generally and specifics about a project. One potential model is to use "outreach attorneys" like the ICC's Office of Rail Public Counsel who were deployed by the agency to various geographic regions to solicit public opinion on agency programs.⁴⁰ Similarly, the

³⁹ Federal Communications Commission, *Rulemaking Process*, <https://www.fcc.gov/about-fcc/rulemaking-process> (last visited Apr. 22, 2021).

⁴⁰ Bloch & Stein, *supra* note 25.

OPP should affirmatively seek out public opinion and work to bring public opinion into Commission proceedings. Surveying communities along a right-of-way for a pipeline project to identify community groups who would be interested in the proposed project may be time intensive, but it is precisely the type of work the OPP is suited to perform.

In affirmatively soliciting public participation, the OPP will need to be mindful of which groups it engages. As a general matter the OPP should focus on direct stakeholders who historically have not engaged or otherwise had the opportunity to engage at FERC. For infrastructure projects this may include local and tribal governments, individuals whose land is impacted, and community-based organizations in the area. For energy regulatory proceedings this should include impacted rate-payers, and regional consumer and energy organizations. The OPP can also ask the groups they are aware of to reach out through their advocacy networks to better bring other community organizations to the table. The OPP will need to continuously and consciously re-evaluate who it is reaching out to, and which necessary voices are being left out of FERC decision-making.

In addition to its own education and outreach, there is also opportunity for the OPP to partner with existing programs from other agencies for broader outreach. In particular, the Department of Energy's environmental justice personnel and the Environmental Protection Agency's local outreach efforts are programs the OPP could partner with. In fact, part of the OPP's mandate ought to

be hosting workshops bringing together personnel from programs at other federal agencies to review and share best practices on public participation.

1. Facilitate existing public engagement

The OPP should become the Commission's subject matter experts for education and outreach and be involved in all Commission public engagement efforts. The Commission already engages the public in several ways, but does not have unified messaging across programs. To the extent the OPP is not delegated these responsibilities, the OPP should take an active role in facilitating and improving those opportunities.

The first of these existing opportunities is public meetings run by the Commission. As discussed in more detail below, the OPP should facilitate their planning and coordination to ensure that each public meeting encourages the greatest amount of public engagement. For example, these meetings must ensure proper language access and should be held at various times of the day to ensure that people who work evening shifts or multiple jobs have an opportunity to attend. The second existing opportunity for public engagement is technical conferences and workshops. The OPP should be involved in the planning and coordination of these events with a focus on public engagement.

2. Research

To support its education objectives, the OPP must have the authority to conduct its own independent research that can be shared with the public. The OPP should conduct and publish research on topics that would support the public's

ability to engage in Commission proceedings. This type of function is seen in both the SBA's Office of Advocacy, which researches small business finance,⁴¹ and the Securities and Exchange Commission's ("SEC") Office of the Investor Advocate which studies investor behavior.⁴²

The OPP could study trends in public participation in different FERC proceedings (by type, location, impact, etc.), public concerns with project construction and methods for monitoring and coordinating follow-up interaction by FERC, the implementation of protective measures during project construction and operation, or methods for effective public participation in Commission proceedings. One study that would immediately help to facilitate public engagement is a market rate study on the costs of attorneys and experts while engaging in FERC proceedings. This would help inform community group planning and the development of the intervenor compensation program.⁴³ An additional study that would benefit the Office going forward, would be an assessment of FERC's ex parte communication rules, with a focus on how these rules may have hindered public participation and ways in which they can be restructured modified particularly in the context of infrastructure proceedings while still preserving their important legal function.

⁴¹ Background Paper Office of Advocacy 2017–2020 at 81.

⁴² See SEC Office of the Investor Advocate, <https://www.sec.gov/page/investor-advocate-landing-page> (last visited Apr. 22, 2021).

⁴³ The California PUC conducted a similar study in the summer of 2018 to help the implementation of its intervenor compensation program. See California State Auditor, *Report 2012-118 Recommendation 5 Responses* (July 2013) <https://www.bsa.ca.gov/reports/responses/2012-118/5>.

3. Immediate Needs for Outreach and Education

A common and recurrent theme in our stakeholder outreach was that one of the primary responsibilities of the Office needs to be the clear and concise communication regarding the core responsibilities and authority FERC has pursuant to both the FPA and NGA. A better communication of the limits of these responsibilities will help properly set expectations for what FERC can and cannot do for the public. This would not only result in a better-informed public, but also have the substantive result of more focused comments that can better assist agency decision-making. An obvious place for much of this material is on a dedicated OPP webpage.

This messaging should also be consistent and complementary across the various outreach platforms the Office chooses to deploy (including social media). For example, at the beginning of public meetings for jurisdictional infrastructure projects, OPP staff could speak to what concerns may be addressed through the FERC process, as compared to falling under the responsibility of a different federal or state agency. In this context it is important for OPP staff to be familiar with those separate processes and be able to guide interested parties to the appropriate contact. The OPP should also host future in-person educational seminars that are recorded and posted on the OPP webpage.

i. Development of Landowner Outreach and Education Materials

Stakeholders communicated that a critical component of the OPP ought to be generating more effective education materials that are directly provided to

landowners. This would include clear communication on the full rights of landowners prior to construction activity, during construction activity, and after construction activity is completed. These materials should include a list of voluntary best-practices made available to landowners regarding their property rights. The materials should also include suggestions on how to best conduct pre-construction inventories of trees, shrubs, and other vegetation, post-construction review of their property, and credible valuation tools for estimating lost or reduced crop production or land use.

Landowners have voiced concerns that there is a significant need for post-construction support from FERC. Frequently, once a pipeline is in the ground, the project applicant has little incentive to be responsive to landowner concerns. The OPP should be responsible for highlighting and elevating post-construction landowner concerns to the appropriate office for enforcement or dispute resolution purposes, while also educating landowners on how to navigate that process and the respective roles of FERC and Pipeline and Hazardous Materials Safety Administration (and in some instances, states) during construction and operation of inter-state natural gas pipelines.

Additionally, there is a significant power imbalance inherent in the negotiation process between landowners and project applicants, as the project applicant is aware of what other landowners have agreed to, while each individual landowner does not have access to that information. One way to mitigate this clear power imbalance is for OPP to collect and make available common protective terms

that have historically been contained in the easement agreements for FERC jurisdictional projects and make that information available to the public. The OPP could also identify ways that such terms could be made fairer. A separate mechanism would be to require a “favored-landowner” clause for easement agreements, such that project applicants must agree to treat a particular landowner no worse than any of the other landowners.

Part of these educational materials should also include OPP-sponsored trainings on how landowners can act as public monitors of construction activity that takes place on either their property or public property. The consultants who FERC currently relies upon to conduct inspections for NGA jurisdictional projects are frequently chosen, and paid for, by the very companies that they are overseeing. As such, these inspectors have a conflict of interest in being overly scrupulous regarding the intensity of their oversight.

Educating landowners on what pre-construction, construction, and post-construction activities should look like would act as an additional safeguard by empowering landowners to ensure that project applicants are not cutting corners, undertaking non-FERC sanctioned activities, or having deployed failed environmental protection measures (i.e., failed erosion and sediment control measures). These trainings would include a safety component as well as a clear delineation of where and how landowners could conduct their oversight, and direction as to who at OPP to report their findings. It is simply impossible from a resource perspective to have inspectors along the entire right-of-way during all

critical phases of construction activity, or during every significant precipitation event. Enabling landowners to have access to the tools necessary to help FERC better oversee these activities should be a central component of the Office.

ii. Outreach to tribal governments and entities

Tribal governments and entities are important stakeholders in the FERC process, and FERC has historically had difficulty in outreach and engagement with these communities. Indeed, this failure of public outreach manifested in one of the OPP listening sessions dedicated to Tribal governments, where there was virtually no participation.⁴⁴ When questioned during the listening session as to what outreach FERC did to target tribal governments, a FERC representative indicated that they sent out an email to the tribal contacts they had on file.⁴⁵ This level of effort is not sufficient, particularly for tribal groups who have not traditionally participated at FERC. To begin remedying these issues, the OPP must acknowledge that while there is overlap, tribes have unique treaty rights and sovereignty considerations in contrast with other public participants or environmental justice communities.

