

167 FERC ¶ 61,021
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

RTO Insider LLC

Docket No. EL18-196-000

v.

New England Power Pool Participants Committee

ORDER DISMISSING COMPLAINT

(Issued April 10, 2019)

1. On August 31, 2018, pursuant to section 206 of the Federal Power Act (FPA)¹ and Rule 206 of the Commission's Rules of Practice and Procedure (Rule 206),² RTO Insider LLC (RTO Insider) filed a complaint (Complaint) against the New England Power Pool (NEPOOL) Participants Committee concerning its policies prohibiting press and non-member, general public (public) attendance at and reporting on NEPOOL stakeholder meetings. NEPOOL filed a Motion to Dismiss the Complaint (Motion to Dismiss). We grant NEPOOL's Motion to Dismiss and dismiss RTO Insider's Complaint, as discussed below.

I. Background

A. Description of RTO Insider

2. RTO Insider is a trade publication publisher that "provides independent, objective coverage and analysis of the wholesale electric industry's markets and policymaking."³ RTO Insider covers wholesale electric industry markets and stakeholder meetings across the country, including the committee, subcommittee, and task force meetings of California Independent System Operator Corporation (CAISO), Electric Reliability Council of Texas, ISO New England Inc. (ISO-NE), Midcontinent Independent System

¹ 16 U.S.C. §§ 824e, 825e (2012).

² 18 C.F.R. § 385.206 (2018).

³ *About Us*, RTO Insider (last visited Feb. 19, 2019), <https://www.rtoinsider.com/rto-insider-about-us/>. See also Complaint at 1.

Operator, Inc., New York Independent System Operator, Inc., PJM Interconnection, L.L.C. (PJM), and Southwest Power Pool, Inc.⁴

B. Description of NEPOOL

3. NEPOOL is a private, voluntary association with nearly 500 members comprised of end-users and their designated representatives, generators, power marketers and aggregators, transmission owners and developers, municipal entities, natural gas providers, and a trader in renewable energy certificates.⁵ Although independent from ISO-NE, NEPOOL provides the primary stakeholder process for advisory input on ISO-NE proposals to revise the ISO-NE Transmission, Markets and Services Tariff (Tariff), related rules and practices, and ISO-NE Board selection, except for input from state regulatory authorities and as otherwise may be provided in the Tariff.⁶ NEPOOL conducts these functions through communications and negotiations with ISO-NE, state officials, regulators, and among NEPOOL members.⁷ Pursuant to the NEPOOL Agreement, all NEPOOL members or their designated representatives may attend every NEPOOL meeting and express views on any matter under consideration.⁸

II. Complaint

4. On August 31, 2018, RTO Insider filed the Complaint, requesting that the Commission 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.⁹ RTO Insider also requests that the Commission direct NEPOOL to cease and desist from imposing such a ban on press and

⁴ *About Us*, RTO Insider (last visited Feb. 19, 2019), <https://www.rtoinsider.com/rto-insider-about-us/>.

⁵ NEPOOL Answer at 3.

⁶ *Id.* at 2; Participants Agreement, section 8.1.3(c). The Participants Agreement is the agreement among ISO-NE and the NEPOOL Participants acting by and through the Participants Committee and the Individual Participants. *See* NEPOOL Agreement, section 1.64. The NEPOOL Agreement outlines the establishment of NEPOOL and contains its governance rules.

⁷ NEPOOL Answer at 2.

⁸ NEPOOL Agreement section 6.13.

⁹ The Complaint alleges that NEPOOL seeks to formalize an unwritten “press ban.” Complaint at 7.

public attendance.¹⁰ Specifically, RTO Insider claims that NEPOOL has 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.¹¹ RTO Insider states that ISO-NE is the only Regional Transmission Organization (RTO)/Independent Service Operator (ISO) with a press and public ban, and notes that NEPOOL has not explained why ISO-NE/NEPOOL are different from other RTOs/ISOs such that a press and public ban is warranted.¹²

5. RTO Insider asserts that NEPOOL's "ban" of the press and public violates ISO-NE's and NEPOOL's mission statements, which espouse transparency.¹³ RTO Insider further argues that NEPOOL's attendance policies violate Order No. 890's openness and transparency requirements.¹⁴ RTO Insider claims that ISO-NE's Planning Advisory Committee (PAC) must consult with NEPOOL's Reliability Committee on virtually all aspects of transmission planning, but that Reliability Committee meetings are closed to the press and public.¹⁵

6. RTO Insider claims that NEPOOL violated the NEPOOL Agreement and applied its membership criteria in a discriminatory manner by preventing Michael Kuser and RTO Insider from advocating for press access before the June 2018 NEPOOL Participants Committee meeting.¹⁶

7. RTO Insider contends that NEPOOL's attendance and reporting policies discriminate against smaller entities, potential new entrants, and otherwise eligible participants by raising the costs of attending meetings and preventing such entities from

¹⁰ *Id.* at 1.

