



215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • [www.citizen.org](http://www.citizen.org)

## Securing The Public Interest At FERC

The election of Joe Biden as the 46<sup>th</sup> President, combined with a divided 117<sup>th</sup> Congress, means that meaningful policy reforms will likely spring from executive branch agency initiatives rather than legislation. One such agency, the independent Federal Energy Regulatory Commission, is correctly identified as a key to addressing the climate crisis. Less discussed are the myriad of other public interest protections that can be improved under a newly constituted FERC—without the need for Congress to act. Public Citizen’s five point [Securing The Public Interest At FERC](#) follows:

### 1. Launch A Rulemaking To Establish An Office of Public Participation

In 2016, Public Citizen [led a petition asking FERC](#) to create and fund an Office of Public Participation. Although Congress ordered it to be established as part of sweeping energy legislation back in 1978, it was never implemented, and FERC has ignored our petition. The existing statutory language directs the office to “coordinate assistance to the public”, authorizing financial “compensation for reasonable attorney’s fees, expert witness fees, and other costs of intervening or participating in any proceeding before the Commission”. Intervenor funding could be available not only for public interest participation at FERC, but at Commission-jurisdictional proceedings such as the stakeholder processes of regional transmission organizations (RTOs).

### 2. Enforce Full Market Access For Renewable Energy And Demand Response, Preserve State Decarbonization Goals, and Conduct Lifecycle Greenhouse Gas Emission Impacts For Natural Gas Public Interest Determinations

While the Commission’s power market regulation has correctly been technology- and fuel-neutral, recent RTO and Commission actions have unfairly disadvantaged renewables and consumers. To ensure that clean energy has open, non-discriminatory access to markets, the Commission must:

- Incorporate lifecycle greenhouse gas emission impacts in evaluating the public interest test as part of determining a certificate of public convenience and necessity for proposed gas infrastructure.



215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • [www.citizen.org](http://www.citizen.org)

- Suspend and overturn recent orders that penalize state energy policies through administrative price supports that require renewables to bid in to capacity auctions at artificially high prices, thereby allowing more expensive fossil fuel generation to wrongly outbid clean energy.
- Prioritize implementation of distributed energy resources, energy storage, and demand response rules to allow their full, non-discriminatory participation in all FERC-jurisdictional markets. RTOs may drag their feet on compliance filings, and clearer guidance from FERC is necessary to hasten clean energy's involvement in these markets.
- Respect and promote state authorities for clean energy preferences.
- Eliminate mandatory capacity markets, as they are structurally uncompetitive.
- Ensure that any action under Section 219 of the Federal Power Act to incentivize electric transmission prioritizes “economically efficient” and just and reasonable rates for consumers.

### **3. Strengthen Market Oversight & Enforcement**

Strong enforcement is essential if competitive markets are to promote clean energy. Market performance and the public's trust are undermined if market manipulation becomes a feature of organized markets. There is a perception that policing the markets has taken a back seat in recent years. FERC should:

- Restore the issuance of Notices of Alleged Violations. Rescinded in 2019 (Docket No. PL10-2-003), these notices had provided essential transparency for a decade to alert the public when Commission staff had sufficient evidence to bring a case against violators.
- Increase staff resources for market oversight, surveillance and enforcement for the Office of Enforcement, the Office of Energy Policy and Innovation, and the Office of Energy Market Regulation (FERC's total budget for FY2021 is \$404 million). As a self-funding agency, it is easier for FERC to establish its own budgets.
- Require RTO tariffs to feature “soft caps” of, say \$250/MWh, where any price charged above this amount compels the seller to file justification reports at FERC. This obliges public review of excessive prices and subjects them to refund if the justification is lacking. As extreme weather events become more common and widespread, our system's reliance on market-based rates exposes consumers to the risk of climate change price gouging.



215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • [www.citizen.org](http://www.citizen.org)

- Promote formal roles for whistleblowers as an enforcement tool. For example, Section 748 of the Dodd-Frank Wall Street Reform and Consumer Protection Act amended the Commodity Exchange Act by adding Section 23, entitled “Commodity Whistleblower Incentives and Protection.” Since then, FERC’s sister agency the CFTC has embraced this authority and actively promotes whistleblowers as a component of its enforcement and oversight capabilities. There is nothing preventing FERC from similarly encouraging a formal role for whistleblowers.
- Support withdrawing the exemption from CFTC oversight that was granted to RTOs for financial transmission rights, congestion revenue rights and analogous instruments. These speculative financial products are complex derivatives that are beyond the Commission’s ability to effectively regulate, as evidenced by PJM’s GreenHat disaster. Alternatively, the Commission should require FTR and similar traders to apply for permission under Section 205 to charge FERC-jurisdictional rates.
- All Notice of Penalty Violations of cybersecurity rules must publicly identify the names of the utilities committing the violations. A September 2020 staff white paper (Docket No. AD19-18) promotes shielding names of offenders from the public.

