UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

The Office of Public Participation	)	Docket No. AD21-9

Comments of RTOGov Researchers[1]

We appreciate the opportunity to provide comments on the launching of an Office of Public Participation at the Federal Energy Regulatory Commission (FERC). While Congress envisioned its creation more than forty years ago, the need for an Office of Public Participation has only grown more urgent. Today, two-thirds of all power sales in megawatt hours are managed by seven RTOs.[2] Those "[w]holesale electricity markets have changed dramatically in recent years: from an industry characterized by self-sufficient, vertically integrated utilities, where most utilities operated their own generation, transmission, and distribution facilities, to an industry that utilizes market-based rates and "open access" to transmission systems."[3] As a result, market participants and stakeholders have proliferated, further complicating an already complex governance system (see Fig.1, highlighting particularly pronounced growth in PJM; see also Figs. 2-3, identifying where growth has occurred in PJM membership and the narrower category of voting membership). Across the seven RTOs are more than 4,200 market participants and more than 1,500 members with rights to participate in stakeholder processes to develop market rules and transmission plans.[4] The proliferation of certain types of stakeholders have diluted their voting power in sector-based voting regimes. On top of this, a growing number of state policymakers and advocates now see rule changes in FERC-jurisdictional markets as opportunities for (or obstacles to) creating a cleaner, more equitable grid. Finally, millions of

[1] The RTOGov researchers who contributed to these comments and/or are cited within include: Dr. Seth Blumsack, Professor of Energy and Environmental Economics and International Affairs, College of Earth and Mineral Sciences, Pennsylvania State University; Michael H. Dworkin, JD., Professor Emeritus, Vermont Law School; Dalten Fox, Graduate Student, Boise State University; Mark James, JD., Senior Research Associate, Institute for Energy and the Environment, Vermont Law School; Kevin Jones, Director, Institute for Energy and Environment, Vermont Law School; Kate Konschnik, JD., Climate & Energy Director, Nicholas Institute for Environmental Policy Solutions, Duke University; Dr. Stephanie Lenhart, Senior Research Associate, Energy Policy Institute, School of Public Service, Boise State University; Christina Simeone, Senior Fellow, Kleinman Center for Energy Policy, University of Pennsylvania; Zachary F. Teti, Graduate Student, Pennsylvania State University; and Elizabeth J. Wilson, Professor of Environmental Studies and Director, Arthur L. Irving Institute for Energy and Society, Dartmouth College. RTOGov is made possible through the generous support of the Alfred P. Sloan Foundation and the Heising-Simons Foundation.

[2] US Energy Information Administration, Form 861 data for 2019, 2020. Six of these markets are FERC-jurisdictional; the seventh, the Electric Reliability Council of Texas (ERCOT), is subject to state oversight.

[3] Enhancement of Electricity Market Surveillance and Analysis through Ongoing Electronic Delivery of Data from Regional Transmission Organizations and Independent System Operators [FERC Order 760] (Apr. 19, 2012), at 2. These trends have only deepened since 2012.

[4] This estimate does not include non-voting participants in some processes. The California Independent System Operator (CAISO) does not have a membership construct and so this number may under count participation. The estimate includes 260 members of the ERCOT.

Americans and tens of thousands of businesses source their electricity back to these markets and the decisions made within them.

Figure 1: Stakeholder Group Sizes, Over Time[5]

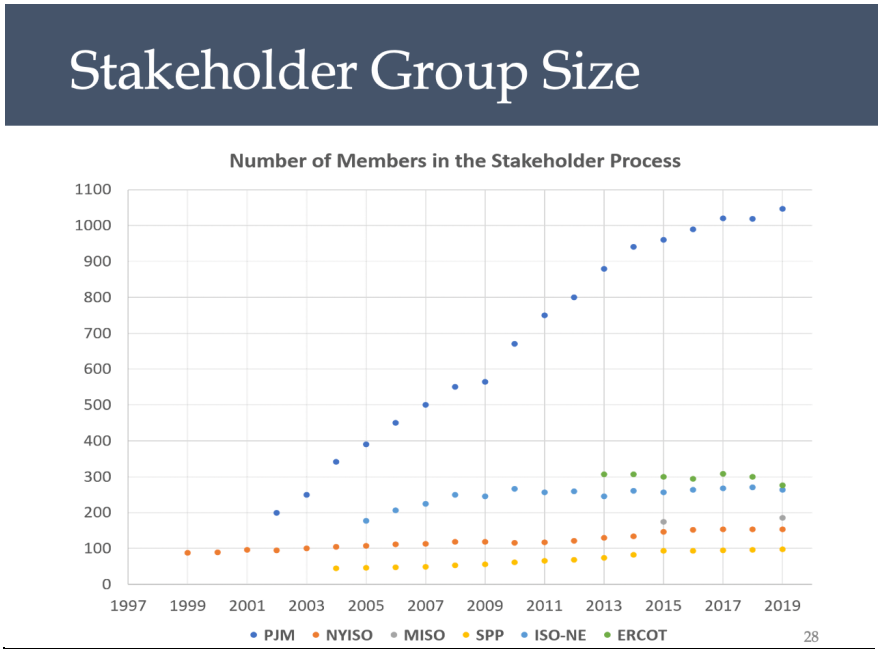
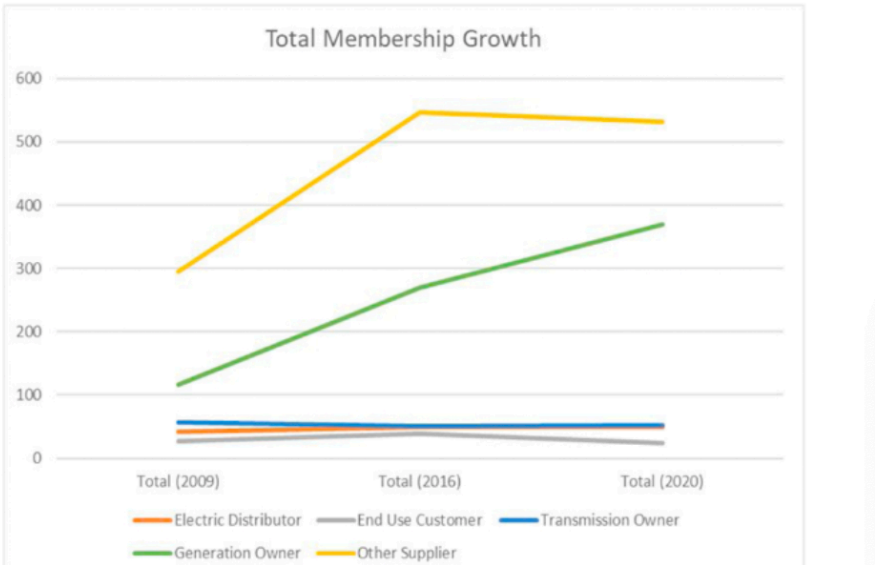


