COMMENT

COMMENT ON SHELLEY WELTON, *RETHINKING GRID GOVERNANCE FOR THE CLIMATE CHANGE ERA*

by Casey Roberts

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In *Rethinking Grid Governance for the Climate Change Era*, Shelley Welton has incisively described the underexplored institutional role of regional transmission organizations (RTOs) in facilitating decarbonization. As an attorney who advocates within the RTO stakeholder process, and before the Federal Energy Regulatory Commission (FERC) and the federal courts, I see firsthand how the RTO processes for identifying and addressing emerging issues can succeed or be derailed, and the limitations in FERC's ability to proactively set these processes and their outcomes straight. I agree with Welton that RTOs cannot be trusted to self-govern and that many factors militate against treating them with a lighter hand than a run-of-the-mill utility.[1] But I am more sanguine than Prof. Shelley Welton that FERC has sufficient ability to shape RTO processes and outcomes in a manner that protects consumers and advances decarbonization.

Second, while RTO voting structures unquestionably favor incumbents, the broader political environment in which RTOs operate can constrain their worst tendencies. I describe some of these dynamics and suggest ways that states, consumer advocates, and public interest organizations can shape outcomes while deeper reforms are pursued.

For all of their deficiencies, RTOs are a significant improvement over the prior holders of Federal Power Act Section 205 rights—individual utilities. Consumers have an inadequate say in RTO decisionmaking processes, but they have even less of a say in the decisions of a utility outside of an RTO. And while RTOs may drag their heels or erect roadblocks to innovative new technologies, it is undisputable that a non-RTO vertically integrated utility squelches nearly all competition from such technologies, unless the utility itself can develop them and add them to its rate-base. While RTOs are a significant improvement, they present considerable untapped potential.

I. FERC's Ability to Shape RTO Tariffs Is Substantial

Professor Welton notes that following the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit's decision in *NRG Power Marketing*, FERC's ability to modify an RTO's Section 205 filing has been significantly constrained, leaving FERC without the ability to impose a *more* just and reasonable alternative.[2] This limitation on FERC's authority also, of course, applies where a non-RTO utility submits changes to its rates under Section 205,[3] and I think the evidence is mixed as to whether the RTO structure further diminishes FERC's authority.

It is true that FERC's approval of an RTO's Section 205 filing is sometimes heavily influenced by the fact that it was approved by a substantial portion of the RTO's membership. In this way, FERC could be understood to be applying a lighter hand to RTO filings because of the implicit vetting below. However, at other times, the existence of the stakeholder process complicates an RTO's effort to get its way at FERC. As Professor Welton observes, some controversial filings actually contravene stakeholder preferences,[4] which leaves the RTO with the unenviable task of explaining why it has ignored these preferences. More broadly, the stakeholder process usually provides an opportunity for advocates to dissect and extract information from the RTO about its preferred course of action.[5]

1. Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, 109 Cal. L. Rev. 209, 257 (2021).

2. *Id.* at 233-34 (citing NRG Power Mktg. v. FERC, 862 F.3d 108, 114 (D.C. Cir. 2017)).

3. It is worth considering that FERC may actually have broader authority over RTO rates than it does over bilateral contracts widely used outside of centralized RTO markets, given that application of the *Mobile-Sierra* doctrine to the latter limits FERC to setting aside rates only if they are clearly contrary to the public interest. Tri-State Generation & Transmission Ass'n, 170 FERC ¶ 61,221, at PP 44-46 (2020) (reiterating FERC precedent that the *Mobile-Sierra* standard applies only to individualized agreements negotiated at arms-length, not to generally applicable rates).

4. Welton, *supra* note 1, at 255.

5. *See, e.g.*, ISO New England, Inc., Order Rejecting Proposed Tariff Revisions, 173 FERC ¶ 61,106, at P 49 (2020) (finding an ISO-NE rate proposal unjust and unreasonable because the costs exceeded the benefits based on an impact assessment that ISO-NE had conducted at stakeholders' request).

This can unearth evidence that undermines the RTO's case for its proposed tariff, which can later provide FERC with grounds to conclude that the RTO's proposal is not just and reasonable, or at least that the RTO has not met its burden of proof on that issue. Thus, even if public advocates lack sufficient voting power to prevent a Section 205 filing, the existing stakeholder processes help to build evidentiary records that can support Commission rejection of an RTO's Section 205 filing.