¹¹ *Id.* at 7, 15-16.

¹² *Id.* at 7.

¹³ *Id.* at 8-9.

¹⁴ *Id.* at 10-11 (citing *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 123 FERC 61,120, *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) (Order No. 890)).

¹⁵ Complaint at 10-11.

¹⁶ *Id.* at 15-16.

obtaining information about NEPOOL meetings.¹⁷ RTO Insider argues that NEPOOL allows consultants to provide reporting services akin to those NEPOOL bars RTO Insider from providing. RTO Insider asserts that such entities benefit from NEPOOL's exclusion of RTO Insider from its meetings, rendering the practice unduly discriminatory. RTO Insider claims that NEPOOL's defense of the ban is conclusory, unsubstantiated, and belied by the experience of stakeholder processes in larger RTOs/ISOs such as PJM, whose operations remain open to the public.¹⁸

8. RTO Insider alleges that NEPOOL has vast privileges, powers, and subsidies that distinguish it from other RTO/ISO-related entities. Specifically, RTO Insider asserts that NEPOOL is the predominant provider of stakeholder input to ISO-NE and controls the stakeholder process, including changes to the ISO-NE Tariff, procedures, and manuals.¹⁹ RTO Insider also highlights NEPOOL's "jump ball" privileges, which 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.²⁰ RTO Insider adds that NEPOOL receives \$2.6 million annually from ISO-NE, NEPOOL members comprise nearly half of the nominating committee for the ISO-NE Board, NEPOOL controls ISO-NE's audits, and ISO-NE provides billing and collection services to NEPOOL.²¹

9. If the Commission finds that NEPOOL can justify its press and public ban because it is a "private" entity that is entitled to have closed, members-only meetings, then RTO Insider requests that the Commission direct NEPOOL to relinquish its special powers and privileges and that the resources ISO-NE devotes to NEPOOL should be transferred to an open stakeholder process within ISO-NE.²²

¹⁷ *Id.* at 11-15.

¹⁸ *Id.* at 16-21.

¹⁹ *Id.* at 3-4.

²⁰ *Id.* at 5-6. 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. 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." *See* ISO-NE, Participants Agreement, section 11.1.5.

²¹ Complaint at 6.

²² *Id.* at 21-22.

III. Related Proceedings

10. On August 13, 2018, in Docket No. ER18-2208-000, NEPOOL filed the NEPOOL Press Amendments, which proposed revisions to the NEPOOL Agreement to prevent press from becoming NEPOOL members or from being designated as representatives of NEPOOL members. On January 29, 2019, the Commission rejected those proposed revisions, finding that NEPOOL did not demonstrate that the NEPOOL Press Amendments were just and reasonable and not unduly discriminatory or preferential.²³

IV. Notice and Responsive Pleadings

11. Notice of the Complaint was published in the *Federal Register*, 83 Fed. Reg. 45,923 (2018), with interventions and comments due on or before September 20, 2018.²⁴

12. Timely motions to intervene were filed by Conservation Law Foundation; Earthjustice; Massachusetts Electric Company, Nantucket Electric Company, and Narragansett Electric Company; Natural Resources Defense Council and Sustainable FERC Project, jointly; New England States Committee on Electricity (NESCOE); New Hampshire Office of Consumer Advocate (NH Consumer Advocate); New York Transmission Owners;²⁵ Reporters Committee for Freedom of the Press (Reporters Committee); Public Citizen Inc. (Public Citizen); and William P. Short III. Comments were filed by Erik Abend; NH Consumer Advocate; Public Citizen; Public Interest Organizations;²⁶ Reporters Committee; and William P. Short.

13. On September 20, 2018, NEPOOL filed the Motion to Dismiss and an answer to the Complaint (NEPOOL Answer). On October 5, 2018, RTO Insider and Public Interest Organizations filed answers to the Motion to Dismiss and NEPOOL Answer

²³ *New England Power Pool Participants Committee*, 166 FERC ¶ 61,062 (2019).