While a carefully crafted OPP has the capacity to mitigate some of FERC's outreach shortcomings in this space, there is also the potential that if the OPP is not properly designed, that it may exacerbate existing problems. For example, the existing FERC tribal liaison and technical support staff should not simply be moved

⁴⁴ See Tr. of the 03/24/2021 Public Participation Listening Session, Docket No. AD21-9 (April 5, 2021) ("March 24, 2021 Tr.").

⁴⁵ *Id.*

from their existing offices and housed in the OPP. Instead, each relevant FERC office should maintain or add a tribal representative and an additional liaison in the OPP, who would facilitate tribal participation across FERC's programmatic work.

The OPP should also be delegated the responsibility of initiating a stakeholder process to better reform FERC's existing consultation policy statement codified at 18 C.F.R. § 2.1c. The policy statement was developed in the early 2000s very lightly update in November of 2019, and provides, among other things, guidelines for the way in which the consultation process operates between FERC and Tribal governments for addressing the impacts of proposed projects on tribal interests.⁴⁶

The consultation process is partially formalized through federal requirements for agencies to consult with tribes on a government-to-government level. Currently, consultation is conducted by FERC staff and is limited in scope due to perceived conflicts between FERC's consultation obligations and ex parte limits. Tribal advocates we spoke with expressed dissatisfaction with the process, and noted that true consultation recognizing tribal sovereign status requires direct communication between tribal leaders and Commissioners as the head of FERC. This point was also expressed at the April 16, 2021 workshop.⁴⁷ The conflict between consultation and

⁴⁶ See Revision to Policy Statement on Consultation with Indian Tribes in Commission Proceedings, 84 Fed. Reg. 56,940 (Oct. 24, 2019).

⁴⁷ See, e.g., FERC, *Workshop Regarding the Creation of the Office of Public Participation*, at Panel 1 (comments of Lois Sweet Dorman, Snoqualmie Tribal Elder, Snoqualmie Falls Spokesperson), <https://www.ferc.gov/news-events/events/workshop-regarding-creation-office-public-participation-04162021>.

ex parte considerations caused by FERC's quasi-judicial status is incredibly complex. The OPP should facilitate a larger process in deeply exploring these issues and substantively reforming FERC's consultation procedures and staffing.

Additionally, there is no question that FERC can improve its current practices by starting the identification of tribal entities and the resulting consultation process earlier, while also providing better education to project applicants on how they can effectively coordinate and communicate with Tribal officials.⁴⁸ Lastly, as a governing principle, the OPP needs to recognize that tribal governments are not the same as the general public, and there are different rights and privileges that must be recognized and respected when engaging with tribal entities.⁴⁹

Furthermore, the OPP should also be responsible for providing clear guidance to tribal entities regarding the extent of FERC's jurisdiction. It is clear that FERC has struggled to effectively reach out to tribal entities with regard to both NGA and FPA activities. A complicating factor that is a barrier to tribal participation is the great uncertainty over where the jurisdictional lines are drawn for tribes. Even among seasoned FERC lawyers there is confusion over what the stakes are for tribal participation, or lack of participation, in various FERC proceedings given the lack of clarity of what authority FERC has over those activities. As such, a primary responsibility of the OPP will be to find ways to effectively communicate to tribal

⁴⁸ *Id.*

⁴⁹ *Id.*

communities where FERC's authority lies. In this context, while tribal outreach from FERC has largely focused on NGA jurisdictional projects and the licensing and relicensing of dams, there must be an additional focus by the OPP on facilitating public participation regarding tribal interests in wholesale electricity markets. Part of the OPP's mandate ought to be clearly defining the stakes for these communities, regarding both FERC's authority under the NGA and the FPA.

iii. ISO/RTO Specific Education and Outreach

It is important to consider that as we move to a decarbonized future, an increasingly important role for the OPP will be to facilitate better public participation in the decision-making processes involving the electrification and oversight of the grid. Therefore, it is key that FERC carve out some clear lanes for the way in which the Office will improve public participation at the various FERC jurisdictional RTO/ISOs.

Consistent with the OPP's efforts in the development of educational and outreach material for landowners, the OPP ought to develop a handbook, workshops, and other guidance specific to each FERC jurisdictional RTO/ISO directing the public on: 1) generally what types of issues are governed by RTO/ISOs and how those issues impact the public, 2) how the public can track issues that are under currently consideration at the RTO/ISOs; and, 3) identify each of the available touch points for public participation in the decision-making process. These educational materials will necessarily be different for each RTO/ISO as their public participation models vary.

The OPP should also periodically initiate a stakeholder driven process to evaluate the public participation models and opportunities at the various FERC jurisdictional RTO/ISOs. This evaluation should include but not be limited to: an evaluation of public input opportunities – or lack thereof – during the RTO/ISOs’ decision-making processes, a review of the degree of information transparency in the proceedings, and a historical appraisal of the participation of traditionally marginalized groups such as environmental justice groups, overburdened communities, and tribal entities in the decision-making process. As a result of this review, the OPP should be delegated the authority to draft a report memorializing its findings and making individual policy recommendations specific to each RTO/ISO.

It is important that OPP have permanently assigned staff in field offices at each of the RTO/ISOs. These staff members should monitor RTO/ISO proceedings and provide monthly updates – available on the OPP website – that summarize newly emerging issues, pending issues including their upcoming deadlines that provides guidance on public input opportunities, and a description of decided issues with a tracking mechanism for member/stakeholder votes. To accurately capture this information, OPP staff should have access to all key RTO stakeholder and committee meetings.

iv. Environmental Justice Community Specific Education and Outreach

As noted throughout this comment, underserved communities face significant barriers to meaningful engagement at FERC. Many of the recommendations

provided throughout these comments will help mitigate some of the barriers faced by environmental justice communities (i.e. targeted educational materials and outreach, templates for filings, lists of attorneys and experts, issue tracking documents, accountability measures etc.); however, below are some additional specific considerations with regard to environmental justice groups.

On February 11, 2021 Chairman Glick announced plans to “better incorporate environmental justice and equity concerns into the Commission’s decision-making process by creating a new senior position to coordinate that work.”⁵⁰ This cross-cutting position will be “charged with working with the experts in all FERC program offices to integrate environmental justice and equity matters into Commission decisions.”⁵¹ The relationship between this newly created position and the OPP needs to be planned so that their efforts mutual reinforce one another.

Additionally, as recommended in the April 16, 2021 workshop, the Office needs dedicated staff to build relationships with environmental justice communities and leaders, and to coordinate financial compensation for their participation in FERC processes.⁵² Outreach and relationship building requires the presence of physical staff, whether it is in the context of OPP staff walking the right-of-way for an infrastructure project, attending RTO/ISO stakeholder meetings, or present in regional offices closer to environmental justice communities. The OPP would be

⁵⁰ See <https://www.ferc.gov/news-events/news/ferc-chairman-acts-ensure-prominent-ferc-role-environmental-justice>.

⁵¹ *Id.*

⁵² See <https://www.ferc.gov/media/opp-panel-1-bios-and-testimony> (testimony provided by Michelle Martinez).

well-positioned to conduct specific outreach to overburdened communities, and provide supportive workshop-style sessions, perhaps modeled after the FERC seminars designed for consultants and project applicants.⁵³ Continuity in this context is key, as nothing can replace the relationship building through conversations and communications between environmental justice stakeholders and outreach staff. As stated during the workshop by Ms. Martinez of the Michigan Environmental Justice Coalition, “if environmental justice communities aren’t coming to your table, then you need to go to theirs.”⁵⁴

As described by Kerene Tayloe of WE ACT, “Environmental justice communities have historically held an antagonistic relationship with FERC.”⁵⁵ In addition to the suggestions above, some of the ways in which to generate better relationships would be to have OPP staff trained on the “Principles of Environmental Justice and the Jemez Principles of Democratic Organizing in its engagement processes,” and also “[p]rioritiz[ing] inclusion of community activists and leaders who may regularly have exposure to FERC in regional engagement plans.”⁵⁶ Furthermore, the creation of an advisory board has been recommended by several groups as a critical step for the Office.⁵⁷ This advisory board could be modelled after the Environmental Protection Agency’s National Environmental

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See <https://www.ferc.gov/media/opp-panel-2-bios-and-testimony> (testimony of Kerene Tayloe).