Moreover, while FERC's role under Section 205 is "passive and reactive," it is far from a rubber stamp.[6] *NRG* imposes real limits, but FERC still has options for nuance, such as accepting only in part,[7] or rejecting with guidance on what the RTO might re-file that would be acceptable.[8] The Commission can also influence the contents of a tariff before it is filed through dialogue with RTOs on emerging issues and pre-filing meetings on particular topics. Of course, the Commission's authority under Section 205 is meaningless if it lacks a quorum or is deadlocked. Under Section 205(d), a utility's filing goes into effect by operation of law if the Commission is unable to rule on it within 60 days.[9] Several recent filings with significant policy implication went into effect by operation of law,[10] which confirms that institutional structures that result in RTO filings that better reflect state policies and consumer protection are critically important.

Finally, Professor Welton notes the challenges of invoking FPA Section 206, under which the Commission can direct RTOs to take specific actions.[11] To invoke this authority, the Commission must establish that the status quo is not just and reasonable. This is a real hurdle, but it is far from insurmountable so long as the Commission can build the needed record. As Professor Welton notes, the Commission has taken this action in cases where incumbents are constraining access by new entrants.[12] Admittedly, the Commission's sometimes-passive approach to Section 205 filings—conceding that wide range of proposals can be just and reasonable—could be viewed as affecting its ability to find that many tariffs are not just and reasonable. But evidence of changed circumstances, and even evolving Commission views regarding economics, can justify a change in the Commission's determination regarding a tariff that it previously concluded was just and reasonable.[13] It is true that the interests of an affordable energy transition may not always be advanced by the Commission's action under Section 206, but this is less an indicator of insufficient regulatory oversight of privatized RTOs, than another reminder that elections have consequences.

II. Increasing Consumer and State Influence to Accelerate an Affordable Clean Energy Transition

I share Professor Welton's conviction that RTO decision-making must better reflect the positions of new entrants, consumers, and states, if the RTO model is to facilitate an affordable clean energy transition. Notwithstanding the limitations recognized in the *CAISO* decision,[14] the Commission has determined that membership rules have a direct effect on FERC-jurisdictional rates and therefore fall within its jurisdiction.[15] FERC has also recognized that reforms other than changing the membership requirements or voting structure can directly affect rates and moreover, are just and reasonable. For example, in 2016, FERC approved a tariff change to provide funding for the Consumer Advocates of PJM States, because this expense would "benefit PJM's ratepayers by increasing its responsiveness to the needs of customers and other stakeholders and by making the stakeholder process more inclusive, transparent, and robust."[16] In an earlier order, FERC approved funding for the PJM regional state committee—the Organization of PJM States, Inc.—on the basis that it would enable PJM to more efficiently engage with state regulators and would benefit market participants through coordinating consideration of transmission and markets issues with state and federal components.[17] FERC has thus already recognized that additional resources for consumer and state advocates improve the quality of stakeholder deliberation—further expanding the resources available for engagement by these sorts of representative organizations could immediately benefit customers.[18]

While FERC has broad jurisdiction over governance practices, and there is ample precedent for approving reforms that improve responsiveness and accountability,[19] there are important practical limitations on FERC's abil-

6. *See, e.g.*, Advanced Energy Mgmt. All. v. FERC, 860 F.3d 656, 662 (D.C. Cir. 2017).
7. *See, e.g.*, NYPSC v. FERC, 642 F.2d 1335, 1345 (D.C. Cir. 1980); W. Res., Inc. v. FERC, 9 F.3d 1568, 1574 (D.C. Cir. 1993); Sea Robin Pipeline Co. v. FERC, 795 F.2d 182, 183, 187 (D.C. Cir. 1986).
8. PJM Interconnection, LLC, 175 FERC ¶ 61,084, at P 17 (2021) (rejecting a Section 205 filing based on flaws in the proposed transition mechanism, but noting that the proposal was otherwise just and reasonable); PJM Interconnection, LLC, 176 FERC ¶ 61,056, at P 3 (2021) (accepting revised proposal filed without transition mechanism).
9. 16 U.S.C. §824d(d).
10. *See, e.g.*, PJM Interconnection LLC., Docket ER21-2582, Notice of Filing Taking Effect by Operation of Law (Sept. 29, 2021) (PJM filing to eliminate application of minimum offer price rule to state policy resources); Alabama Power Co., Dominion Energy South Carolina, Inc., Louisville Gas and Electric Co., Duke Energy Carolinas, LLC, Duke Energy Progress, LLC, Georgia Power Co., Kentucky Utilities Co., Mississippi Power Co., Notice of Filing Taking Effect by Operation of Law, Docket Nos. ER21-1111-002, ER21-1112-002, ER21-1114-002, ER21-1116-002, ER21-1117-002, ER21-1119-002, ER21-1120-002, and ER21-1121-002 (Oct. 13, 2021) (southern utilities filing to create energy exchange market).
11. Welton, *supra* note 1, at 261-62.
12. *Id.* at 244-45 (noting Orders 841 and 2222 pertaining to energy storage and aggregations of distributed energy resources, respectively).
13. *See, e.g.*, Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970).
14. *See* Welton, *supra* note 1.
15. New England Power Pool Participants Comm., 166 FERC ¶ 61,062, at P 48 (2019).
16. PJM Interconnection, L.L.C., 157 FERC ¶ 61,229, at P 2 (2016).
17. PJM Interconnection LLC, 113 FERC ¶ 61,292, at P 39 (2005).
18. Of course, state legislatures could and should increase funding for chronically under-resourced consumer advocates and state regulatory bodies.
19. *See* Christina E. Simeone, *Reforming FERC's RTO/ISO Stakeholder Governance Principles*, 34 Electricity J. 106954 (2021) (assessing proposing four new RTO governance principles to address observed deficiencies in RTO processes not covered by existing Order 719 criteria).