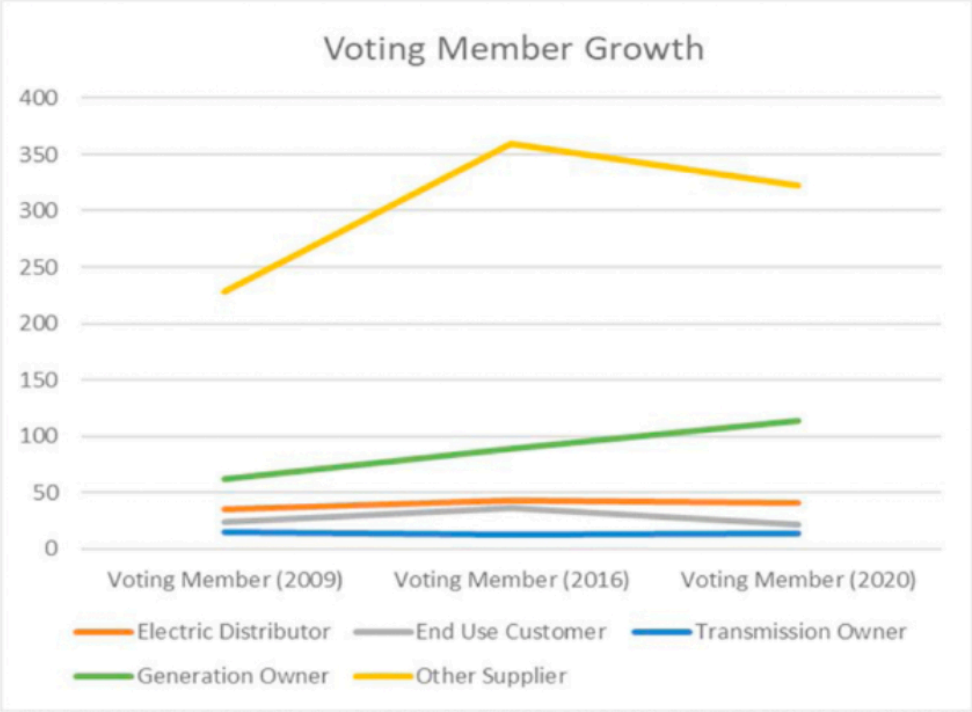
Figure 2: Total PJM Member Growth by Sector (2009-2020)[6]



[5] Reprinted from Nicholas Johnson, Stephanie Lenhart and Seth Blumsack, "The Evolution of Participatory Policy Making in Regional Transmission Organizations," working paper (2021).

[6] Reprinted from Christina Simeone, Reforming FERC's RTO/ISO Stakeholder Governance Principles, THE ELECTRICITY JOURNAL, 34 (2021) 106954, Fig. 1 (sourcing data from Raab Associates, Ltd. and CBI, 2009, and PJM Interconnection, 2020).

Figure 3: PJM Voting Member Growth by Sector (2009-2020)[7]



RTOGov is a network of academic researchers working in different disciplines at universities across the U.S. What binds us together is an interest in Regional Transmission Organizations/ Independent System Operators (RTO/ISO – hereinafter, RTO) and their decision-making processes and power dynamics. We study the differences between markets and then seek to determine whether those differences give rise to different market outcomes – cost, reliability, customer choice, and carbon intensity.

Summary of Comments

We submit these comments to suggest that the Office of Public Participation could "coordinate assistance to the public" with respect to the six FERC-jurisdictional RTOs.[8] We believe the Office of Public Participation could help the public – which might include new market entrants but also individuals, civil society organizations, and public sector representatives impacted by market decisions – in understanding the significance of RTOs and the opportunities to engage in their decision-making processes. This is especially important for public interests that have been historically under-represented in formal regulatory proceedings and underrepresented in RTO stakeholder engagement processes. We also think it would be beneficial to create an RTO ombudsman position in the Office of Public Participation. Finally, we suggest that the Office of Public Participation could develop best practices for improving public involvement in RTO decision-making.

[7] Reprinted from Christina Simeone, Reforming FERC's RTO/ISO Stakeholder Governance Principles, Fig. 2 (sourcing data from Raab Associates, Ltd. and CBI, 2009, and PJM Interconnection, 2020).
[8] Section 319(b)(1) of the Federal Power Act, 16 § 825q-1.

I. Coordinating Assistance to the Public with Respect to RTOs is Consistent with Longstanding Market Requirements and Governance Principles.

Having the OPP provide RTO education, outreach and support to the public would be entirely consistent with FERC orders establishing information and oversight requirements as well as governance principles for RTOs. In particular, over the last twenty years, FERC has:

- Required RTOs to generate and share **information** to FERC and to the general public;
- Ordered independent market monitoring to strengthen **accountability**, including the publication of quarterly reports on market functions and decision-making; and
- Directed RTOs to improve **responsiveness** to "customers and other stakeholders, and ultimately to the consumers who benefit from and pay for electricity services and establish these processes in their tariffs."[9]

A. *Information Sharing*

Information sharing and transparency are central to RTO governance. "Information is the key to a viable electricity market and to preventing market manipulation."[10] As FERC began relying on RTOs and competition more generally to generate market-based rates that were deemed "just and reasonable," it also required the reporting of new information, to ensure a fair and open market.[11] Order 719 recognizes the role of information sharing in the RTO decision-making process and requires that

> The business practices and procedures [of RTOs] must provide for stakeholder input into the RTO's or ISO's decisions as well as mechanisms to provide feedback to stakeholders to ensure that *information exchange and communication continue over time*.[12]

A few years later, Order 760 required RTOs to provide FERC "ongoing electronic delivery of data relating to physical and virtual offers and bids, market awards, resources outputs, marginal cost estimates, shift factors, financial transmission rights, internal bilateral contracts, uplift, and interchange pricing."[13] FERC uses this information to "assess the effectiveness of Commission-approved market rules and provide better tools to monitor the efficacy of existing market designs in producing just and reasonable rates."[14] While this information is held confidential,[15] FERC publishes analyses which are derived from the data and relied on in Commission decisions.[16]

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[9] Wholesale Competition in Regions with Organized Electric Markets, 125 FERC 61,071 [FERC Order 719] (Oct. 17, 2008); order on reh'g, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 (2009), order on reh'g, Order No. 719-B, 129 FERC ¶ 61,252 (2009), Summary.

[10] Charles H. Koch, Jr., Collaborative Governance: Lessons for Europe from U.S. Electricity Restructuring, 61 ADMIN. L. REV. 71, 97 (2009) (citing Order 760, at 5, n. 12).

[11] Mark J Niefer, Information and Competition in Electricity Power Markets: Is Transparency the Holy Grail?, ENERGY L. J. 35:375 (2014), at 380-81 n. 16 (citing James H. McGrew, FEDERAL ENERGY REGULATORY COMMISSION 179-80 (2d ed. 2009)).

[12] FERC Order 719 (Oct. 17, 2008), at 482 (emphasis added).

