

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

RTO Insider LLC

Docket No. EL18-196-001

v.

New England Power Pool Participants Committee

ORDER DENYING REHEARING

(Issued January 23, 2020)

1. Public Citizen, Inc. (Public Citizen) seeks rehearing of the Commission's order in this proceeding dismissing a complaint against the New England Power Pool (NEPOOL) Participants Committee (NEPOOL Participants Committee) concerning its policies prohibiting press and non-member, general public attendance at, and reporting on, NEPOOL stakeholder meetings.¹ In this order, we deny rehearing.

I. Background

2. On August 31, 2018, RTO Insider LLC (RTO Insider) filed a complaint (Complaint) against the NEPOOL Participants Committee under section 206 of the Federal Power Act (FPA)² and Rule 206 of the Commission's Rules of Practice and Procedure (Rule 206).³ The Complaint asked the Commission to find that NEPOOL's policies prohibiting press and public attendance at, and reporting on, NEPOOL meetings are unlawful, unjust and unreasonable, unduly discriminatory, and contrary to the public interest. RTO Insider, which is a trade publication publisher that covers wholesale

¹ *RTO Insider LLC v. New England Power Pool Participants Committee*, 167 FERC ¶ 61,021 (2019) (Order on Complaint).

² 16 U.S.C. §§ 824e, 825e (2018).

³ 18 C.F.R. § 385.206 (2019).

electric industry markets and stakeholder meetings, stated that NEPOOL held up the membership application of an otherwise eligible end-user, RTO Insider reporter Michael Kuser, solely because he is a member of the press. RTO Insider asserted that NEPOOL's ban of the press and public violates the ISO New England Inc. (ISO-NE) and NEPOOL mission statements, which espouse transparency, and the openness and transparency requirements of Order No. 890.⁴ RTO Insider also claimed that NEPOOL violated the NEPOOL Agreement and applied its membership criteria discriminatorily by preventing Mr. Kuser and RTO Insider from advocating for press access before the June 2018 NEPOOL Participants Committee meeting.⁵

3. NEPOOL filed a motion asking the Commission to dismiss the Complaint on the grounds that the Commission lacks jurisdiction under the FPA over NEPOOL's meeting policies.⁶ NEPOOL asserted that it is not a public utility under the FPA and that its press policies are not a rate, charge, or classification concerning the transmission of electric energy in interstate commerce, the sale of electric energy at wholesale in interstate commerce, or facilities for such transmission or sale of electric energy.⁷ NEPOOL also stated that its meeting policies do not constitute rules, regulations, practices, or contracts affecting a jurisdictional rate, charge, or classification and that the Commission's jurisdiction is limited to utility methods and conduct that directly affect a rate or are closely related to the rate.⁸

4. The Commission granted NEPOOL's motion to dismiss the Complaint. The Commission stated that its jurisdiction under FPA section 205 extends to all rates and charges made, demanded, or received by any public utility for or in connection with the transmission or wholesale sale of electric energy in interstate commerce, as well as to "all

⁴ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 118 FERC 61,119, *order on reh'g*, Order No. 890-A, 121 FERC ¶ 61,297 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

⁵ Order on Complaint, 167 FERC ¶ 61,021 at PP 4-6.

⁶ *Id.* P 14. NEPOOL also asserted that RTO Insider lacks standing and that the Complaint did not comply with Rule 206 of the Commission's Rules of Practice and Procedure because it failed to establish a *prima facie* case. *Id.*

⁷ *Id.* P 15.

⁸ *Id.* P 16.

rules and regulations affecting or pertaining to” such rates.⁹ The Commission explained that its jurisdiction over rules and regulations “affecting” jurisdictional rates is limited “to rules or practices that directly affect the wholesale rate.”¹⁰

5. The Commission stated that while NEPOOL is not a public utility as defined by the FPA, it could exert jurisdiction over NEPOOL’s operations insofar as they directly affect jurisdictional rates.¹¹ The Commission noted that it has previously found that rules governing NEPOOL membership “directly affect what filings the Commission receives pursuant to FPA section 205” because they dictate who may vote on proposed ISO-NE filings and NEPOOL-originated “jump ball” proposals.¹² However, the Commission stated that NEPOOL rules prohibiting press and public attendance at NEPOOL meetings do not directly affect such filings because they do not affect who may vote on NEPOOL proposals. The Commission stated that only NEPOOL members may vote on proposed ISO-NE filings and NEPOOL-originated “jump ball” proposals.¹³ As non-members, the press and public could not vote on those proposals or speak in support of or against them even if they were to attend NEPOOL meetings. Therefore, the Commission concluded that rules governing only attendance at NEPOOL meetings do not directly affect the filings brought before the Commission in the way that membership rules that allow members to vote do.¹⁴

⁹ *Id.* P 45 (quoting 16 U.S.C. § 824d(a)).