²⁴ On September 12, 2018, the Commission denied NEPOOL's motion requesting an extension of time to respond to the Complaint.

²⁵ This group is comprised of: Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk d/b/a/ National Grid, Orange and Rockland Utilities, Inc., Power Supply Long Island, and Rochester Gas and Electric Corporation.

²⁶ This group is comprised of Conservation Law Foundation, Earthjustice, Natural Resources Defense Council, and Sustainable FERC Project.

(respectively, RTO Insider Answer and Public Interest Organizations Answer). On October 5, 2018, NEPOOL filed an answer to Public Interest Organizations and NH Consumer Advocate comments (NEPOOL Second Answer). On October 15, 2018, NEPOOL responded to the RTO Insider Answer (NEPOOL Third Answer).

A. NEPOOL Motion to Dismiss and Answer

1. Motion to Dismiss

14. NEPOOL asks the Commission to dismiss the Complaint because (1) the Commission lacks jurisdiction over NEPOOL's meeting policies; (2) RTO Insider lacks standing; and (3) the Complaint does not comply with Rule 206 of the Commission's Rules of Practice and Procedure²⁷ because it fails to establish a *prima facie* case.

15. First, NEPOOL asks the Commission to dismiss the Complaint on the grounds that the Commission's jurisdiction under the FPA does not extend to NEPOOL's meeting policies.²⁸ NEPOOL asserts that it is not a "public utility" because it does not participate in the transmission or sale of energy in interstate commerce or operate any facilities that do.²⁹ NEPOOL also argues that its press policies are not a "rate, charge, or classification" concerning "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."³⁰

16. NEPOOL adds that its meeting policies do not constitute rules, regulations, practices, or contracts affecting a jurisdictional rate, charge, or classification.³¹ Noting that the Commission's "affecting" jurisdiction "is limited to those methods or ways of doing things on the part of the utility that directly affect the rate or are closely related to the rate,"³² NEPOOL asserts that the conduct of its meetings is even further removed from jurisdictional rates than the Commission's actions related to CAISO's governing

²⁷ 18 C.F.R. § 385.206.

²⁸ NEPOOL Answer at 6.

²⁹ *Id.* at 7-8.

³⁰ *Id.* at 7-8 (citing 16 U.S.C. § 824(b)).

³¹ *Id.* at 8.

³² *Id.* at 8 (citing *California Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004) (*CAISO*)).

board selection process that were found to be beyond the Commission's jurisdiction.³³ NEPOOL contends that the Commission's assertion of jurisdiction over NEPOOL's meeting policies would lead to Commission overreach into granular aspects of private entities' operations.³⁴ NEPOOL asks the Commission to decline to expand its jurisdiction in this manner, as it has done in the past.³⁵

17. Second, NEPOOL asks the Commission to dismiss the Complaint because RTO Insider lacks standing to challenge NEPOOL policies prohibiting press and public attendance at and reporting on NEPOOL meetings.³⁶ NEPOOL notes that "any person" may file a complaint with the Commission but such person must demonstrate that they are "adversely affected" by the challenged rate or practice."³⁷ NEPOOL adds that these adverse effects "must be defined with a certain degree of specificity, and cannot be too speculative in nature" and that "mere allegations of a 'generally available grievance' that are not 'concrete and particularized' cannot establish standing."³⁸ NEPOOL argues that RTO Insider does not allege that it participates in the New England energy market as a market participant or end-use customer and that NEPOOL's alleged conduct does not create an adverse rate impact on RTO Insider.³⁹ NEPOOL also asserts that RTO Insider lacks prudential standing because RTO Insider's claimed interest falls outside "the zone of interests protected by the law invoked."⁴⁰

³³ *Id.* at 9 (citing *CAISO*, 372 F.3d at 404).

³⁴ NEPOOL Answer at 9.

³⁵ *Id.* at 10 (citing *Pacific Gas and Elec. Co.*, Notice Dismissing Complaint, Project No. 1962-113 ¶ 3 (July 25, 2005)).

³⁶ *Id.* at 10.

³⁷ *Id.* at 11 (citing 16 U.S.C. § 824d(a); 18 C.F.R. § 85.206).

³⁸ *Id.* at 11 (citing *R. Gordon Gooch v. Colonial Pipeline Co.*, 142 FERC ¶ 61,220, at P 13 (2013); *Delta Air Lines, Inc.*, 157 FERC ¶ 61,214 (2016)).