[13] Enhancement of Electricity Market Surveillance and Analysis through Ongoing Electronic Delivery of Data from RTOs/ISOs [FERC Order 760] (April 19, 2012), at ¶ 1.

[14] Id. at ¶ 18.

[15] Id. at ¶ 30.

[16] Id. ¶ 35.

Other orders directed the publication of data by utilities with the authority to impose market-based rates. For instance, Order 2001 and its progeny[17] established the Electric Quarterly Report (EQR) for these public utilities. The animating force behind Order 2001 was FERC's concern that "the quality of information provided in [the past] has proven to be inconsistent and not always sufficiently informative for the Commission *and the public*."[18] At times, FERC has moved to revoke market-based ratemaking authority when a public utility fails to submit EQRs.[19]

B. *Market Monitoring/Accountability*

RTO accountability to FERC, and ultimately to the public, is founded on market transparency and broad information sharing on market performance. From Order 2000 onward,[20] FERC has recognized independent market monitoring as central to the basic functioning of an RTO. While RTOs are regulated by and accountable to FERC, independent market monitors boost accountability by providing market-specific monitoring and evaluation services. For instance, in a 2005 policy statement on market monitoring,[21] the Commission stressed that market monitors "should monitor and regularly report on performance and structure of the electricity market within the ISO/RTO region."

> Since these markets ultimately exist for the benefit of customers, the MMU should focus on how efficiently the markets are responding to customers' needs for reliable electricity supply at the lowest long run cost to customers. … The MMU should also be responsible for providing an analysis of the structural competitiveness of the wholesale markets and a determination of effectiveness of bid mitigation rules to remedy potential exercise of market power.[22]

In 2008, FERC enhanced the role of market monitors, again to "improve the performance and transparency of organized RTO and ISO markets."[23] Market monitors would now be expected to "evaluat[e] rules, tariff provisions and market design elements for their effectiveness;" review and report on the performance of the wholesale markets; and refer suspected wrongdoing to the Commission."[24] Moreover, "where an MMU believes market design flaws interfere with appropriate price signals, these flaws should be brought to the attention of concerned entities."[25]

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[17] Revised Public Utility Filing Requirements, FERC Stats. & Regs. ¶ 31,127 [FERC Order 2001], reh'g denied, Order 2001-A, 100 FERC ¶ 61,074, reh'g denied, Order 2001-B, 100 FERC ¶ 61,342, order directing filing, Order 2001-C, 101 FERC ¶ 61,314 (2002), order directing filing, Order 2001-D, 102 FERC ¶ 61,334, order refining filing requirements, Order 2001-E, 105 FERC ¶ 61,352 (2003), order on clarification, Order 2001-F, 106 FERC ¶ 61,060 (2004), order revising filing requirements, Order 2001-G, 120 FERC ¶ 61,270, order on reh'g and clarification, Order 2001-H, 121 FERC ¶ 61,289 (2007), order revising filing requirements, Order 2001-I, 125 FERC ¶ 61,103 (2008).

[18] Order 2001, at 29 (emphasis added).

[19] *See, e.g.,* Order on Intent to Revoke Market-Based Rate Authority, 170 FERC ¶ 61,020 (Jan. 23, 2020) (proposing to revoke authority of thirteen public utilities for failure to file Electric Quarterly Reports).

[20] Regional Transmission Organizations, 89 ¶ 61,285 [FERC Order 2000] (Dec. 20, 1999).

[21] Market Monitoring Units in Regional Transmission Organizations and Independent System Operators, 111 FERC ¶ 61,267 (2005) [2005 Policy Statement].

[22] Id. at 4.

[23] Order 719 at ¶ 310.

[24] Id. at ¶ 345.

[25] Id. at ¶ 358.

FERC sought enhanced information dissemination by monitors as well, including an annual report and quarterly reports of market performance.[26] Monitors now served an additional informational function, providing public assessments of market operations and meeting with state regulators to discuss their findings. Order 719 clarified that states could continue to make additional information requests of market monitors to assist in their own regulation.[27]

C. *Responsiveness*

FERC also recognizes a potential role for the public to engage in RTO decision-making. Order 719 directed the RTOs/ISOs "to establish a means for customers *and other stakeholders* [emphasis added] to have a form of direct access to the board of directors, and thereby to increase the boards of directors' responsiveness to these entities.

> By responsiveness, we mean an RTO or ISO board's willingness, as evidenced by its practices and procedures, to directly receive concerns and recommendations from customers and other stakeholders, and to fully consider and take actions in response to the issues that are raised. [28]

FERC pledged to review "responsiveness" tariff revisions using four criteria:

- Inclusiveness - The business practices and procedures must ensure that any customer or other stakeholder affected by the operation of the RTO or ISO, or its representative, is permitted to communicate its views to the RTO's or ISO's board of directors.
- Fairness in Balancing Diverse Interests - The business practices and procedures must ensure that the interests of customers or other stakeholders are equitably considered and that deliberation and consideration of RTO and ISO issues are not dominated by any single stakeholder category.
- Representation of Minority Positions - The business practices and procedures must ensure that, in instances where stakeholders are not in total agreement on a particular issue, minority positions are communicated to the RTO's or ISO's board of directors at the same time as majority positions.
- Ongoing Responsiveness - The business practices and procedures must provide for stakeholder input into the RTO's or ISO's decisions as well as mechanisms to provide feedback to stakeholders to ensure that information exchange and communication continue over time.[29]

Meanwhile, public comments on the proposed Order 719 had suggested a number of ways to improve responsiveness in the RTOs, including:

- Periodic required showings that RTOs/ISO have: (1) evenly divided industry sector representation; where (2) no one sector (or entity) can dominate the process and (3) votes are taken to measure stakeholder sentiment; (4) there is a formal process for the RTO or

[26] Id. at ¶¶395-397.
[27] Id. at ¶ 446 (see also ¶ 416).
[28] Id. at ¶ 477.
[29] Id. at ¶ 482; 18 CFR § 35.28(g)(5).

ISO to consider adoption of stakeholder initiatives; and (5) before the RTO or ISO can reject a stakeholder position supported by a supermajority of stakeholders, it must articulate its reasons in writing, including in any filing it makes with the Commission.[30]

- Cost-benefit analyses of tariff revisions, and retroactive reviews of the costs and benefits of decisions made.[31]
- Improvements in notices for time/place of RTO meetings.[32]
- Periodic surveys of customer satisfaction and periodic reviews of stakeholder processes.[33]
- Improved dissemination of information.[34]

Many of these proposals remain highly salient today, and yet to a large extent have not been realized across the FERC-jurisdictional markets.

II. RTO Processes are Complex, Technical, and Time Consuming.

RTO governance structures create three types of challenges for public participation: 1) highly technical and resource intense governance processes; 2) divergence in membership eligibility criteria, sector definitions, and committee hierarchies; and 3) inconsistent communication and decision-making practices that hamper meaningful engagement. These challenges run up against the information-sharing; accountability; and responsiveness goals of RTO governance and form the basis of our recommendations in the next section.