¹⁰ *Id.* P 46 (citing *FERC v. Elec. Power Supply Ass’n*, 136 S.Ct. 760, 774 (2016) (*EPISA*)).

¹¹ *EPISA*, 136 S.Ct. at 774.

¹² *New England Power Pool Participants Committee*, 166 FERC ¶ 61,062, at P 48 (2019).

¹³ NEPOOL’s “jump ball” privileges require ISO-NE to file with the Commission an alternative NEPOOL market rule proposal that receives support from at least 60 percent of the NEPOOL Participants Committee when such proposal differs from a market rule proposal filed by ISO-NE. When this threshold is met, ISO-NE must file, pursuant to FPA section 205, NEPOOL’s alternate proposal at the same time and on the same footing as ISO-NE’s proposal. Under the ISO-NE Participants Agreement, the Commission may adopt any or all of ISO-NE’s Market Rule proposal or the alternate Market Rule proposal as it finds, in its discretion, to be just and reasonable and preferable. Order on Complaint, 167 FERC ¶ 61,021 at P 48.

¹⁴ Order on Complaint, 167 FERC ¶ 61,021 at P 8 n.20.

6. The Commission also found that reporting on NEPOOL meetings lacks a direct effect on filings submitted to the Commission, and even if that reporting eased the burden of monitoring NEPOOL activities for smaller NEPOOL members or enabled monitoring by prospective members, it was not clear that this could directly affect the outcome of NEPOOL proceedings and thus have a direct effect on jurisdictional rates.¹⁵

II. Request for Rehearing

7. Public Citizen maintains that the Commission made four errors of fact in granting NEPOOL's motion to dismiss the Complaint.¹⁶ First, Public Citizen argues that the Commission erred in finding that press or public attendance at NEPOOL meetings does not impact votes and therefore cannot impact jurisdictional rates. Public Citizen states that even NEPOOL's own expert witness stated that the mere presence of non-members such as the general public and journalists at NEPOOL meetings would alter NEPOOL member behavior by altering their willingness to speak on some issues. Public Citizen asserts that any variable that impacts voting members' behavior in deliberations or votes on proposed rates impacts rates.¹⁷

8. Second, Public Citizen argues that the Commission incorrectly asserted that non-member attendance at NEPOOL meetings cannot affect rates because the role of non-members would be passive, i.e., because non-members cannot vote on NEPOOL proposals or speak in support of or against such proposals. Public Citizen states that other regional transmission organizations (RTOs) allow non-members to participate actively in stakeholder meetings, including granting non-members the right to speak and ask questions. Public Citizen states that active participation by non-members from the general public during the stakeholder process could alter debate and voting outcomes and that allowing this participation would impact rates.¹⁸

9. Third, Public Citizen contends that excluding the public from the NEPOOL stakeholder process impacts rates because it denies the public equal access to important, non-public details about the development of NEPOOL proposals that will be filed with the Commission. According to Public Citizen, this places non-members at a distinct disadvantage relative to members when it comes time to exercise their rights under the

¹⁵ *Id.* P 49.

¹⁶ Rehearing Request at 1.

¹⁷ *Id.* at 2, 4-5.

¹⁸ *Id.* at 2, 5-6.

FPA to inspect rate filings and to intervene and participate in a Commission proceeding regarding a rate filing.¹⁹