³⁹ NEPOOL Answer at 11. NEPOOL notes also that RTO Insider is headquartered in Potomac, Maryland. *Id.* at 11 (citing *About Us*, RTO Insider <https://www.rtoinsider.com/rto-insider-about-us/> (last visited Sep. 9, 2018)).

⁴⁰ *Id.* at 12 (citing *Green Island Power Auth.*, 577 F.3d 148, 158 (2nd Cir. 2009); *Trans-Alaska Pipeline Sys. Sohio Pipe Line Co.*, 35 FERC ¶ 61,425, 61,981 (1986)).

18. NEPOOL contends that RTO Insider also lacks standing to challenge NEPOOL's conduct with respect to Michael Kuser's membership application.⁴¹ NEPOOL notes that RTO Insider does not claim to have applied for membership itself, nor does it establish its eligibility for NEPOOL membership.⁴² NEPOOL argues that a party lodging a complaint "on his own behalf . . . can only represent his own interest in [a] proceeding," which Michael Kuser fails to do.⁴³ NEPOOL contends that RTO Insider cannot claim associational standing because it is a for-profit business that employs Michael Kuser as a reporter.⁴⁴

19. Third, NEPOOL asks the Commission to dismiss the Complaint because RTO Insider has failed to comply with Rule 206, which requires complainants to establish a *prima facie* case by "(1) clearly identify[ing] the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements; and (2) explain[ing] how the action or inaction violates the applicable statutory standards or regulatory requirements."⁴⁵ NEPOOL asserts that RTO Insider's allegations do not involve violation of any applicable statute or regulation.⁴⁶ With respect to the appendices attached to the Complaint, NEPOOL argues that they do not demonstrate undue discrimination, unlawful conduct, or any conduct concerning Commission-jurisdictional activities, contrary to Rule 206(b)(8)'s requirement that a complaint "[i]nclude all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to contracts and affidavits."⁴⁷

20. NEPOOL states that the Complaint does not assign a monetary value to the harm RTO Insider has allegedly sustained and only speculates as to the financial impact NEPOOL's meeting policies could have on New England energy consumers. Similarly,

⁴¹ *Id.* at 12.

⁴² *Id.* at 12.

⁴³ *Id.* at 12-13 (citing *City of Tacoma, Wash.*, 135 FERC ¶ 61,155, at P 27 (2011)).

⁴⁴ NEPOOL Answer at 13.

⁴⁵ *Id.* at 13 (citing 18 C.F.R. § 385.206(b)(1)-(2)).

⁴⁶ *Id.* at 14.

⁴⁷ *Id.* at 14 (citing 18 C.F.R. § 385.206(b)(8)).

NEPOOL argues that the Complaint fails to allege nonfinancial harm that the Commission could statutorily address.⁴⁸

2. Answer to RTO Insider Complaint

21. NEPOOL states that RTO Insider mischaracterizes NEPOOL meetings as secret meetings, and NEPOOL disputes that its meeting policies violate the public interest. NEPOOL states that it publicly posts the date, time, and location of its meetings on the NEPOOL and ISO-NE websites and circulates agendas and materials well in advance.⁴⁹ NEPOOL explains that every one of its nearly 500 members, including consumers and those who represent consumer interests, are entitled to attend the meeting in person or by phone.⁵⁰ NEPOOL states that members of the press may report on individual members' positions if those members wish to share their views publicly.⁵¹

22. NEPOOL argues that it does not discriminate against smaller entities because (1) these entities can obtain information from NEPOOL's website free of charge, (2) consumer positions are well-represented at NEPOOL meetings, and (3) end-users may join at a relatively lower cost and also may split the cost of attending by selecting voting representatives.⁵² NEPOOL states that all members can present their views either in writing, through representatives, or in person before issues are put to a vote. NEPOOL adds that it has a specific End User sector, which has an equal share in voting, providing for consumer and public interest perspectives in every vote.⁵³

23. NEPOOL claims that it does not discriminate against new entrants because, while it requires potential members to demonstrate a connection to the New England market, it

⁴⁸ *Id.* at 15.

⁴⁹ *Id.* at 18.

⁵⁰ NEPOOL Answer at 19-20, nn.59-62. NEPOOL states that it counts among its members more than 50 consumer-owned utilities, various public interest groups, and the offices of public advocates from Connecticut, Maine, Massachusetts, and New Hampshire. NEPOOL also notes that its meetings are attended by representatives of New England state public utility commissions, other public officials in person or through NESCOE, and state and federal policymakers, including Commission staff.