⁵⁶ *Id.*

⁵⁷ *Id.*

Justice Advisory Council or the White House Justice Advisory Council.⁵⁸ Such a board could, among other things, provide advice to the Commission regarding a range of strategic, scientific, technological, regulatory, community engagement, and economic issues related to environmental justice.

B. The OPP Should Provide Technical/Administrative Assistance to the Public

Another major barrier to the general public in participating in Commission proceedings is the complexity and difficulty in intervening or filing comments. The FERC Rules of Practice and Procedure are difficult for individuals and community groups to understand if they do not regularly engage in FERC proceedings. The eLibrary and eFiling systems can be clunky and difficult for a novice to successfully navigate. In Earthjustice's outreach, groups voiced frustration in trying to navigate this system and inability to get consistent support in doing so. To facilitate participation in proceedings, the OPP will need to provide direct administrative and technical assistance to groups trying to participate in different activities at FERC.

Addressing this difficulty will require the OPP to both better direct new intervenors and commentors through the process and to simplify the process. The OPP should conduct systemic reforms for the means in which the general public interacts with FERC. The most effective and long-term means in which to help the public overcome barriers is to remove them. Although not every systemic issue will be solely the OPP's responsibility, many of them are inherent to fundamental public participation functions that will be under the OPP's responsibility.

⁵⁸ *Id.*

In addition to formal intervention and commenting on proceedings, the OPP should provide technical and administrative assistance in all areas where the public engages with FERC. This includes working with other offices within FERC to provide support to the public engaging in pre-filing and post-certificate processes for infrastructure projects. It also includes the OPP being involved in the notification process to ensure that public notice is direct and inclusive of different actors and provides detailed information on how to provide comments, formerly intervene, and access education materials.

The OPP can also provide support by facilitating public understanding about the interagency coordination for infrastructure projects under statutes like NEPA and how different aspects of projects are managed across different agencies.

1. Immediate Needs for Technical and Administrative Assistance

The OPP should take steps to help the public build its own capacity for engaging at FERC. Stakeholders voiced the concern that it was difficult to find competent and affordable legal representation, as well as credible experts that could influence the outcome of FERC proceedings. The Office should house and make available a searchable list of attorneys and experts that have engaged in prior FERC dockets. For attorneys, the list should be searchable based on at least the following: the dockets in which the attorney participated, whether the attorney was compensated in those dockets, whether the attorney represents the non-regulated entities, and the party the attorney represented. Similarly, the list of experts should be searchable based on at least the following: subject matter expertise, the dockets

in which they have participated, whether they were compensated in those dockets, and the party that retained the expert.

Similarly, the OPP should maintain and make available a compendium of templates for different types of FERC filings. The first barrier most prospective participants face is determining the appropriate form and necessary contents of the myriad of different types of filings that FERC accepts. The form and type of filings are well known to repeat-players, but present a real barrier for those who are unfamiliar with the process. This compendium would be accessible online, and include templates for motions to intervene, comments, protests, complaints, requests for rehearings, motions to dismiss, etc. This would not only benefit the public and facilitate more persuasive and effective advocacy, but it would also help standardize the types of filings that the Commission has to review thereby making the processing and review of those documents easier.

i. Public Records and Information Request Reforms

Another barrier frequently cited by stakeholders is an inability, or significantly delayed ability, to access Critical Energy/Electric Infrastructure Information (“CEII”) and Privileged documents, which are often key components of meaningful public comment. The OPP should be delegated the responsibility to facilitate access to and resolve disputes over document requests relating to CEII and Privileged documents. Currently, the process is highly cumbersome, and requesting parties are often left at the mercy of requesting the documents from the project applicants themselves, who often have a perverse incentive in not disclosing the information. The OPP could develop a standardized and easily accessible non-

disclosure agreement (“NDA”), and an online training regarding the repercussions of signing the NDA, that would allow access to the material.

Separately, the OPP should be tasked with organizing and making available information that has been released by FERC via Freedom of Information Act requests. Creating a single searchable location to access information that has been released would allow the public easy access to that could help inform their comments and ultimately lead to better agency decision-making.

ii. Website Reform

Another barrier cited during our outreach was the general inaccessibility of FERC’s website. The OPP should be tasked with contracting with a website design consultant that specializes in effective outreach and communication with resource constrained and historically marginalized communities. Through this consultative process, the OPP should recommend that the website be optimized to allow people with slower internet connections, and lower download capabilities to more easily access and file documents.

Additionally, the way in which docket information is organized, and presented on the website is unwieldy and difficult to manage, particularly in dockets where there are thousands of docket entries. The OPP should create a handbook and/or training video[s] that detail the best way in which to efficiently navigate FERC’s website. These materials should be made available in as many non-English languages as practicable.

The OPP should also be consulted to help design the part of the website where docket information is displayed, to make it more user friendly for the public.

For example, there should be a way to more easily sort the docket entries based on the content, subject matter, the title of the document, and clearly link responses that were filed to the specific data request. Under the current system, docket numbers are the only way to consistently pull up relevant information to a proceeding. Tracking down a docket number can be a cumbersome process that serves as a barrier to accessing public information.

Additionally, through OPP consultations on website re-design, the OPP should recommend ways in which to assist the average user in identifying relevant projects regarding their interests. For example, the OPP should compile a complete list of NGA jurisdictional pending projects and create a table that is accessible on the website. The Commission currently maintains a similar table for “major” NGA projects, but this should be expanded to *all* pending projects. The OPP should maintain and make public on the website a similar table of pending tariff filings from various RTO/ISOs, and pending LNG facility filings. The OPP should also publish monthly updates on new filings that discusses in plain language new FPA/NGA proceedings that are pending before the Commission. This update should include a summary of the project/filing, the docket number, and upcoming public participation deadlines.

C. The OPP Should Facilitate Systemic Changes to Remove Barriers to Public Participation

Public engagement happens across different areas of the Commission and the OPP cannot and should not be solely responsible for conducting public engagement. Instead, the OPP should work with different offices to identify existing barriers to

public participation and implement changes to remove those barriers. This focus on systemic changes across the organization will be critical in supporting durable and impactful assistance to the public participation.

The OPP should be situated as an internal resource and expert on public participation within FERC. In that function, the OPP should observe existing FERC public engagement for opportunities for improvement and have the ability to recommend those improvements to other offices. Additionally, the OPP should be a resource for other offices at FERC to initiate their own efforts to improve public interactions.

For this function to be effective, the OPP will need to have some authority to prompt changes. The OPP should have the ability to make formal recommendations and suggestions to other offices. Additionally, the OPP should have the ability to make recommendations with a larger scope directly to the Commission as the official policy setters for the agency. The Commission will need to be mindful to balance the OPP's authority to prompt change, with a consideration of how best to foster an atmosphere and culture of cooperatively working with other offices.

Additionally, the OPP should have the ability to request the initiation of a rulemaking similarly to other offices within the Commission. It will be important for the OPP to be able to formalize some of its own rules and to initiate formal changes to the Commission's existing rules. In particular, the OPP will likely need this authority in the context of intervenor compensation.

1. Immediate Needs for Systemic Change at FERC

Earthjustice's research and outreach identified several systemic accessibility issues universal across all of FERC's programs that the OPP should address. The OPP should make it a priority to improve language accessibility through translation services and interpreters for various FERC proceedings; in particular, the OPP should ensure that first-contact outreach information is available in the preferred language of the impacted community.

Furthermore, to the extent practicable, there should be multilingual staff in the OPP who can respond to public inquiries in their preferred language. Additionally, FERC's website could greatly be improved to ease access for those whose first language is not English. The OPP should lead a stakeholder process to make recommendations on ways to better provide multilingual accessibility on FERC's website and elsewhere. Effective public outreach is data informed and culturally and linguistically responsive, and the OPP should be utilized and relied upon to improve access to information for non-English speakers.