A. *Highly Technical and Resource Intensive Governance Processes*

RTO decision-making processes are highly technical and require a deep understanding of the market for effective engagement (see Figs. 4-5 illustrating complex committee and decision-making structures in RTOs).[35] This can be a challenging venue for small asset owners, emerging technology representatives, non-governmental organizations (NGOs), ratepayer advocates, and public sector agencies.

[30] Id. at ¶ 492. "Two related issues arise when RTOs use sectors. First, sector membership often includes a diversity of interests *within* the sector. Specifically, if a sector is very large or includes diverse interests it makes it more difficult for individual members to influence deliberations, creates vote dilution, and may create a disincentive for participation. Second, the interests of a single entity can extend *across* several sectors, again making it difficult for an organization to effectively participate in collective decision making." Stephanie Lenhart, Comparative Review of Regional Transmission Organization Governance: An Assessment of Stakeholder Engagement Design and Public Interest Accountability (2021) (under review).
[31] Id. at ¶ 495.
[32] Id. at ¶ 496.
[33] Id. at ¶ 498.
[34] Id. at ¶ 500.
[35] Benjamin A. Stafford and Elizabeth J. Wilson, Winds of Change in Energy Systems: Policy Implementation, Technology Deployment, and Regional Transmission Organizations, ENERGY RESEARCH AND SOCIAL SCIENCE, 21, 222-236 (2016).

Figure 4: Complex Committee Structure of PJM (credit PJM)

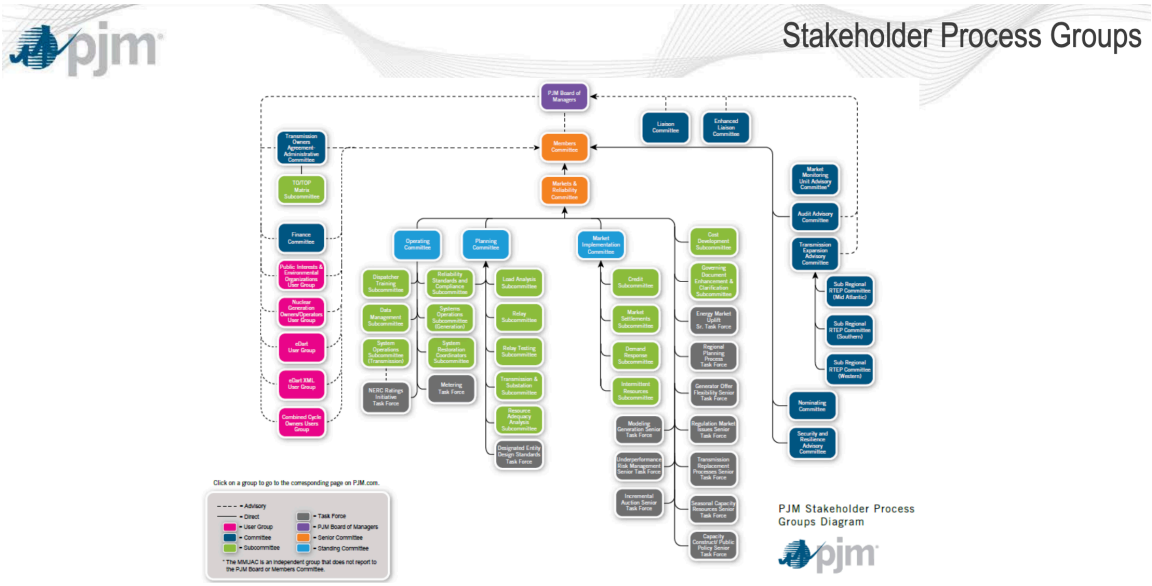


Figure 5: Diversity of Decision-Making Processes Across RTOs[36]

RTO/ISO	Number of Sectors	Ratio of Voting Eligible Members to Market Participants[a]	Members Committee Sector Weighted-Voting[b]	Subcommittee, Group, or Task Force Voting[d]	Members Committee Voting Threshold
CAISO[c]	6	NA	NA	No voting Staff moves issues forward	NA
ERCOT	7	19%	20.0% for the consumer sector and 13.3% for all remaining sectors	Sector voting in four standing subcommittees[e]	Supermajority (2/3 of voting and majority of seated)
ISO-NE	6	54%	16.7% per sector once alternative resources sector is fully activated	Sector voting in three standing subcommittees[e]	Supermajority (2/3; 60% for mkt rules)
MISO	10	84%	4.0% -16.0% based on sector representation	Determined by each entity	Majority
NYISO	5	20%	17.0%-21.5% based on sector representation	Determined by parent committee	Supermajority (58%)
PJM	5	48%	20.0% per sector	Sector-weighted in the highest-level subcommittee; Others use voting, ranking, and polling	Supermajority (2/3)

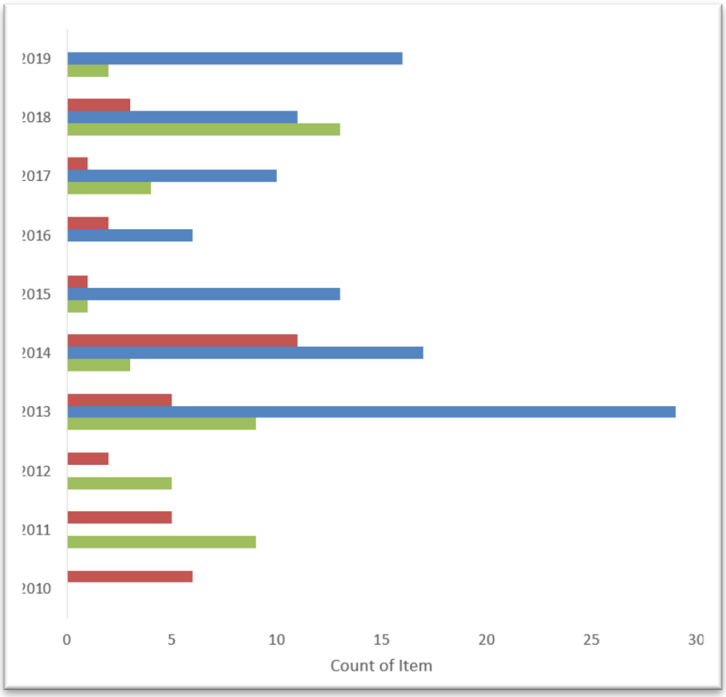
[36] Adapted from Stephanie Lenhart, Regional Transmission Organization Governance: Comparisons and Differences with an ISO-NE Focus. New England Energy Vision: Governance Reform Technical Forum (Feb. 25, 2021).

SPP	11	28%	4.0%-25.0% per sector and depending on participation	Transmission owning vs. using in highest-level subcommittee; Others simple majority	Supermajority (2/3)

a. Not all members are also market participants.
b. High-level comparison. Details of the weighting mechanisms vary across RTOs.
c. CAISO only uses sectors in the board nomination process.
d. Sector-weighting procedures in subcommittees may differ from the procedures in senior members committees.
e. In other subcommittees, groups, or task forces voting procedures are determined by the parent committee.