⁵¹ *Id.* at 21.

⁵² *Id.* at 23.

⁵³ *Id.* at 24.

recognizes developers' "proven efforts" to enter the market as sufficient for membership.⁵⁴

24. NEPOOL argues that, as the transmission provider, ISO-NE, not NEPOOL, is legally responsible for the "openness" and "transparency" principles contained in Order No. 890.⁵⁵ NEPOOL notes that, contrary to RTO-Insider's assertions about the role of the NEPOOL Reliability Committee and attendance at system planning meetings, ISO-NE's system planning is conducted by the ISO-NE PAC, not the NEPOOL Reliability Committee, and that ISO-NE PAC meetings are open to the press and the public.⁵⁶

25. NEPOOL asks the Commission to reject RTO Insider's request to eliminate NEPOOL's "special privileges, power, and subsidies" and impose an open stakeholder process on ISO-NE.⁵⁷ NEPOOL argues that this request is a collateral attack on the orders that established NEPOOL's role in ISO-NE and would result in more protracted litigation and serious harm to New England and its ability to come together on major Commission-jurisdictional initiatives.⁵⁸

26. NEPOOL refutes the assertion that its processing of Michael Kuser's membership application violated the NEPOOL Agreement, arguing that his application did not comply with the conditions placed upon membership by the Participants Committee.⁵⁹

B. Comments

27. Several commenters support the Complaint and request that the Commission direct NEPOOL to amend the Participants Agreement to allow members of the press and public to freely attend all stakeholder meetings and allow press coverage, as in other

⁵⁴ *Id.* at 25-26.

⁵⁵ *Id.* at 21-22, n.70 (citing Order No. 890, 123 FERC ¶ 61,120 at P 3: "[Order No. 890 requires] *transmission providers* to open their transmission planning process to customers, coordinate with customers regarding future system plans, and share necessary planning information with customers.").

⁵⁶ NEPOOL Answer at 22.

⁵⁷ *Id.* at 35 (quoting Complaint at 21-22).

⁵⁸ *Id.* at 36-37 (citing *ISO New England Inc.*, 106 FERC ¶ 61,280 (2014)).

⁵⁹ *Id.* at 28-29 (citing NEPOOL Agreement, section 3.1(a) (noting that membership is conditioned on "compliance with such reasonable conditions as the Participants Committee may prescribe"))).

RTOs/ISOs.⁶⁰ Public Citizen and NH Consumer Advocate argue that NEPOOL is not merely an advisory body because the Commission has authorized NEPOOL to control aspects of changes to the ISO-NE Tariff, including rights under the “jump ball” provision, authority over the ISO-NE budget, selection of the ISO-NE Board of Directors, and approval of ISO-NE auditors.⁶¹

28. Commenters suggest that NEPOOL’s current practices are discriminatory against smaller entities and new entrants because they exclude them from “insider privileges” and information.⁶² Commenters add that the meeting materials and minutes which NEPOOL posts publicly are “super-sanitized” and do not provide sufficient detail to capture deliberations or adequately substitute for attendance and/or membership, or alternatively, independent reporting of the meetings.⁶³

29. Commenters argue that the Commission should apply Order No. 719’s responsiveness principles to NEPOOL’s membership practices and policies, including the mandate that RTO/ISO processes be inclusive, fairly balance diverse interests, represent minority interests, and be responsive.⁶⁴ Public Interest Organizations contend that press coverage of such processes advances Order No. 719’s first responsiveness criterion, inclusiveness, by enhancing the transparency of RTO/ISO decision-making to the public and facilitating greater engagement with RTO/ISO decisions for those not present at stakeholder meetings.⁶⁵

⁶⁰ NH Consumer Advocate Comments at 2; Public Citizen Comments at 17; Public Interest Organizations Comments at 12.

⁶¹ NH Consumer Advocate Comments at 3-4; Public Citizen Comments at 12.

⁶² NH Consumer Advocate Comments at 12, 18; Public Citizen Comments at 3, 11, 14, 17; Public Interest Organizations Comments at 8.

⁶³ Public Citizen Comments at 13-15; Reporters Committee Comments at 6; Short Comments at 2.

⁶⁴ Public Citizen Comments at 10-11; Public Interest Organizations Comments at 6-7.

⁶⁵ Public Interest Organizations Comments at 8.