An additional common criticism amongst those interacting with FERC is the inability to contact FERC staff regarding questions or concerns outside of normal business hours in Eastern Time. Many folks impacted by FERC jurisdictional projects cannot engage with FERC during traditional working hours because of their own personal responsibilities. This concern was voiced in the FERC listening sessions for the OPP (which were held during business hours). To FERC's credit the Commission supplemented their listening sessions with an additional opportunity outside of normal business hours to provide oral comments. There should be similar

responsiveness and opportunities for those interested in participating in FERC proceedings to use resources provided by the OPP to facilitate engagement outside of normal business hours (in all time zones).

i. Landowner Process for Infrastructure Projects

One of the catalysts for launching the OPP is due to a recognition that FERC is falling short in facilitating public participation, conducting meaningful outreach, and being responsive to the concerns of landowners affected by FERC jurisdictional projects.⁵⁹ The OPP should work with offices throughout the Commission to address landowner engagement issues through broad process reforms.

One element of this problem is a product of FERC's delegation of nearly the entirety of first-contact outreach to the jurisdictional entities proposing the projects. These entities have a clear conflict of interest in providing full, accurate, and unbiased information that provides communities and individuals with all the key information they need to be meaningfully informed and to meaningfully participate in the FERC process into which they have just been thrust.

FERC must reconsider or otherwise claw-back the first contact responsibilities from project applicants, and instead delegate this responsibility to the OPP, or at the very least task the OPP with oversight over this crucial phase of the FERC process, and measures to ensure accountability on the behalf of the

⁵⁹ See, e.g., House Committee on Oversight and Reform, *Pipelines Over People: How FERC Tramples Landowner Rights in Natural Gas Projects*, 116th Congress (Dec. 9, 2020), <https://oversight.house.gov/legislation/hearings/pipelines-over-people-how-ferc-tramples-landowner-rights-in-natural-gas>.

project applicant. This oversight could take numerous forms and the suggestions below should not be interpreted as exhaustive.

For example, FERC could mandate that the OPP initiate mandatory trainings for those who will be doing first-contact outreach on behalf of project applicants, these trainings would provide guidance on the full complement of information the project applicants must disclose to landowners as codified in at 18 CFR § 157.6(d)(3). Furthermore, while Section 157.6(d)(3) only requires the project applicant to provide a “*brief summary of what rights the landowner has at the Commission and in proceedings under the eminent domain rules of the relevant state,*” the OPP should provide a *robust summary of all the rights* a landowner has at the Commission.⁶⁰

Providing landowners with only partial information regarding their rights is setting the process up to fail. This is particularly true where the notice of these rights is also provided by project applicants who have a perverse incentive to be less than forthcoming in the information they provide and how they provide that information. This unsustainable structure has resulted in the unworkable situation that gave rise for the need for this office. To the extent this responsibility is not clawed-back by the OPP, first-contact outreach information must be submitted to and approved by the OPP prior to being disseminated to the public.

FERC has for years conducted seminars largely focused on helping *consultants* navigate FERC’s certification process for NGA jurisdictional projects.

⁶⁰ 18 CFR § 157.6(d)(3)(v) (emphasis added).

The fact that FERC needs to provide these full day seminars to those who have the resources and expertise to engage at FERC demonstrates the complexities at play in these FERC proceedings. What is unacceptable here is that there are no similarly designed seminars for landowners, public interest organizations, environmental justice communities, or tribal entities. The OPP should be instructed to conduct such seminars and broadcast their availability widely. Furthermore, in the consultant focused seminars, staff from the OPP must be included to educate consultants and model best practices for project applicant outreach.

Furthermore, these consultant-based outreach trainings should also include a component directing project applicants and consultants how they must work with OPP to develop plans to engage environmental justice, and other resource-constrained communities. Right now, developing such plans and conducting this outreach is merely recommended. The full development and approval by the OPP of outreach plans for overburdened communities should be required before any outreach by the project applicant occurs.

There are numerous other ways in which the OPP can improve outreach and public participation for landowners. For example, the OPP could designate a (non-decisional) staff member as the point person for each NGA jurisdictional project. This staff member would be familiar with the project and be able to answer substantive questions about the project, and their contact information would be made available on the first-contact materials provided to landowners. As part of their responsibilities, this OPP staff member would be able to verify information

provided to landowners by project applicant representatives. The staff member could also provide neutral legal advice and have the ability to identify key standards that must be met by the project applicant.

As an additional accountability mechanism, this OPP staff member could also track instances where verifiably false information was provided to landowners and make that information publicly available. This would incentivize project applicants to provide accurate information to landowners at every point of contact.

Indeed, there are numerous allegations that project applicant representatives have not been truthful with landowners regarding numerous issues pursuant to their projects.⁶¹ Compounding the problem of the perverse incentives of project applicants in this context is the fact that project applicants in some jurisdictions need not negotiate with landowners in good faith prior to initiating eminent domain proceedings.⁶² While project applicants must make a good faith effort to *notify* landowners regarding an application, in many instances the applicant may *negotiate* in bad-faith and face no repercussions. This fact is highly problematic, and landowners need to be informed at the beginning of the process of the reality that project applicants may not be negotiating with them in good faith, nor do they need to be bound by the letter of the law. Having a contact at the OPP who can verify certain key pieces of information provided by project applicant representatives would help

⁶¹ See Mar. 17, 2021 Tr.

⁶² See *Millennium Pipeline Co. LLC v. Certain Permanent and Temporary Easements*, 552 Fed. Appx. 37, 39 (2d Cir. 2014) (noting split in circuits on whether good faith is required, and declining to resolve split in Second Circuit).

correct this natural informational power imbalance between project applicants and landowners.

In addition to tracking and publishing a report on false statements made by project representatives, the OPP should be responsible for other accountability mechanisms as well. For example, as a common condition of a pipeline certificate many pipeline proponents are required to provide construction and post-construction right-of-way environmental assessments, and periodically submit them on the docket. The purpose of the inspection reports is to determine compliance with the environmental conditions of the Commission's Orders Issuing Certificates for the project and to inspect the construction conditions of the project facilities and rights-of-way. These reports typically include a table with four categories: Problem Area, Non-compliances, Follow-up Letter Required, and Refer to Enforcement. The OPP should collect, synthesize, and organize the findings of these reports so that the public can better track project construction and post-construction activities. A review of this data suggests that stop-work orders or financial penalties assessed by FERC are exceedingly and disproportionately rare; however, elevating FERC's findings in these reports may result in a willingness for FERC to more forcefully exercise its enforcement authority regarding these types of violations.

Access to this historic data through the OPP would also help FERC and the public evaluate whether a specific pipeline company has a better or worse record than others, potentially dictating whether additional oversight is appropriate in

providing a certificate to that entity. Such easily available and comparable evidence would add yet another valuable accountability measure for the public.

Yet another related accountability measure would be for the OPP to track commitments regarding environmentally protective measures or project design and construction in the initial environmental assessment or environmental impact statement, and determine whether those promises are ultimately kept or not. Changes are frequently made through variance requests after the project has been approved that are not reflected in the initial environmental review of the project. And many aspirational promises made by project applicants are simply ignored when it is time for them to be deployed. The OPP should be tasked with collecting and tracking these commitments, including any-and-all variance requests, in one place so that the public can clearly see how different a proposed project looks as it moves through the process. This would provide the public with the appropriate information and foundation to challenge any post-certificate variance requests.

Additionally, while there currently exists a landowner hotline, the stakeholder feedback we have solicited has indicated that the hotline is largely ineffective, as the staff person is frequently not able to address the questions or concerns posed. As such, landowner hotline reform to be more responsive to the concerns of landowners should be a priority. The OPP should conduct stakeholder outreach to assess what aspects of the hotline are effective (anonymous reporting), versus those that are not (failures to provide substantive responses to questions). The OPP should also be responsible for developing a comprehensive landing

platform that would not only house the hotline number, but also provide links to the various accountability measures discussed above.