Many issues arise, giving rise to numerous meetings and votes over the course of a year (see Fig. 6 for annual vote counts in three FERC-jurisdictional markets). Furthermore, many issues are interdependent requiring stakeholders to engage in multiple committee or initiative processes at once. This makes RTO decision processes appear convoluted and opaque for those not recognized as formal stakeholders or who do not regularly engage in these processes.

Figure 6. Annual Vote Count in Senior Level Members Committees for PJM, ISO-New England, ISO New York[37]



In addition, the cost of participation relative to the ability to influence outcome and the benefit of that influence varies widely among stakeholders. In comparison with large organizations that will be dramatically impacted by an RTO's decisions, individual energy users have extremely high costs of participation in stakeholder processes compared to the potential benefits of

[37] Reprinted from Zachary F. Teti, *A Show of (Which) Hands: Empirical Analysis of Stakeholder Participation in Regional Transmission Organizations*, M.S. Thesis (2021), Pennsylvania State University.

prevailing. Thus, large companies can overwhelm the process because they can invest so much more in the processes. Smaller organizations, regulatory representatives, and public interest groups have less money to participate and see more diluted benefits, so it is harder for them to meaningfully engage.[38]

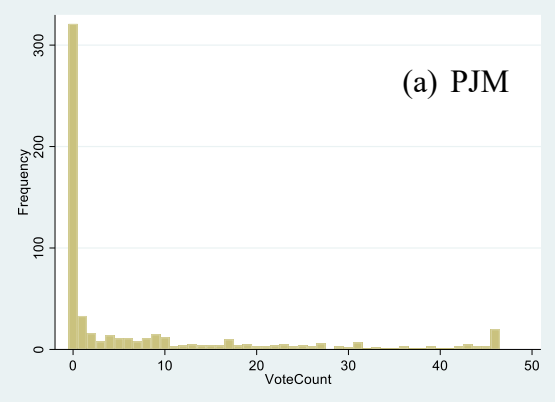
Participation in RTO decision-making varies widely by RTO and type of participant, even among recognized stakeholders with standing to vote in RTO rules (see next subsection). In some RTOs, participation rates in decisions made by senior-level membership committees are quite low (see Fig. 7). Five-year average member participation rates were just 21 % at the PJM Members Committee, for instance, and 20 % in PJM's Markets and Reliability Committee.[39]

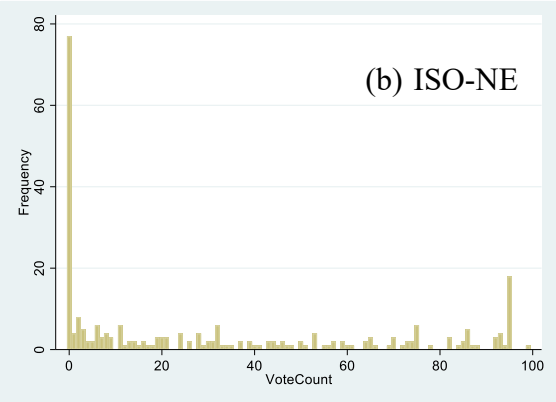
> [P]articipation rates are lowest in the oversubscribed supply sectors (i.e. Generation Owner and Other Supplier) with the greatest degree of vote dilution. These are the sectors where renewable energy, demand response, energy efficiency, financial product providers, and other new market entrants reside. Failure to integrate these emerging interests into the stakeholder process could results in suboptimal design of market rules that prioritizes incumbent interests over competitive outcomes.[40]

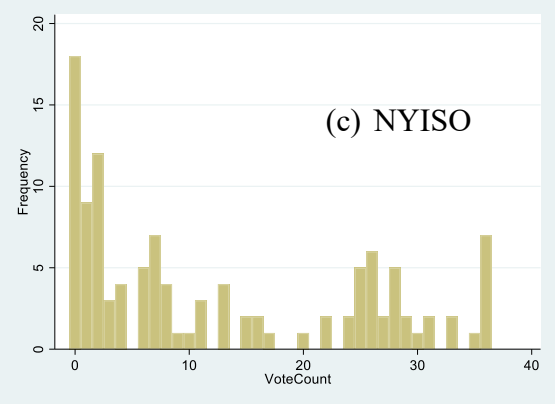
Across markets, transmission owners, generation owners with large asset portfolios in an RTO, and generation owners with a high concentration of natural gas generation in their RTO asset portfolio (whether that portfolio is large or small) are more likely to be active participants in RTO senior-level stakeholder committees. Generation owners whose asset portfolios have a high concentration of wind and solar technology are less likely to participate in senior-level stakeholder committees, although those who do participate tend to be quite active. The topic of deliberations also influences participation rates. Deliberations about capacity markets, for example, are more likely to see higher levels of stakeholder participation than other topics.

[38] Dworkin and Goldwasser, at 584.
[39] Simeone, Reforming FERC's RTO/ISO Stakeholder Governance Principles, at 4. Simeone points out that, for comparative purposes, "between 2008–2020 U.S. voter turnout was between 54 %–62 % for presidential elections and 34 %–46 % for midterm elections." Id. (citing United States Elections Project, 2021).
[40] Id.

Figure 7: Senior-level Stakeholder Committee Participation Data for PJM, ISO New England and New York ISO[41]







B. *Divergent Participation Models*

FERC does not require a specific RTO governance structure or institutional design.[42] As a result, each of the FERC-jurisdictional markets have developed its own rules for membership and formal participation in rule changes and other decision-making processes. The participation models are particularly divergent when it comes to stakeholders who are not market participants.[43]

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[41] Reprinted from Zachary F. Teti (2021).

[42] In 2002, FERC issued a notice of proposed rulemaking to establish a standard market design. This proceeding was terminated in 2005. 67 Fed. Reg. 55,452 (Aug. 29, 2002), Stats. & Regs. ¶ 32,563 (2002).

[43] FERC regulations define "market participant" as "any entity that, either directly or through an affiliate, sells or brokers electric energy, or provides ancillary services to the Regional Transmission Organization, unless the Commission finds that the entity does not have economic or commercial interests that would be significantly affected by the Regional Transmission Organization's actions or decisions" or "any other entity that the Commission finds has economic or commercial interests that would be significantly affected by the [RTO's] actions or decisions." 18 C.F.R. § 35.34(b)(2)(i). This definition is a "reference point" for limits on ownership and standards for governance. Final Order; Order on Rehearing [FERC Order 2000-A] (Feb. 25, 2000), at 16.