C. Answers**1. NEPOOL Second Answer**

30. NEPOOL contends that its policies do not justify re-litigation of the Commission's 2008 determination that the New England arrangements satisfy Order No. 719.⁶⁶ NEPOOL maintains that it is not the RTO/ISO and not subject to Order No. 719 and, as such, any reliance on Order No. 719 to change New England's governance procedures and stakeholder processes is misplaced.⁶⁷

2. RTO Insider Answer**a. Motion to Dismiss**

31. RTO Insider argues that the Motion to Dismiss is meritless because NEPOOL is a public utility and exclusion of the press and public from meetings is Commission-jurisdictional.⁶⁸ RTO Insider also asserts that the Commission has jurisdiction over NEPOOL's meeting policies as a practice affecting rates because *PJM Interconnection, L.L.C.* establishes that the stakeholder process directly affects wholesale rates, particularly with respect to transmission planning, which implicates NEPOOL's Reliability Committee.⁶⁹ RTO Insider contends that, even if the Commission could not rule directly on NEPOOL's meeting practices, the Commission could condition NEPOOL's continued existence as ISO-NE's primary stakeholder process upon its compliance with Commission directives because the Commission has authority to enforce jurisdictional tariffs such as the ISO-NE Tariff and the Participants Agreement.⁷⁰

32. RTO Insider further argues that NEPOOL's joint FPA section 205 filings with ISO-NE and "jump ball" rights render it a public utility because only public utilities may make such filings with the Commission.⁷¹ RTO Insider adds that the Commission has

⁶⁶ NEPOOL Second Answer, Appendix A at 4-7.

⁶⁷ *Id.* at 5-7.

⁶⁸ RTO Insider Answer at 9-14.

⁶⁹ *Id.* at 11-12 (citing *PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,229, at P 11 (2016) (*PJM*)).

⁷⁰ *Id.* at 13 (citing *Central Iowa Power Coop. v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979)).

⁷¹ *Id.* at 10 (citing *ISO New England Inc.*, 106 FERC ¶ 61,280, at PP 51-59 (2004); *ISO New England Inc.*, 109 FERC ¶ 61,147, at PP 26-29 (2004)).

previously made findings on NEPOOL governance, participation, and other matters when it accepted ISO-NE's RTO status.⁷² RTO Insider also disagrees with NEPOOL's claim that asserting jurisdiction over NEPOOL's meeting policies would precipitate "staggering" implications because opening NEPOOL's meetings to the press and public would put it on the same footing as all RTOs/ISOs.⁷³

33. RTO Insider contends that, even if RTO Insider does not have standing, other parties to the proceeding have standing, including NH Consumer Advocate and Public Interest Organizations. RTO Insider asserts that the standing of one party can sustain an action, even if the original party lacks standing.⁷⁴

34. RTO Insider claims that, contrary to NEPOOL's assertion, it quantified the financial impact it suffered by noting that it "has approximately 40 subscribers who are NEPOOL members and would benefit from its reporting on NEPOOL stakeholder meetings."⁷⁵ RTO Insider states that it would benefit from the increased value of its publication to existing subscribers by providing the same coverage it provides for all other RTOs/ISOs and could attract new subscribers.⁷⁶

b. Complaint

35. RTO Insider states that the public interest lies in transparency and releasing meeting notices and minutes is not sufficient to serve the public interest.⁷⁷ RTO Insider rejects NEPOOL's claim that RTO Insider filed the Complaint solely to advance its business interests and asserts that it filed the Complaint to uphold the integrity of the stakeholder process and public faith in energy markets.⁷⁸ RTO Insider states that NEPOOL ignores its role in transmission planning, arguing that ISO-NE's ultimate

⁷² *Id.* at 10-11.

⁷³ *Id.* at 13-14.

⁷⁴ RTO Insider Answer at 15 (citing *Ameren Services Co. v. FERC*, 893 F.3d 786, 791-92 (D.C. Cir. 2018)).

⁷⁵ *Id.* at 17 (citing Complaint at 14, n.36).

⁷⁶ *Id.* at 17.

⁷⁷ *Id.* at 22.