The OPP could also house and make accessible critical landowner information that would put landowners at less of a disadvantage when engaging with project applicant representatives. For example, we have heard stakeholder feedback that it would be highly beneficial if the OPP could publish various recognized and credible valuation tools for determining the appropriate compensation for property losses (losses in vegetation, farmable acreage, etc.). Valuation tools could be in the form of FERC generated tables or valuation schedules based on historical compensation awards, or referrals to credible third-party appraisal tools. While the OPP need not endorse any particular method or schedule, it is critical that landowners have quick and easy access to reliable valuation tools.

ii. Receiving and Reporting Complaints and Issues

Common feedback from stakeholders was a lack of a substantive reporting structure for issues with specific projects and public participation in general. Landowners and community organizations need an easy, direct, and substantive way in which to report issues with project implementation, engaging with project applicants, and interacting with FERC staff. This reporting then needs to be able to result in substantive consideration of an issue by relevant internal offices. Additionally, reported issues need to be collected and integrated into the OPP's process for evaluating public participation at FERC.

One commonly proposed model for this function is by having a staff member with an ombudsperson role. The ombudsperson should be independent from the rest of the Commission with the ability to report directly to the Commission on certain issues. The role should be defined broadly to allow access to any member of the general public with a concern (as opposed to limiting it to landowner complaints). The OPP should initiate the process for designing and implementing this role.

iii. Public Meeting Format Reform and Rule Codification

The results of surveys and outreach across a wide cross-section of stakeholders reported that FERC's public meeting process for NGA jurisdictional has created barriers to public participation rather than break them down. For example, stakeholders report that public meetings have been held at locations far from environmental justice communities and other impacted communities, requiring significant travel to participate in the meetings; they have been scheduled close to major holidays; they never have a FERC Commissioner present either in person or virtually; and because of ex parte rules there are no FERC staff present at the public meetings who can substantively respond to questions posed. And while this practice may have changed, there have even been public meetings wherein participants seeking to provide comments were sequestered into a separate room to provide their oral comments. Considering one of the most valuable parts of attending a public meeting is hearing other members of the public speak, this practice proved to be yet another cynical barrier to better public participation.

The OPP should be assigned the authority and delegated the responsibility for more clearly standardizing and planning public meetings for NGA jurisdictional

projects. The OPP should initiate a stakeholder process to standardize the public meeting format and that process should be subject to public review and comment. Issues that should be considered in the stakeholder process include, but are not limited to, the following: development of a decision-making process to determine times, location, and number of meetings, translation requirements at meetings, outreach strategies to provide additional notice to environmental justice communities, standardized format for information presentation, virtual Commissioner presence at certain meetings, remote participation capabilities, and mechanisms for OPP staff to respond to substantive questions raised by participants.

In particular, stakeholders found it imperative that there be at least a virtual presence of a Commissioner in at least at one public meeting per NGA project. Such a presence is not only a showing of good faith that helps develop the trust of the public, but also provides a critical viewpoint for Commissioners who often are not at the frontline of communities that their decisions so drastically impact. Hearing and seeing a person provide a public comment, is far different from reading that same comment on one's computer. These reforms are critical, as when these processes are left to the hands of project applicants these meetings have amounted to nothing more than a "dog and pony show" in promotion of the project, as opposed to balanced information-driven meetings.

- iv. Facilitate Coordination and Cooperation Across Different Government Actors*

FERC has never fully complied with the statutory requirements of 15 U.S.C. § 717n(d), which has resulted in yet another barrier to public participation at FERC. The OPP should be delegated with the responsibility for compliance with this provision. Section 717n(d) requires that:

The Commission *shall*, with the cooperation of Federal and State administrative agencies and officials, *maintain a complete consolidated record of all decisions* made or actions taken by the Commission or by a Federal administrative agency or officer . . . with respect to any Federal authorization. Such record shall be the record for . . . judicial review under section 717r(d) of this title of decisions made or actions taken of Federal and State administrative agencies and officials . . .⁶³

However, the Commission never accumulates the *full* record with regard to any of these decisions. Instead, while the Commission may have on file the record-of-decision, the full administrative record underlying that decision is never submitted to FERC. Providing a single-stop access point to all this additional material would greatly benefit the public participation in not only the FERC specific process, but all the public processes involved in each of the other Commission required approvals. This issue has never been raised or resolved through litigation because it is difficult for a party to show a legally cognizable harm arising from this continued failure. This of course, does not mean that there is no harm, just not a harm that is readily redressable through the courts. The OPP would be well positioned to address this problem and break down this barrier to better information dissemination.

Additionally, the OPP should help facilitate coordination and cooperation with different, often local, government actors. These government officials are often

⁶³ 15 U.S.C. § 717n(d) (emphasis added).

as inexperienced with the FERC process as the public; yet, they are looked to by the public for answers on the FERC process. The OPP could coordinate with the Office of External Affairs to provide communication and training tools to local government officials that could potentially provide the OPP an additional partner in helping inform the public.

Furthermore, the OPP should incentivize or otherwise encourage project applicants to comply with local laws even where such laws would otherwise be preempted. This can be accomplished by, among others, educating project applicants on the public relations benefits of being a “good neighbor.” Fostering better coordination with local municipalities, townships, and tribal entities would result in not only better public outreach, but better decision-making by FERC.

Lastly, the OPP should coordinate or otherwise convene an interagency workshop whereby staff from public participation programs across other federal agencies could come together and share best practices.

v. *Simplify and Expand Access to Engaging in NGA/FPA Projects*

One statement Earthjustice universally heard throughout our stakeholder outreach was the frustration that FERC does not make available, as does numerous other federal agencies, a dedicated email address for each NGA/FPA project through which the public can file comments and other documents. This email address should be publicized and managed by OPP. This simple change would be a significant value-add to increasing public participation especially considering the universally held frustration among stakeholders of navigating the FERC website.

The OPP should also be delegated the task of developing a system that better allows for landowners along the right-of-way to become intervenors. Currently, the system can fairly be categorized as an “opt-in” system, whereby landowners have to submit in the docket an affirmative statement indicating their desire to be an intervenor, and also comply with specific rules governing intervention. Instead, the OPP should be delegated the responsibility of developing something that either resembles an “opt-out” system or other mechanisms to ease the intervention process.

Additionally, for all other intervenors the OPP should be responsible for timely notice that intervenor status has been granted. Currently, intervenors whose status is challenged are not informed as to whether their motions have been granted until the NEPA documents are filed by the Commission. This is typically months into the process. Such late notice risks potential intervenors investing significant time and resources into a process while only learning later that they do not meet the baseline requirement for to qualify for compensation. The OPP should be able to facilitate decisions within two weeks from the time in which a party has to challenge the motion to intervene.

vi. Public Comment on Remanded NEPA Documents

In certain situations where FERC certifies an NGA jurisdictional project and that approval is later successfully challenged and remanded back to FERC as a result of a faulty environmental review pursuant to NEPA, FERC creates a barrier to public participation by prohibiting public comment on the supplementary analysis required by the court. For example, in *Delaware Riverkeeper Network v.*

FERC, 753 F.3d 1304 (D.C. Cir. 2014), the Delaware Riverkeeper Network successfully argued that FERC had improperly segmented the environmental review of four separate pipeline projects and the court remanded back to FERC for further environmental review. Subsequently, FERC provided a supplement to the deficient NEPA document, but did not provide an opportunity for public review or comment on that document. In these situations, the OPP should be delegated the responsibility for raising public awareness of the court-ordered remand, and facilitating public comment on the remanded NEPA document.

D. The OPP Should Audit and Report on Public Participation at the Commission

As noted above, the OPP needs the ability to evaluate and make formal reports on public participation at the Commission. The reports should be annual and made to the entire Commission and published to the public. The auditing and reporting function is an important accountability tool and helps ensure active engagement and effort by the OPP as public participation needs change over time. The Office of Enforcement already makes annual reports to the Commission.

In certain specific circumstances, it may be appropriate for the OPP to have the authority to provide its report to Congress as an additional check on the progress of the Office. The Commission waited over 40 years to develop the OPP and additional accountability measures are important for seeing the OPP through its early stages. It is noteworthy that other offices of this nature reported directly to

Congress. That is, Congressional reports were an important function of both the SBA's Office of Advocacy⁶⁴ and the SEC's Office of Investor Advocates.⁶⁵

A key component of this report is that it is subject to review and public comment before being finalized. Indeed, the public ought to have a significant voice in the review and oversight of the Office that is mandated with soliciting their input.