10. Finally, Public Citizen maintains that the Commission mischaracterizes the limits on its authority to regulate independent system operator (ISO) governance matters. It states that while the Commission referred in the Order on Complaint to the limits on its authority over such matters described in *California Indep. Sys. Operator Corp. v. FERC*,²⁰ the Commission ignored other authority the court identified in that case that would allow the Commission to require public and press access to NEPOOL stakeholder meetings. Public Citizen states that the court noted in *CAISO* that “[t]he Commission, in Order No. 888 and other rulings made pursuant thereto, has defined ISOs according to the terms it wishes” and the Commission “has the authority not to accept something which it does not deem an ISO.”²¹ According to Public Citizen, these findings mean that “[t]he Commission can easily order in this Docket that NEPOOL must . . . open its doors to non-members of the public and the press to freely attend and participate in all stakeholder meetings.”²² Public Citizen states that if NEPOOL refuses to do so, the Commission “can declare that NEPOOL no longer qualifies as the stakeholder process for ISO-NE.”²³ Public Citizen maintains that the *CAISO* court “determined that FERC has the authority to dictate what criteria constitutes an ISO” and “[t]he Commission can easily require all ISO stakeholder meetings be freely open to the public and journalists as a condition of being classified as an ISO.”²⁴

III. Discussion

11. We deny rehearing. Public Citizen maintains that the Commission made four “errors of fact” in dismissing RTO Insider’s complaint. Two of these alleged errors involve a variation on Public Citizen’s general contention that “[a]ny variable impacting voting member’s behavior in deliberations of or votes upon proposed electric rates

¹⁹ *Id.* at 2, 7-8.

²⁰ 372 F.3d 395 (D.C. Cir. 2004) (*CAISO*).

²¹ Rehearing Request at 9 (quoting *CAISO*, 372 F.3d at 404).

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 2.

impacts rates.”²⁵ Thus, Public Citizen argues that the Commission erred in not recognizing that allowing non-members, such as the general public and journalists, to witness and report publicly on NEPOOL’s deliberations would alter NEPOOL member behavior²⁶ and that active participation by non-members in the stakeholder process could alter outcomes of the debate and voting.²⁷ However, what Public Citizen refers to here are, at best, indirect effects on rates, whereas it is direct effects that create Commission jurisdiction.

12. The Commission explained in the Order on Complaint that it “can exert jurisdiction over NEPOOL’s operations only insofar as they *directly* affect jurisdictional rates.”²⁸ With regard to stakeholder process, the Commission noted that it has previously stated that “the stakeholder process within an RTO/ISO is a practice that affects the setting of rates, terms, and conditions of jurisdictional services of the type that the Supreme Court has held falls within the Commission’s jurisdiction,” but that the Commission’s jurisdiction over the stakeholder process “necessarily is limited to aspects of an RTO/ISO stakeholder process that have a *direct* effect on jurisdictional rates.”²⁹ The Commission found that the NEPOOL membership rules directly affect rates because they dictate who may vote on proposed ISO-NE filings made at the Commission and NEPOOL originated jump-ball proposals.³⁰ On the other hand, the Commission found that “NEPOOL rules prohibiting press and public attendance at NEPOOL meetings do not *directly* affect such filings because they do not affect who may vote on NEPOOL proposals.”³¹ It is voting that has the direct effect. Even if the activities of the press and

²⁵ *Id.*

²⁶ *Id.* at 2-5.

²⁷ *Id.* at 2, 5-6.

²⁸ Order on Complaint, 167 FERC ¶ 61,021 at P 46 (citing *EPSA*, 136 S.Ct. at 774) (emphasis supplied).

²⁹ *Id.* P 47 (emphasis supplied) (citing *New England Power Pool Participants Committee*, 166 FERC ¶ 61,062 at P 48; *PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,229, at P 11 (2016) (citing *EPSA*, 136 S.Ct. at 774)).

³⁰ *Id.* P 48.

³¹ *Id.* (emphasis supplied).

non-voting members could affect the views of NEPOOL voting members,³² that would be an indirect effect on rates.

13. Public Citizen's third allegation of error involves an effect on rates that is even more indirect than those described above. Here, Public Citizen argues that exclusion of the public from the NEPOOL stakeholder process "impacts rates because it denies the public equal access to important, non-public details about the development of NEPOOL's rate filings," which places "non-members at a distinct disadvantage relative to members when it comes time to intervene and participate in the relevant [Commission] proceeding."³³ But any effect on rates that might arise through such participation prior to the filing of a proposed rate with the Commission is itself indirect, as it consists merely of potentially using some non-public information in attempting to influence Commission determinations on rate filings. Just as the activities of the press and non-voting members, if permitted to participate at NEPOOL meetings, could affect the views of NEPOOL voting members, the contents of pleadings before the Commission can affect the Commission's decision-making, but any resulting effect on rates is, again, indirect at best. We further note that all members of the public have the opportunity to seek to participate in Commission proceedings consistent with Commission rules and regulations.