⁷⁸ *Id.* at 8-9.

responsibility for transmission planning is irrelevant, given NEPOOL's significant role in the process.⁷⁹

36. RTO Insider reiterates that, given the large number of NEPOOL meetings, press coverage would effectively split the cost of attending meetings among subscribers; banning the press denies this cost savings to smaller entities.⁸⁰ RTO Insider states that NEPOOL concedes that the ban discriminates against potential new entrants in the transmission, alternative resources, and public power sectors by confirming that membership in these sectors requires demonstrated activity in the New England market, which is anticompetitive.⁸¹ RTO Insider adds that, contrary to NEPOOL's assertion, NEPOOL essentially permits reporting by business consultants, who include non-public information from the stakeholder meetings in their disseminated content, contrary to NEPOOL's assertions.⁸²

37. RTO Insider also disagrees with the assertion that the alternative relief requested in the Complaint is a collateral attack on prior Commission orders.⁸³ RTO Insider notes that the Commission has not approved NEPOOL's press ban as part of the overall ISO-NE/NEPOOL governance/stakeholder structure, noting that two former Commissioners have stated that they were unaware of the press ban when approving the current structure.⁸⁴

3. Public Interest Organizations Answer

38. Public Interest Organizations ask the Commission to deny the Motion to Dismiss, grant the Complaint, and order NEPOOL to modify its bylaws to allow press access.⁸⁵ Public Interest Organizations contend that the Commission has jurisdiction over (1) the Complaint because the fairness and transparency of RTO/ISO stakeholder processes

⁷⁹ *Id.* at 25-27 (citing Order No. 890, 123 FERC ¶ 61,120).

⁸⁰ RTO Insider Answer at 27.

⁸¹ *Id.* at 27-30.

⁸² *Id.* at 30, 33.

⁸³ *Id.* at 43-44 (citing *Electric Cooperative v. PJM Interconnection, L.L.C.*, 164 FERC ¶ 61,116, at P 17 (2018)).

⁸⁴ *Id.* at 44-45.

⁸⁵ Public Interest Organizations Answer at 2, 12.

affect the justness and reasonableness of rates;⁸⁶ (2) the Participant's Agreement to the extent it falls within the Commission's FPA authority;⁸⁷ and (3) the conduct of NEPOOL meetings because the Commission may determine whether NEPOOL's policy of excluding the press from meetings fails to ensure just and reasonable rates.⁸⁸ Public Interest Organizations contend that NEPOOL's press ban is a practice affecting rates.⁸⁹ Public Interest Organizations further argue that NEPOOL's reliance upon *CAISO* is inapposite because, while corporate governance is *not* a practice affecting rates, the stakeholder process *is*, especially given NEPOOL's "jump ball" rights.⁹⁰ Public Interest Organizations also assert that RTO Insider is not required to demonstrate standing and that NEPOOL fails to support its restrictive view of standing with Commission precedent.⁹¹

39. Public Interest Organizations claim that media access to stakeholder discussion is critical to ensure that non-NEPOOL member ratepayers understand RTO/ISO activities and programs, arguing that the Commission should intervene when the process is opaque enough that it jeopardizes the legitimacy of the process and the ability of the stakeholder process to result in just and reasonable rates.⁹²

4. NEPOOL Third Answer

40. NEPOOL responds that *PJM*, which addressed a proposed cost recovery mechanism that "directly affected the wholesale rate," does not apply here because no jurisdictional rate is challenged or proposed. Specifically, NEPOOL argues that a public utility is not seeking to amend its tariff, no effort is being made to recover any costs associated with the stakeholder process, and the challenged practices do not directly affect jurisdictional rates or the outcome of jurisdictional practices.⁹³ NEPOOL adds that

⁸⁶ *Id.* at 1, 3, 8.

⁸⁷ *Id.* at 6.

⁸⁸ *Id.* at 1, 7.

⁸⁹ *Id.* at 3, 6.

⁹⁰ *Id.* at 5.

⁹¹ Public Interest Organizations Answer at 1, 7.

⁹² *Id.* at 4-5.

⁹³ NEPOOL Third Answer at 3 (citing *PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,229 at P 11).

the Complaint does not seek a change to the means by which stakeholder input is provided to ISO-NE nor relief from a specific charge.

41. NEPOOL adds that it does not fall under the Commission's jurisdiction as a public utility, pointing to the boilerplate language in joint NEPOOL/ISO-NE filings that explicitly states that only ISO-NE has FPA section 205 filing rights.⁹⁴ NEPOOL argues that RTO Insider's publication of an article concerning matters discussed and addressed at the October 4, 2018 NEPOOL Participants Committee Meeting indicates that its stakeholder meetings do not prevent participation and transparency.⁹⁵

V. Determination

A. Procedural Matters

42. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

43. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2018), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Discussion

44. For the reasons discussed below, we grant NEPOOL's Motion to Dismiss RTO Insider's Complaint.

45. Under FPA section 205, the Commission's jurisdiction 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 rules and regulations affecting or pertaining to" such rates.⁹⁶ This "affecting" jurisdiction is limited "to rules or practices that directly affect the wholesale rate."⁹⁷

⁹⁴ *Id.* at 3, n.12.