> Civil society organizations are not market participants and may or may not be eligible to join as members and participate in formal committees… . The opportunities for participation are thus dependent on both formal membership requirements as well as being able to garner the resources and technical capacity to join and effectively engage in processes.[44]

How a public interest group, or a state policymaker, or a consumer advocate participates in RTO governance processes is determined by the rights and obligations conferred on them by a RTO's operating agreements, bylaws, and manuals. Each RTO defines its own stakeholder sectors and determines the eligibility rules for joining that sector and the rights afforded to the members of that sector (see Fig. 8 as illustration of the diversity of interests represented in the "end user" sectors in each RTO). RTOs also determine the governance documents define the costs of participation including entrance fees, annual membership fees, and exit fees.

Consumer advocates and environmental NGOs often are grouped with interests that diverge from their own. For example, environmental nonprofits are included in the end-use sector for ISO-NE and ERCOT, while they belong to the public power sector in NYISO. By contrast, in SPP and MISO environmental nonprofits have their own sectors.

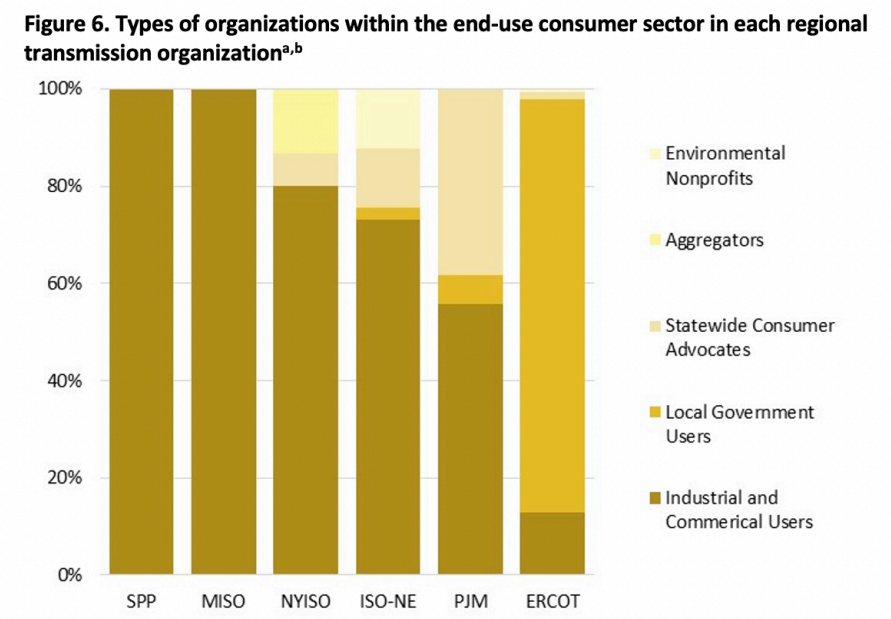
Markets designate different roles for environmental NGOs to play in decision-making, as well. ISO-NE and NYISO have created environmental advisory groups to advise the Boards. In PJM, environmental interests are represented in a user group that makes an annual presentation to the RTO Board. This group can make proposals but does not have voting rights or other sector responsibilities.

A different barrier to participation may occur with new market entrants. Unless and until market rules are changed to make a new technology or service eligible to participate, or to provide enough value to entice participation, emergent interests will not formally participate in the market. And yet, without formal participation, they cannot shape the rules that will make their participation worthwhile. Where their new product or service has the potential to improve reliability, reduce emissions associated with electricity generation, or bring down costs, these barriers to entry harm the broader public.

Without consistent roles and ongoing engagement in the process, individuals, community representatives, new advocacy organizations, or new market entrants face challenges in creating the relationships to effectively participate within a particular sector.

[44] Stephanie Lenhart and Dalten Fox, Comparative Review of Regional Transmission Organization Governance: An Assessment of Stakeholder Engagement and Public Interest Accountability (under review).

Figure 8: Diversity of Representation in the "End Use" Sectors for each RTO[45]



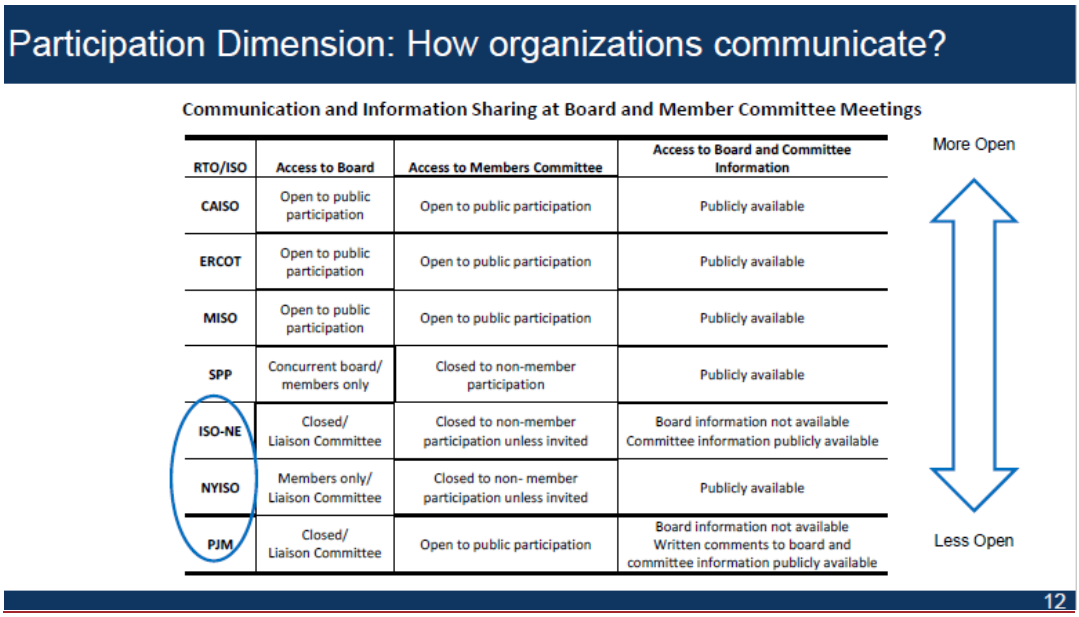
a. CAISO is not included because the sector is formed specifically and only for the nomination of board members.
b. Environmental nonprofits are included in the end-use sector for ISO-NE and ERCOT. In contrast, they are included with consumer-owned utilities in NYISO and are represented by separate sectors in SPP and MISO. In PJM, environmental interests are represented in a user group with consumer advocates. This group can make proposals but does not have voting rights or other sector responsibilities.

C. *Inconsistent Governance Outreach*

As noted, FERC has long articulated a responsiveness principle for RTOs, seeking to ensure that "stakeholder[s] affected by the operation of the" markets can share their views to an RTO's board of directors, participate in decision-making, and receive feedback from market operators.[46] Of course, to be able to engage in the first place, stakeholders must know that a decision-making process is underway. To non-members or interests outside of market participants, the process by which RTOs make decisions can appear confusing and opaque. This is in part because of the complexity of stakeholder processes, but also because of the varying amount, detail and accessibility of information produced by RTOs about stakeholder process and board deliberations (Fig. 9). Reducing the substantive and procedural barriers to information accessibility therefore increases the diversity and effectiveness of RTO governance participation.