The report should consider the overall strategic goals, information on steps the OPP had taken that year, a summary of serious problems encountered by the public during that year, and recommendations for actions to resolve these problems. The report should include statistical information and substantive analysis. The SBA report includes performance measurement tables with indicators of success such as the number of outreach events, number of presentations, and media and policy audiences.⁶⁶ An independent survey of the FTC's intervenor compensation program reviewed the individuals and organizations applying for its intervenor compensation program and reported on the effectiveness at ensuring consideration of diverse views, bringing new participants into rulemakings, and production of

⁶⁴ Background Paper Office of Advocacy 2017–2020.

⁶⁵ See SEC, Investor Advocate Reports to Congress, <https://www.sec.gov/advocate/investor-advocate-reports.html> (The requirement to issue these reports is in Section 4(g)(6) of the Securities Exchange Act of 1934, 15 U.S.C. § 78d(g)(6)) (last visited Apr. 22, 2021).

⁶⁶ SBA Office of Advocacy, *Fiscal Year 2021 Congressional Budget Justification and Fiscal Year 2019 Annual Performance Report*, at 19–20, <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/02/12093237/FY-2021-Congressional-Budget-Justification-and-FY-2019-Performance-Report.pdf> (last visited Apr. 22, 2021).

more efficient and equitable results.⁶⁷ The OPP should similarly include these metrics in its reports.

The reporting function should be institutionalized as a rule to help ensure the durability of the accountability tool and the Office.

In addition to this auditing and reporting function, the OPP could receive additional review. One option is for the General Accountability Office to periodically review FERC efforts at improving public participation. Another option would be for the head of the OPP to testify as part of regular oversight hearings in front of Congress. Earthjustice therefore recommends both an annual report as described above, layered with a less frequent secondary separate accountability mechanism.

E. The OPP Should Forgo Taking on Advocacy Responsibilities

Some organizations may want the OPP to take on a function as a public advocate that participates in proceedings on behalf of the public similarly to how various Offices of Consumer Advocates work across the federal and state governments. Although that type of role could benefit the public and increase the representation of the public interest at Commission proceedings, that function should be through a body other than the OPP.

Successful advocacy organizations require a narrowly focused goal. For example, the Office of Rail Public Counsel advocated on behalf of “the interests of

⁶⁷ Debra L. Scammon et al., *"The FTC's Public Participation Funding Program: Perceptions of Applicants,"* Advances in Consumer Research Vol. 10, 479–483 (Richard P. Bagozzi and Alice M. Tybout eds., Association for Consumer Research, 1983), <https://www.acrwebsite.org/volumes/6165/volumes/v10/NA-10>.

those communities and users of rail service which, for whatever reason, such as their size or location, might not otherwise be adequately represented”⁶⁸ and the SEC’s Office of Investor Advocate advocates “to ensure that the needs of investors are considered as decisions are made at the SEC, at self-regulatory organizations (SROs), and in Congress.”⁶⁹ In comparison the OPP has a very broad mandate to assist the public and “persons intervening or participating” in FERC proceedings. There are a lot of different types of public participants (e.g., individual landowners, community groups, local governments, tribal governments, and advocacy groups) that need better representation at FERC that all have different nuanced positions. The OPP would not be able to simultaneously represent the interests of all these groups.

Instead, a public advocate at FERC should take the form of an independent office or body. Unlike the OPP, most advocacy organizations are organizationally separate from the body they practice in front of. A separate body with a narrower mandate would be able to better serve an advocacy role. Additionally, this type of advocacy role is somewhat contentious and might attract some unnecessary controversy and political attention to the OPP during its early stages. Indeed, to the extent the need for this type of advocacy crystallizes, it would be well-within the

⁶⁸ Finkelstein & Johnson, *supra* note 19, at 170.

⁶⁹ See SEC, Office of the Investor Advocate, <https://www.sec.gov/page/investor-advocate-landing-page> (last visited Apr. 22, 2021).

mandate of the OPP to recommend the creation of such a body through its annual review process.

V. The Intervenor Compensation Program

In addition to the OPP's broad mandate to facilitate public participation, Congress gave the OPP the authority to provide compensation to certain intervenors for "reasonable attorney's fees, expert witness fees, and other costs of intervening or participating" at FERC.⁷⁰ The costs of lawyers and experts needed to capably engage in FERC's highly technical and administratively unique processes is a huge barrier to impacted individuals and community groups. Intervenor compensation is critical to allowing new and underrepresented parties participate.

Intervenor compensation can have a big impact on public participation. California has an intervenor compensation program at its Public Utility Commission that has allowed for the successful representation of a broad array of interests and bringing in new groups.⁷¹ Notably, the program has seen a fourteen-to-one return on investment for ratepayers.⁷² The OPP should implement a robust intervenor compensation program to see similar success in facilitating better public participation at FERC. OPP staff should conduct a listening tour across different state public utility commissions with robust intervenor compensation programs for

⁷⁰ 16 U.S.C. § 825q-1(b)(2).

⁷¹ California Public Utilities Commission, *Intervenor Compensation Program Guide*, (Apr. 2017), <https://www.cpuc.ca.gov/icompl/>.

⁷² Tyson Slocum, *FERC Office of Public Participation: A Transformative Opportunity for Public Interest Advocacy*, Public Citizen (Feb. 10, 2021), <https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/TysonWEACT.pdf>.

the purpose of gathering best practices, lessons learned, and recommendations from staff at those locations currently managing their own intervenor compensation programs. OPP staff should then compile that information into an individual report or as a portion of a larger report outlining the Office’s mission, objectives, and structure.

PURPA sets the following requirements for intervenor compensation: (1) that the proceeding is significant, (2) participation would be “a significant financial hardship” for an intervenor or participant, and (3) that participation “substantially contributed to the approval, in whole or in part, of a position advocated by such person.”⁷³ The administration of the intervenor compensation program is left to be determined through rules promulgated by the Commission.⁷⁴ In addition to its other functions, the OPP should establish, design, and primarily administer the intervenor compensation program.

The OPP should define “significant proceeding” to broadly include all formalized proceedings at the Commission that the average person would have difficulty navigating without assistance. The intervenor compensation program in California defines proceedings as “an application, complaint, or investigation, rulemaking, alternative dispute resolution procedures in lieu of formal proceedings as may be sponsored or endorsed by the commission, or other formal proceeding before the commission.”⁷⁵ The Oregon PUC’s intervenor compensation program

⁷³ 16 U.S.C. § 825q-1(b)(2).

⁷⁴ *Id.*

⁷⁵ Cal. Pub. Util. Code § 1802(g) (2017).

considers significant proceedings to include general rate cases, mergers and acquisitions, integrated resource plans, and annual power cost updates.⁷⁶ In line with these state models, the OPP should define significant proceedings to include rate cases, rulemakings, pipeline applications, LNG applications, hydropower cases, RTO/ISO compliance filings, and other significant proceedings under the FPA, Public Utility Regulatory Policies Act (“PURPA”), and NGA.

The OPP should build out the significant financial hardship requirement to ensure that funds go to community organizations and individuals that are underrepresented at the commission and not adequately represented industry groups. Different intervenor compensation models use different financial criteria to vet participants. All programs require some form of application to demonstrate it meets eligibility requirements and provide basic financial information. The Michigan Utility Consumer Participation Board requires applicants to specifically identify additional funds or resources used for participation and how those funds are utilized.⁷⁷ The Oregon ICP takes a step further and expects intervenors to pay 20% of their eligible expenses to receive funding under the intervenor compensation program.⁷⁸ In addition to financial requirements, the Michigan Utility Consumer

⁷⁶ Order No. 18-017, Approval of the Fourth Amended and Restated Intervenor Funding Agreement, App. A at 2 (Or. P.U.C. Jan. 17, 2018), <https://apps.puc.state.or.us/orders/2018ords/18-017.pdf>.

⁷⁷ Mich. Comp. Laws § 460.6m(11) (2017).