ity to radically overhaul governance within the existing framework of voluntary RTO membership. Creation of an RTO involves assignment of the transmission-owning utility's Section 205 filing rights to an independent entity on terms that the utility concludes are acceptable given the advantages of membership in a particular RTO. In *Atlantic City Electric Co. v. FERC*, the court rejected FERC's effort to change the terms of the deal these transmission owners had negotiated to form the PJM Interconnection by requiring the transmission owners to entirely cede their Section 205 rights to PJM.[20] Any FERC action mandating sharing of Section 205 rights with states, or significantly diminishing utilities' ability to affect the exercise of those rights by the RTO compared to the status quo, would face not only legal risk, but also potentially cause an exodus of utilities from the RTO. Unless RTO membership becomes mandatory or FERC sweetens the benefits of RTO participation, the risk of transmission owner defection constrains FERC's ability to significantly reform governance.

Formal voting power and exercise of Section 205 rights are only one part of the picture, however—the political environment in which RTOs operate moderates their pro-incumbent tendencies. For instance, while RTO membership is voluntary from FERC's perspective, states can compel utilities within their jurisdiction to become RTO members and arguably, prohibit or constrain it.[21] In PJM, states further have the option of requiring their utilities to opt out of PJM's capacity market (though not the obligation to procure sufficient capacity). RTOs also show awareness that their social license to develop rules with wide-ranging effects on people's wallets and environment depends in significant part on public perception of these institutions as neutral arbiters that protect reliability of the bulk power system and seek to balance competing interests. Without this perception, RTOs may face more opposition to their filings at FERC, be pelted with Section 206 complaints, or receive less deferential treatment of their Section 205 filings at FERC. Under Order 2000, RTO boards are required to be independent of the influence of any sector of market participants,[22] and thus are sensitive to circumstances giving rise to questions about their independence.[23]

As shown in the CAPS and OPSI orders, FERC shares an interest in RTO stakeholder processes functioning well and being perceived as fair, for a couple of reasons. First, truly inclusive and representative stakeholder processes lead to better-vetted and more durable tariff changes because differing perspectives can be discussed and reflected in the tariff design. Second, more inclusive stakeholder processes can result in Section 205 filings by RTOs that are less contentious or less likely to give rise to litigation against the Commission for approving them.

States themselves have put forward proposals for improved consideration of state and consumer views that stop well short of taking the reins at the RTO. The New England States Committee on Electricity recently published recommendations that focus heavily on requiring the ISO New England board to be transparent in how it has considered consumer costs and the positions of New England states when it makes decisions[24]; presumably such transparency facilitates accountability to these interests, as well as providing additional evidence for proceedings at FERC. I offer these examples of more limited, intermediate steps to better state engagement at RTOs not to preclude the possibility of deeper governance reform, but instead to encourage near-term progress during a critical time for climate action and consumer protection.

20. Atlantic City Electric Co. v. FERC, 295 F.3d 1, 9 (D.C. Cir. 2002).
21. Some states already mandate that their utilities participate in regional transmission organization. *See, e.g.*, Ohio Rev. Code Ann. §4928.12, https://codes.ohio.gov/ohio-revised-code/section-4928.12 (requiring transmission owners to be members of RTOs); Va. Code Ann. §56-579 (2022) (requiring utilities that own transmission to form or join a regional transmission entity).
22. *See* Order 2000, 89 FERC ¶ 61,285, at P 152 (1999) (describing requirement that RTOs have a decisionmaking structure independent of control by any market participant or class of participants).
23. *See, e.g.*, Letter from PJM Board of Managers (Feb. 25, 2021), https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/20210225-board-response-to-caps-letter-re-common-interest-agreements.ashx (responding to criticism of confidentiality agreement with transmission owners).
24. NESCOE Resources, *Advancing the Vision* (June 29, 2021), https://nescoe.com/resource-center/advancing_the_vision/.