[45] Stephanie Lenhart, New England Energy Vision: Governance Reform Technical Forum (Feb. 25, 2021).
[46] Order 719 at ¶ 482; 18 CFR § 35.28(g)(5).

Figure 9: Diversity of Stakeholder Communication Styles Across RTOs[47]



Outreach by RTOs about stakeholder engagement and decision-making processes varies widely. Some RTOs publish meeting minutes, materials and detailed voting information that covers activities by formal stakeholders. The greatest level of data and information availability is generally with the high-level stakeholder membership committees. Information about deliberations, participation and decisions in lower-level committees and task forces, which is where a number of proposals are generated, is generally much less detailed. Even where detailed information is provided by RTOs, this information is not archived in the public domain. The RTOGov network has been engaged in a years-long effort to collect and archive stakeholder process data for northeastern RTOs, as an effort to fill in this information gap.[48]

III. The New Office of Public Participation Could Consider a Number of Important Roles Related to RTO/ISO Operations.

Each citizen who uses and pays for energy from each RTO's distribution region has a stake in the outcomes of the market system. The FERC is allowing wholesale markets because when they are truly competitive these markets will, according to the FERC, provide 'just and reasonable' rates. In the broadest sense, the RTO is accountable to each and every citizen for ensuring that they receive just and reasonable rates (at least in the wholesale market).[49]

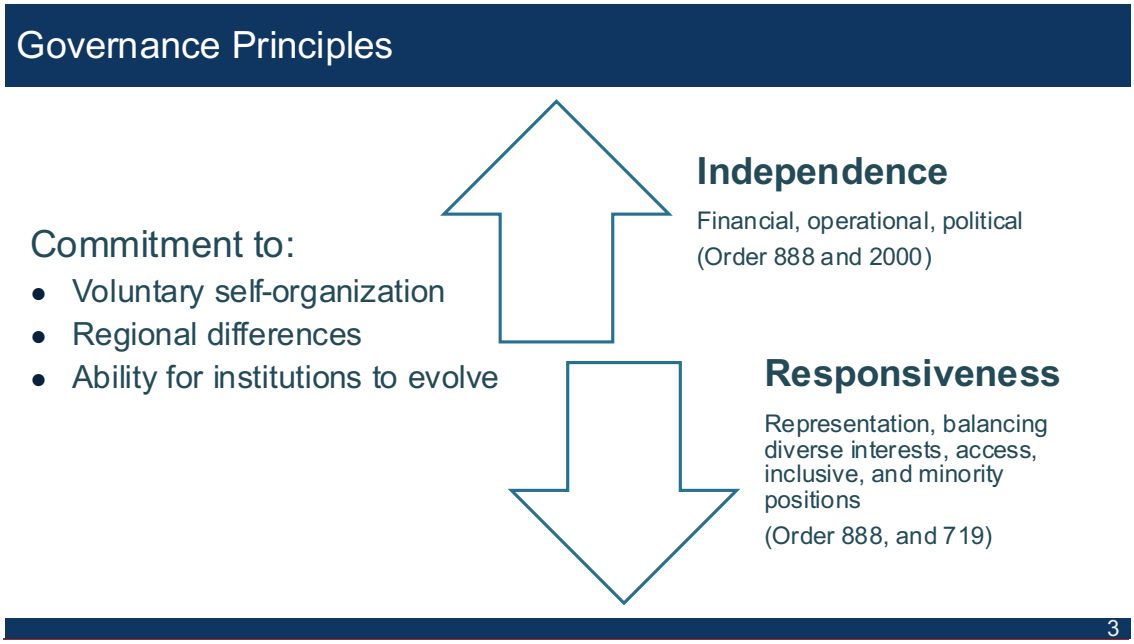
And yet:

[47] Stephanie Lenhart, New England Energy Vision: Governance Reform Technical Forum (Feb. 25, 2021).
[48] Zachary Teti and Seth Blumsack, RTOGov: Regional Transmission Organization Member Voting Data. Duke Research Data Repository (2021), https://doi.org/10.7924/r40k2dx36.
[49] Dworkin and Goldwasser, at 578.

> When RTOs are asked to balance between several different interests and outcomes, it makes designing a framework that holds each of these interests in check very difficult. … Moreover, the public's interest in RTO decision-making is extremely difficult to particularize. Stakeholders' interests diverge dramatically.[50]

In lieu of a standard market design, FERC has supported voluntary RTO participation, regional differences, and the evolution of governance institutions that align with specific principles and criteria defined through a series of orders.[51] These governance principles reflect – but do not resolve – some inherent tensions; most notably, that which exists between the goals of independence and responsiveness (Fig. 10). This tension has been observed in practice and identified in research on RTO governance.

Figure 10: The Inherent Tensions of RTO Governance Principles[52]



A. *The Office Could Educate the Public about RTO Governance.*

Almost everyone can name their electric utility, but few people are aware of the wholesale competitive energy market that supplies their energy. The role and impact of RTOs have grown considerably since Orders 888 and 2000, but the visibility and knowledge of RTOs has lagged behind. RTOs have a major role to play in the transition to a low-carbon energy system. Understanding how their governance processes shape our energy options is paramount to

[50] Id. at 581.
[51] *See, e.g.,* Order 2000, Order 888, Order 719.
[52] Reprinted from Stephanie Lenhart, New England Energy Vision: Governance Reform Technical Forum (Feb. 25, 2021). *See also* Proposed Rule, Wholesale Competition in Regions with Organized Electric Markets, 72 Fed. Reg. 36,276, 36,294 (2007) (codified at 18 C.F.R. pt. 35).

boosting participation and input from stakeholders and other parties. The Office of Public Participation could meet this need, by publishing primers on RTOs and introducing these entities to a broader public. The Office could also field questions from public interest organizations, incipient market participants, and other members of the public about how to engage with bulk power markets.

The Office of Public Participation could also facilitate the sharing of public information about RTOs decision-making processes. For instance, the Office could host an electronic bulletin board for RTO public meeting notices, and minutes from public meetings. The Office could also socialize best practices for market data reporting and archiving (see subsection below on best practices more generally).

By increasing RTO literacy, the Office can help to increase the diversity of participants and therefore, diversity of views represented in RTO decision-making. In turn, these trends can help to better ensure that the clean energy transition is affordable and equitable.

B. *The Office Could Hear Public Concerns about RTO Processes through an RTO Ombudsman*.

Even when stakeholders know about RTOs and have already engaged in market decision-making, they may face obstacles to meaningful participation depending on the sectors to which those stakeholders are assigned, their voting and other participation rights, and the committee structure and decision-making processes established by each market. Of course, in multi-faceted stakeholder processes housing diverse interests, no one is happy all the time. But having a clear course to follow for stakeholders with process concerns can enhance confidence in an institution and in some cases can lead to productive reforms.