14. Finally, we disagree with Public Citizen that the Commission erred in not recognizing that it "has the authority to declare what attributes NEPOOL must have in order to qualify as the stakeholder venue for ISO-NE."³⁴ Public Citizen bases this argument on the court's statement in *CAISO* that "[t]he Commission, in Order No. 888 and other rulings made pursuant thereto, has defined ISOs according to the terms it wishes. FERC has the authority not to accept something which it does not deem an ISO."³⁵ According to Public Citizen, this means that "[t]he Commission can easily order in this Docket that NEPOOL must . . . open its doors to non-members of the public and the press to freely attend and participate in all stakeholder meetings,"³⁶ and if NEPOOL

³² See, e.g., *id.* P 49 (stating that reporting on NEPOOL meetings lacks a direct effect on filings submitted to the Commission and that, while it could ease the burden of participating in NEPOOL, it does not enable participation, and, therefore, any effect it may have on jurisdictional rates is indirect).

³³ Rehearing Request at 2.

³⁴ *Id.* at 9.

³⁵ *Id.* (quoting *CAISO*, 372 F.3d at 404).

³⁶ *Id.*

refuses to do so, the Commission “can declare that NEPOOL no longer qualifies as the stakeholder process for ISO-NE.”³⁷ There are two difficulties with this argument.

15. First, to find in this proceeding that NEPOOL does not qualify as the stakeholder venue for ISO-NE, it would be necessary to identify some established Commission requirement that NEPOOL is not fulfilling. Public Citizen has not done this in its rehearing request. And to the extent that Public Citizen asks the Commission to alter in this proceeding the minimum criteria for ISO status that it has previously set by rulemaking, we find such a request to be outside the scope of this complaint proceeding concerning participation in NEPOOL’s stakeholder meetings.

16. Second, while Public Citizen maintains that *CAISO* supports discretionary powers that the Commission did not acknowledge in the Order on Complaint, Public Citizen has not shown that the Commission determination supported, in part, by *CAISO* is erroneous. This determination states that while the Commission could “exert jurisdiction over NEPOOL’s operations ... insofar as they directly affect jurisdictional rates,”³⁸ rules governing only attendance at NEPOOL meetings do not directly affect rates and therefore are beyond the scope of Commission jurisdiction.³⁹ The Commission noted that the court made a similar finding in *CAISO* with regard to practices used to select an ISO board. We have addressed Public Citizen’s objections to the Commission’s jurisdictional finding above. We note here only that *CAISO* supports that finding.

³⁷ *Id.*

³⁸ Order on Complaint, 167 FERC ¶ 61,021 at P 46 (citing *EPSA*, 136 S.Ct. at 774).

³⁹ *Id.* P 48.

The Commission orders:

Public Citizen's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Glick is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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GLICK, Commissioner, *concurring*:

1. As I explained in my concurrence to the underlying order, while I agree that we lack jurisdiction over the NEPOOL rules at issue in this proceeding, I believe those rules are misguided. NEPOOL meetings address a broad range of important issues, including, among other things, the reliability of the electric grid, state policies for addressing climate change, and the integration of new technologies into the resource mix. The public and, by extension, the press have a legitimate interest in how NEPOOL, the entity charged with administering ISO-New England’s stakeholder process, is considering these matters public of interest.

2. Although I appreciate NEPOOL’s concern about preserving a forum for candid discussion, I am troubled by NEPOOL’s apparent belief that closed-door meetings without opportunity for public involvement or education through the press furthers the mission of the stakeholder process or the broader interests at play in these proceedings. To paraphrase Justice Louis Brandeis, sunlight is the best disinfectant¹ and it is hard for me to understand how barring public and press scrutiny will further NEPOOL’s mission or, ultimately, its legitimacy as the forum for considering how ISO-New England’s actions affect its stakeholders. Rather than trying to hide its discussions from the public, NEPOOL and its members would be better served by permitting public and press attendance, so that all entities—including those that cannot spend the time or money needed to attend all NEPOOL meetings—can remain informed of the discussions regarding the important issues under NEPOOL’s purview. That result would lead to a more robust discussion of the issues and, ultimately, to better public policy.

¹ Louis Brandeis, *Other People’s Money* 62 (1933) (“Sunlight is said to be the best of disinfectants.”).

For these reasons, I respectfully concur.

Richard Glick

Commissioner