#### **4. Overhaul Governance And Transparency of RTOs/ISOs**

FERC formally encouraged the voluntary creation of RTOs in 1999’s Order 2000 to “facilitate lighter handed regulation” and “reduce the need for Commission oversight and scrutiny.” FERC has therefore privatized electricity policy making, delegating the heavy lifting of designing energy markets to the private RTOs and their stakeholder processes, where lobbyists for utilities, power plants and Wall Street energy traders are free to not only offer their market design proposals but are granted voting rights by RTOs. It is unsurprising that RTOs pursue market designs and transmission rules that benefit incumbent interests that can be hostile to renewables and the public interest. To improve governance and transparency, FERC should:

- Conduct a Notice of Inquiry of Order 719. A Notice of Inquiry is an opportunity to revisit RTO governance and public participation requirements, which the Commission hasn’t updated since its 2008 order. We believe governance, transparency and public access standards should be uniform across all RTOs.
- Establish boards of state officials and/or hold joint hearings with state regulators representing states within the footprints of multi-state RTOs to ensure that



215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • [www.citizen.org](http://www.citizen.org)

states' views and policies—particularly decarbonization efforts—are properly reflected in Commission and RTO policies, per 16 USC § 824h(a) and 16 USC § 824h(b). In addition, Regional Advisory Bodies comprised of representatives appointed by the Governors of states, empowered to “provide advice” to FERC on whether reliability or cyber security proposals are just, reasonable and in the public interest, should be established, per 16 USC § 824o(j).

- Replace some RTO stakeholder functions with FERC advisory committees. The Commission is the only major federal agency that does not utilize advisory committees. The 1972 Federal Advisory Committee Act ensures transparency of deliberations, with an emphasis on open meetings, public involvement, and reporting by members—in stark contrast to RTOs that restrict public participation.
- Subject RTOs to rules mirroring requirements of federal open meeting laws and the Freedom of Information Act.
- Record and transcribe meetings to preserve archival records of proceedings.
- Provide intervenor compensation to assist with public interest participation, either through FERC office or through the tariff (such as with CAPS in PJM).
- Adjust weighted sector voting ratios by increasing representation for end-use customers and public interest groups to more accurately reflect stakeholder interest in energy markets.
- Encourage RTO board of directors to be accountable to the public interest within its geographic footprint. For example, in the midst of the west coast deregulation crisis, the California assembly in January 2001 gave the Governor the power to appoint all CAISO board members. FERC could require similar board reforms as a condition for multi-state RTOs.
- Reform governance of the North American Electric Reliability Corporation. In 2006, FERC granted legal status for the private corporation NERC to serve as America's front-line regulator and enforcer of electric reliability and cybersecurity rules. But NERC's Board of Trustees is dominated by individuals hailing from the utility industry, presenting significant conflicts of interest. Many of the governance and transparency initiatives outlined for RTOs should also apply to NERC.



215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • [www.citizen.org](http://www.citizen.org)

## 5. Improve Market Transparency

Well functioning markets require transparency. FERC should:

- Enhance affiliation and other upstream ownership details for all market-based rate authority sellers. Applications for MBR authority are the cornerstone of FERC’s power market regulation, and currently provide scant ownership and affiliation details, making it difficult to track common financial interests across markets. For example, MBR sellers don’t have to disclose owners that control less than 10%, or passive financial interests. These oversights allow sophisticated traders to use small investments as part of broader market manipulation schemes. In addition, the Commission should automatically revoke MBR authority for any seller that commits significant violations.
- Establish corporate character reporting standards for Section 205 market-based rate applications. Applicants are currently not required to disclose adjudications, criminal convictions, adverse legal or regulatory rulings against it. The lack of corporate character reporting requirements leaves the Commission vulnerable to approving market-based rate authority to entities that have demonstrated track records of frequent and serious legal violations. A sister agency to FERC, the Federal Communications Commission, enforces such character qualifications of broadcast applicants.
- Host a technical conference on the role mergers since the 2005 Energy Policy Act have had in concentrating generation ownership, facilitating the re-monopolization of generation- and distribution-utilities, and the impacts of mergers on RTO governance.
- Publish wholesale pricing and cost data in a timely, easy-to-use format. Public transparency over wholesale energy prices is needed, including “all in” costs that include both energy market and so-called out of market payments (capacity, uplift, etc) so that consumers and policy makers have very clear and accurate pricing data.
- Include power marketing and energy trading in evaluating market power. The Commission’s market power analyses relies on power plant ownership to determine whether an entity has market power, ignoring the prominent role that energy traders play in influencing prices and obtaining market power without owning generation.
- Maintain and publish up-to-date energy asset and infrastructure ownership databases, so the public can access current information about who exactly owns power plants, pipelines and all other FERC-jurisdictional assets.