⁷⁸ Order No. 18-017, Approval of the Fourth Amended and Restated Intervenor Funding Agreement, App. A at 18–19 (Or. P.U.C. Jan. 17, 2018), <https://apps.puc.state.or.us/orders/2018ords/18-017.pdf>.

Participation Board can only provide intervenor compensation to non-profit and government organizations.⁷⁹

The OPP should create evaluation criteria based around the same interests reflected in state programs. First, there should be a hard limit on market participants and project applicants from receiving funds under the intervenor compensation program. This prohibition would serve a similar purpose as the Michigan program's non-profit and government requirement, but allows for the inclusion non-governmental tribal interests, landowners, land-owner advocates, and a broader array of community organizations.

Second, the OPP should have a broad range of information about an applicant's finances and resources. It is appropriate for the program administrator to consider the amount of additional resources an applicant is contributing to participation in Commission proceedings. However, that information should only be a consideration, not a hard requirement, to ensure that new and under-resourced voices can benefit from the program. Particularly in the context of environmental justice communities and organizations, there should not be a hard minimum contribution percentage and lack of existing resources should not weigh against the applicant.

As another financial consideration, the OPP should consider setting limits on funding for large and established public interest organizations that need less assistance in participating at the Commission. The OPP could set limits based on

⁷⁹ Mich. Comp. Laws § 460.6m(11).

annual funding, staff size, or legal resources. Based on this information the OPP could reduce the relative amount of eligible fees it will cover with intervenor compensation funds. However, the OPP should not exclude those organizations entirely as they are important public participants and often elevate and support other organizations' participation.

In addition to defining statutory components of the intervenor compensation program, the OPP will need to address and develop rules around the administration of the program to ensure it is functionally successful at facilitating public participation. One major area of consideration is the upfront notification and application process. The OPP should require that the availability of funds through the intervenor compensation is included in any notice of a proceeding or rulemaking as is required in the Michigan intervenor compensation program.⁸⁰ This requirement provides better visibility of the program to members of the public who are interacting with the Commission for the first time upon being affected by a project application or other proceeding.

Once a proceeding is underway, intervenor compensation should be addressed early in the process to provide organizations with better visibility when making decisions about committing resources and money to participating in a process. Intervenors and participants interested in receiving funding should submit a notice of intent to claim intervenor compensation early in the process to put both the Commission and other applicants on notice. The OPP needs to examine

⁸⁰ Mich. Comp. Laws § 460.6m(15).

carefully the administrative burden of applying for funding, and streamline the process as much as feasible. The program administrator should then give an initial indication on whether an applicant is eligible for the program. The Wisconsin intervenor compensation program does this by evaluating the applicant's financial eligibility and ability to represent the significant interest it espouses at the outset.⁸¹ Early notice in the process is important to making use of the intervenor compensation program feasible.

Another function consideration will be how to manage the intervenor compensation budget. Specific budget considerations are considered above in Section IV. The OPP should develop clear guidelines of all expenses eligible for the program that applicants can rely on in planning their participation and preparing their intervenor compensation request.⁸² The OPP should also develop rules for how it will prioritize funds for different applicants throughout the entire year.

Participating at the Commission is very costly and there are a lot of relevant public stakeholders to any of the Commissions numerous proceedings. Even a robustly funded intervenor compensation program will be unlikely to cover all expenses for every deserving applicant. Instead of relying on an arbitrary first-come-first-served method for distributing funds, the OPP should set criteria for evaluating different

⁸¹ See Public Service Commission of Wisconsin, *Intervenor Compensation Application Form*, <https://psc.wi.gov/Pages/Programs/Intervenor%20Comp.aspx>.

⁸² See the Oregon intervenor compensation program's comprehensive list of eligible expenses as an example. Order No. 18-017, Approval of the Fourth Amended and Restated Intervenor Funding Agreement, App. A at 18–19 (Or. P.U.C. Jan. 17, 2018), <https://apps.puc.state.or.us/orders/2018ords/18-017.pdf>.

projects with the goal of having adequate funding throughout the entire year to support organizations most in need of financial assistance to participate. Those criteria should include racial and economic justice considerations in addition to other financial criteria.

The OPP will also need to consider who will administer the review of applications and prioritization of funds. This decision-making function of the intervenor compensation program should be reserved for a decision maker outside of the OPP staff. This could include a self-standing administrative body, a regulatory established advisory council, or an administrative law judge at FERC.

Finally, the OPP should develop rules on the timing of reimbursement. The upfront cost of participating in Commission proceedings and waiting for reimbursement is a barrier to some small organizations and individuals. When not an outright barrier, floating these costs for long periods of time is still a hardship on any organization. The OPP should develop hard timelines in which to make a decision and administer funds. In addition, the OPP should develop rules for making payments in advance of an applicant's proposed actions when it is necessary to enable the applicant to participate in a proceeding. The Michigan Utility Commission Participation Board's intervenor compensation program serves as a model for advanced payments.⁸³

CONCLUSION

⁸³ Mich. Comp. Laws § 460.6m(14).

Earthjustice thanks the Commission for the opportunity to offer these thoughts regarding the Commission's design of the Office of Public Participation. We welcome future opportunities for participation, including the Commission hosting technical conferences or providing additional opportunities to comment on the intervenor compensation program. We look forward to working with the Commission on these important issues.

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Respectfully submitted,

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Attachment A

Description of Earthjustice Stakeholder Outreach and Research

The first step Earthjustice took was outreach and interviews with a number of individuals who have deep experience in FERC proceedings, with the goal of identifying the scope and breadth of issues that were significant areas of concern. This initial outreach included interviews with attorneys who have represented landowners, environmental justice communities, representatives at environmental non-profit organizations, leadership at landowner advocacy groups, organizations that use state-level intervenor compensation programs, and academics. Based on these initial interviews we generated a list of key questions and areas of further inquiry organized into four broad categories: scope of mandate and power of the Office to act; compensation models; scope of programmatic activities; and budget and human resources.

To begin answering the questions within these categories Earthjustice then assembled its own internal research team to examine and draw lessons from existing intervenor compensation and public outreach programs at various state public utility and service commissions. After a broad survey, this research focused on several state programs: specifically the programs in California, Oregon, Wisconsin, and Michigan. Our review included the enabling statutes of different state programs, state program audits and annual reports, and articles and reports from academia and various advocacy groups. These materials provided a unique set of perspectives on the structural and programmatic elements of different intervenor compensation and public outreach programs across the nation. This research team also examined a sample year of FERC proceedings and calculated the total number

of intervenors that could potentially qualify for compensation under the criteria in Section 319. Earthjustice also drew upon our own institutional experience as long-time practitioners before the Commission to begin answering a number of these questions.

To complement our own internal research efforts, Earthjustice also engaged with three experts to review various aspects of the proposed OPP. These three experts included Sally Talberg, Professor Sharon Jacobs, and Taunja Berquam.

Ms. Talberg, of Talberg Policy Solutions, was initially appointed by former Governor Rick Snyder to the Michigan Public Service Commission on July 3, 2013, and was appointed chairman on January 4, 2016. Her term ended on December 31, 2020. Prior to her appointment, Chairman Talberg worked in the public and private sectors with a focus on energy policy and utility regulation. Ms. Talberg currently is a private consultant with specialties in public utility regulation; electricity, natural gas and telecommunications industries; and clean energy policy development and implementation.

Ms. Talberg provided research and observations on several topics related to FERC's new Office. Specifically, Ms. Talberg's research focused on the public need for OPP, the goals and roles of the OPP, the structure of OPP within FERC (i.e., office leadership, placement and staffing; defining roles and responsibilities and coordination with other offices; ex parte issues; locations outside FERC headquarters; funding), accountability and reporting structures, and intervenor compensation. The research provided perspectives derived from current and former

state public utility commissioners and FERC officials (staff and commissioners) on the roles, structure, and accountability of the new office by drawing on past experiences of quasi-judicial technical agencies at the state and federal levels engaging with the public.⁸⁴ Ms. Talberg provided recommendations based on these interviews and Ms. Talberg's own professional experience. Earthjustice used these recommendations and research to inform the positions advocated for in this comment.