In the same way independent market monitors boost RTO accountability by assessing the economic operation of the bulk power markets, an RTO ombudsman at the Office of Public Participation could assess the markets' ability to balance diverse stakeholder interests over time. This would enable market monitors to remain focused on economic efficiency, while providing a broader accountability mechanism to the public.

An ombudsman can be particularly useful when "[v]oices do not speak with similar clarity nor … fall on equally receptive ears."[53]An ombudsman can assume many different responsibilities, but two primary roles of an ombudsman are trouble-shooting, and proposing ways to improve the delivery of services.[54] Examples of ombudsman in the federal government include the Taxpayer Advocate (formerly the Taxpayer Ombudsman) at the Internal Revenue Service;[55] the Resource Conservation and Recovery Act (RCRA) Hazardous Waste Ombudsman at the Environmental

[53] David R. Anderson and Diane M Stockton, Federal Ombudsman: An Underused Resource, ADMIN. L. J. Vol 5:275, 280-81 (citing Institute of Governmental Studies, Western American Assembly of the Ombudsman 26 (S. Scott ed. 1968)) (1991).
[54] Anderson and Stockton, Federal Ombudsman: An Underused Resource, ADMIN. L. J. Vol 5:275, 277 (1991).
[55] P.L. 100-647 (1988). In 1977, as an internal matter, the IRS had created the predecessor Office of Problem Resolution. Wendy R. Ginsberg and Frederick M. Kaiser, Federal Complaint-Handling, Ombudsman, and Advocacy Offices, Congressional Research Service (Aug. 4, 2009), https://fas.org/sgp/crs/misc/RL34606.pdf, at 6.

Protection Agency;[56] the U.S. Citizenship and Immigration Services Ombudsman;[57] and the American National Red Cross ombudsman for natural disasters.[58]

While in some of these positions, an ombudsman will advocate for members of the public before an agency, we envision the RTO Ombudsman taking a more impartial stance. Two primary roles of an ombudsman, which seem appropriate here, are trouble-shooting and proposing ways to improve the delivery of services.[59] As an example, two-thirds of the work of the EPA Hazardous Waste ombudsman is responding to requests for information; only the remaining one-third relates to complaints at all.[60] For those matters, an ombudsman may investigate a subset and issue a nonbinding report with recommendations as appropriate.[61] For instance, the Red Cross ombudsman "serve[s] as a neutral party that provides a voluntary, confidential, and informal process to facilitate fair and equitable resolutions to problems brought before it; and explores a range of alternatives or options to resolve the problems."[62]

An issue that the Office of Public Participation might be particularly well suited to address might be, in response to stakeholder concerns, a review of stakeholder sectors and recommendations for new sectors when participants increase or shift dramatically over time. This could address the dilution concerns raised in the last section, which can lead to suppressed participation rates.

C. *The Office Could Facilitate Public Involvement in RTO Decision-Making*.

As recognized in a recent National Academy of Sciences consensus report, the United States needs to double its share of non-carbon emitting electricity generating sources on the grid by 2030 and achieve a net zero economy by mid-century, to meet the decarbonization goals necessary to avert catastrophic global climate change.[63] This is more than a technological challenge:

> A net-zero emissions economy would combine the nation's impressive energy resources and culture of innovation to ameliorate ongoing social injustices in today's energy system and fairly distribute both opportunities and costs.[64]

Meeting these urgent needs while ensuring reliable and affordable electricity is an incredibly daunting challenge. This is also by no means a job exclusively for RTOs. And yet, given these

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[56] ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, OFFICE OF OMBUDSMAN, EVALUATION OF THE HAZARDOUS WASTE OMBUDSMAN PROGRAM (Booz, Allen & Hamilton, Inc. 1988).
[57] Homeland Security Act of 2002, P.L. 107-296; 6 U.S.C. § 272.
[58] American National Red Cross Governance Modernization Act of 2007, P.L. 110-26; 121 Stat. 110.
[59] Anderson and Stockton, Federal Ombudsman: An Underused Resource, at 277 (1991).
[60] Booz, Allen & Hamilton, Inc. 1988, *supra* n. 56, at II-6 (cited in Anderson and Stockton, Federal Ombudsman: An Underused Resource, at 320).
[61] Id. at 344.
[62] American Red Cross, "The American Red Cross Code of Business and Ethics Conduct," http://www.redcross.org/static/file_cont5875_lang0_2860.pdf (cited in Ginsberg and Kaiser, Federal Complaint-Handling, Ombudsman, and Advocacy Offices, at. 22).
[63] Accelerating Decarbonization of the U.S. Energy System, NATIONAL ACADEMY OF SCIENCES CONSENSUS STUDY REPORT (2021).
[64] Accelerating Decarbonization of the U.S. Energy System, Consensus Study Report Highlights.

new demands on the grid, alongside FERC's responsiveness principle which requires that RTO boards "be fully aware of the positions of customers and other stakeholders,"[65] FERC support to facilitate public involvement in the RTO decision-making process would be highly useful.

The Office of Public Participation could lower barriers to public participation in RTO governance processes by reviewing and proposing governance best practices. These might include more effective notification of public meetings, or minimum standards for RTO data sharing and archiving. RTOGov interviews with representatives of environmental NGOs identified the following additional proposals for overcoming barriers to participation, which might be the subject of best practice documents:[66]

- Overcoming resource costs of participation – effective participation is often determined by availability of resources and that is where the TOs and LSEs have an advantage as they can pass on costs;
- Creating participation opportunities for non-market participants in different processes, e.g., scenario development for transmission planning practices;
- Reducing or eliminating differences in access to information between market and non-market participants;
- Improving access to Board and to RTO staff;
- Facilitating eNGO input into Board member nomination and selection; and
- Reviewing the mission of RTOs to explicitly address environmental externalities (presently, only CAISO's mission has an explicit consideration of environmental impacts).[67]

Other topics might be identified through the ombudsman process. For instance, after so many complaints from a particular type of stakeholder about vote dilution in a sector, the Office might make recommendations about new sectors or division of existing sectors. Similarly, ombudsman work might trigger a review of eligibility definitions in a market.

Finally, the Office could facilitate a regular and periodic review of RTO stakeholder processes. Such a review could include an assessment of each market's ability to accommodate input from individuals or organizations that are outside of the defined stakeholder structure. This would track with a number of the suggestions raised in comments around Order 719.[68]

Conclusion

As noted at the outset, we believe the Office of Public Participation could help the public understand the significance of RTOs and the opportunities to engage in their decision-making processes. We also think it would be beneficial to create an RTO ombudsman position in the Office of Public Participation. Finally, we suggest that the Office of Public Participation could develop best practices for improving public involvement in RTO decision-making.

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[65] Order 719 ¶ 510.
[66] Derived from notes taken during stakeholder interviews by Mark James and Kevin Jones, Vermont Law School researchers. Notes on file with the researchers.
[67] The other market missions remain exclusively focused on economic efficiency.
[68] See *supra*, at 6-7.