⁹⁵ *Id.* at 4.

⁹⁶ 16 U.S.C. § 824d(a).

⁹⁷ *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 774 (2016) (*EPISA*) (quotations omitted); *CAISO*, 372 F.3d at 403.

46. NEPOOL is not a public utility as defined by the FPA. As an organization, NEPOOL does not “own[] or operate[] facilities”⁹⁸ engaging in “the transmission of electric energy in interstate commerce” or “the sale of electric energy at wholesale in interstate commerce.”⁹⁹ As such, the Commission can exert jurisdiction over NEPOOL’s operations only insofar as they directly affect jurisdictional rates.¹⁰⁰

47. The Commission has stated previously 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.”¹⁰¹ However, that statement of jurisdiction necessarily is limited to aspects of an RTO/ISO stakeholder process that have a direct effect on jurisdictional rates.

48. In *New England Power Pool Participants Committee*, the Commission 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.¹⁰² However, 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. Only NEPOOL members may vote on proposed ISO-NE filings and NEPOOL-originated “jump ball” proposals. As nonmembers, the press and public could not vote on such proposals or speak in support or against such proposals even if they were to attend NEPOOL meetings. Therefore, 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.

49. Similarly, reporting on NEPOOL meetings lacks a direct effect on filings submitted to the Commission. While RTO Insider and commenters represent that press accounts of NEPOOL meetings could ease the burden of monitoring NEPOOL activities for smaller NEPOOL members or enable monitoring by prospective members, we are not convinced that easing the burden of monitoring these meetings can directly affect the

⁹⁸ 16 U.S.C. § 824(e).

⁹⁹ 16 U.S.C. § 824(b).

¹⁰⁰ *EPSA*, 136 S. Ct. at 774.

¹⁰¹ *New England Power Pool Participants Committee*, 166 FERC ¶ 61,062 at P 48. See *PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,229, at P 11 (2016) (citing *EPSA*, 136 S. Ct. at 774).

¹⁰² *New England Power Pool Participants Committee*, 166 FERC ¶ 61,062 at P 48.

outcome of NEPOOL proceedings. Even if reporting eases the burden of participating in NEPOOL, it does not enable participation; therefore, any effect it may have on jurisdictional rates is indirect.

50. We further find that NEPOOL's policies prohibiting press and public attendance at and reporting on NEPOOL stakeholder meetings are further removed from jurisdictional rates than the board selection practices at issue in *CAISO*, which the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) found did not directly affect jurisdictional rates. In *CAISO*, the D.C. Circuit expressed concern that such an expansive reading of the Commission's jurisdiction could effectively enable Commission scrutiny of an organization's "choice of CEO, COO, and the method of contracting for services, labor, office space, or whatever one might imagine, assuming [the Commission] made the appropriate finding."¹⁰³ Therefore, the D.C. Circuit found that the Commission lacked jurisdiction over the process by which CAISO selected its governing board.¹⁰⁴

51. Whereas the board selection practices under consideration in *CAISO* affected CAISO's governing decisions, here the contested NEPOOL policies do not reach that level of impact on ISO-NE decisions because they do not affect who may vote on NEPOOL proposals. Rather, the challenged NEPOOL policies here concern passive attendance at NEPOOL meetings by non-voting entities and dissemination of written accounts of NEPOOL deliberations. The contested attendance and reporting policies are too attenuated from NEPOOL's voting process to directly affect jurisdictional rates.

52. Accordingly, we grant NEPOOL's Motion to Dismiss and dismiss the Complaint.

The Commission orders:

The Complaint is hereby dismissed, as discussed in the body of this order.

By the Commission. Commissioner LaFleur is not participating.
Commissioner Glick is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁰³ *CAISO*, 372 F.3d at 403.

¹⁰⁴ *Id.* at 404.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

RTO Insider LLC

Docket No. EL18-196-000

v.

New England Power Pool Participants Committee

(Issued April 10, 2019)

GLICK, Commissioner, *concurring*:

1. Although 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 of public 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 with no 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 their 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.

For these reasons, I respectfully concur.

Richard Glick

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

Commissioner