Earthjustice engaged with Professor Sharon Jacobs as its second expert. Professor Jacobs is a law professor at the University of Colorado Law School in Boulder, Colorado. Professor Jacobs practiced energy law in Washington, D.C. for several years prior to entering academia, and now teaches energy, environmental, and administrative law, and has authored numerous articles in these subjects. Professor Jacobs' work was supported by a team of student researchers at the university. Professor Jacobs also served as a panelist for FERC's April 16, 2021 workshop, and specifically spoke on panel five involving intervenor funding.

Professor Jacobs' team's research method for her work for Earthjustice was as follows. First, they reviewed the list of federal government agencies in the second and most recent edition of the Sourcebook of United States Executive Agencies prepared by the Administrative Conference of the United States. For each agency they deemed sufficiently similar to FERC in structure and mission, they reviewed

⁸⁴ Representatives interviewed served under different administrations and timeframes.

the organizational structure chart provided by the agency as well as conducted a keyword web search to determine if the agency had an office of public participation, public outreach, or provided intervenor compensation. They then produced a shortlist of offices and programs deemed sufficiently similar and investigated each of those to determine whether there were enough similarities to make them useful exemplars for FERC. A much shorter list emerged from this review, and they ultimately flagged five federal offices (two of which are no longer in existence) for more detailed review, including the Federal Trade Commission's ("FTC") Public Participation Program (defunct), the Office of Rail Public Counsel ("ICC") (defunct), Office of Advocacy ("SBA"), and the Offices of the Investor Advocate and Office of the advocate for Small Business Capital Formation at the Securities Exchange Commission ("SEC"). They also examined three existing offices that bear some resemblance to the OPP, although they do not offer intervenor compensation. The results of this review of each federal office were included in the research, and broken out as related to office structure (organizational position, geographic position, staffing, funding), functions (intervenor funding, advocacy, public outreach and support research), and program evaluations.

Earthjustice's third expert was Taunja Berquam of Berquam Ventures, LLC. Ms. Berquam has decades of experience in the public sector, having served in both the executive and legislative branches. Ms. Berquam is currently a consultant specializing in public infrastructure, including basic research and energy development, and legislative affairs. In 2006, Taunja joined the House

Appropriations Committee working for both Democratic and Republican majorities. In 2008, she became the Democratic staff director and clerk for the Energy and Water Development Subcommittee under Chairman David Obey (D-WI). She also worked under Ranking Members Norm Dicks (D-WA) and Nita Lowey (D-NY), as well as, Subcommittee Ranking Members Peter Visclosky (D-IN) and Marcy Kaptur (D-OH). Ms. Berquam has extensive knowledge in a wide array of areas, including: public infrastructure, scientific research and energy development, as well as, natural resource and national security matters. During her tenure she worked on dozens of appropriations acts, including the American Recovery and Reinvestment Act. Ms. Berquam provided analysis regarding the Federal Energy Regulatory Commission's authority to fund the Office of Public Participation with the existing year's fiscal budget. Specifically, Ms. Berquam examined relevant provisions of the Energy and Water Development and Related Agencies Act, Government Accountable Office procedures, reprogramming limits, notification requirements for reprogramming, limits on grant allocation, reporting guidelines, and provided key conclusions on how FERC can fund the Office. The analysis drew from a combination of Ms. Berquam's appropriations experience in government, interviews with other appropriations experts, and her own research.

In addition to these research streams, Earthjustice also hosted a series of webinars to raise awareness on ways in which the public could better shape the Office, and gather information to inform our own comments. Specifically, the primary goals of the webinars were: (1) to make sure individuals and groups heard

of the various opportunities FERC offered to shape the Office so they were prepared to participate in the process (i.e., the March listening sessions, comment deadline, April 16, 2021 workshop, nomination process for the workshop, and likely rulemaking process), and (2) to create space to brainstorm and learn from participants about their needs, concerns, and experiences. Earthjustice held webinars on March 15th, March 23rd, and April 20th. The webinars were well-attended and a total of roughly 80 individuals, landowner advocacy groups, environmental organizations, and tribal groups participated.

An additional component of the webinar was a request that attending parties fill out a survey drafted by Earthjustice with a series of questions about the design of the OPP.⁸⁵ A number of parties provided this feedback, which were then collected, organized, and reviewed by Earthjustice's internal research team. The feedback from these surveys also informed Earthjustice's substantive comments. Lastly, Earthjustice's internal research team also reviewed the comments provided in the five public input sessions hosted by FERC between March 17th and 25th, and on April 19th, as well as the workshop held on April 16th.

The wide-ranging research efforts and input from a variety of stakeholders, as described above, collectively informed Earthjustice's substantive comments.

/s/ Aaron Stemplewicz

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⁸⁵ A sample of the survey is provided as Attachment B.

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Attachment B

Survey Questions:

Instructions: This survey is designed to capture input on a wide range of areas from a diffuse set of stakeholders. We have organized the questions based on topic. Please read through all the questions and feel free to respond to any prompt. The headers are there to help, not limit which questions you respond to. Simply skip questions you do not have a response to. We greatly appreciate you taking the time to answer what questions you can.

Name:

Organization:

Organization Type (Community Group, Landowner, Landowner Advocate, FERC Practitioner, Academic, Tribal Group/Organization, Other):

Your experience with FERC

1. Do you currently engage with FERC, and if so, how frequently? By “engage” we mean a broad range of activities including, e.g., going to FERC’s website for information on projects or FERC proceedings; submitting public comments; participating as a party in proceedings; protesting or letter writing campaigns against FERC; etc.)
2. What are the most common ways you engage with FERC now, or would expect to engage with FERC in the future?
3. In your most common interactions with FERC, what has been the top one or two biggest barriers or frustrations to successful engagement?

Understanding FERC’s activities

4. How do you currently learn about what FERC is doing, and how FERC’s action may impact you, your organization, or your organization’s members?
 - a. In your experience, are these mechanisms effective? Why or why not?
5. What changes would most help you, or your organization, to be aware of and informed about the FERC actions that most matter to you?

Communicating with FERC

6. There are a broad number of reasons one may need to reach out and try to communicate with FERC officials (e.g., learn how to fill out a form, ask questions about procedures, report impropriety, initiate dispute resolution, etc)
 - a. If you have tried to communicate with FERC, what challenges, if any, did you face in reaching the right official and receiving the support needed?
7. What changes would most help you, or your organization, to be able to communicate successfully with FERC?

Participation in Proceedings at FERC

8. There are several barriers that may prevent or hinder individuals or organizations from effectively participating at FERC, ranging from technical ones around the complexity of FERC proceedings to practical ones about cost and familiarity with how to engage at FERC.
 - a. While there may be multiple barriers, what is your, or your organization's, most significant barrier to meaningfully participating in FERC dockets?
 - b. What steps could an Office of Public Participation take that would most help you, or your organization, to overcome that barrier?
9. One barrier to participation is the difficulty in building experience and capacity to engage in FERC dockets. One potential way to overcome that would be for the Office of Public Participation to offer technical assistance grants (e.g., enabling the hiring of outside support) and/or capacity building (e.g., helping to train existing or hire new staff) programs. Assuming the Office is empowered to offer such assistance:
 - a. What form of capacity building program would be most helpful to you or your organization? Be as specific as possible.
 - b. What form of technical assistance would be most helpful to you or your organization? Be as specific as possible.
 - c. What steps could the Office of Public Participation take to ensure that these capacity building or technical assistance programs reach the individuals or organizations that most need it?

Other forms of support for public engagement at FERC

10. Beyond the ideas already mentioned in the survey, are there other services the Office of Public Participation should provide in order to facilitate better public engagement with FERC? (e.g., outreach, education, etc.) Please be as specific as possible.

Institutional Organization of the Office

11. Accountability is an important component of ensuring the Office is successful.

- a. What metrics should the Office track to measure its success?
- b. How should the Office evaluate or report those metrics to ensure accountability?

12. To be successful, the Office of Public Participation will need to engage in outreach and education to groups who do not traditionally engage in FERC proceedings.

- a. Could you provide examples of education or outreach strategies deployed by other government agencies to new or otherwise inexperienced participants that you have found to be effective?

Please provide any additional thoughts you would like to share with us.