

INCORPORATING ENVIRONMENTAL CONCERNS INTO WHOLESALE ELECTRIC MARKETS: THE IMPACT OF REGIONAL TRANSMISSION ORGANIZATION GOVERNANCE MODELS ON ENGO PARTICIPATION IN STAKEHOLDER PROCESSES (PART I)

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Synopsis: Regional Transmission Organizations (RTOs) operate the transmission grid and manage the electricity markets for more than 60% of the electricity supply in the United States. RTO governance combines independent board members with market participant stakeholders who together must navigate within sometimes blurred state and federal jurisdictional boundaries. RTO governance models vary between the seven RTOs serving North America. RTOs emerged two decades ago and were structured around creating open access and enhancing economic efficiency in the sale, purchase, and transmission of wholesale electricity. Environmental issues received different treatment during RTO formation compared to what they are afforded now. Given the historic and increasing importance of electricity production to achieving local, regional, and global environmental goals, RTO governance bodies are being asked to meet the challenge of expeditiously integrating low carbon and distributed resources into these market constructs. This challenge is creating tensions between federal and state policymakers and other stakeholders.

This, the first of two companion articles, examines RTO governance processes in the seven RTOs, the importance of RTOs in the transition to a low-carbon future, the value of including environmental non-governmental organizations (eNGOs) in RTO governance processes, and how RTOs integrate environmental interests into their governance processes. Our article focuses on eNGOs, who are not market participants with a market interest and represent environmental con-

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cerns that were considered and incorporated differently in the stakeholder processes when each of the RTOs were formed. We survey the historic and emerging role of eNGOs in the stakeholder process, the structures of each RTOs' governance process, each model's success in incorporating environmental interests in the decision making, and whether those structures have adapted over time to improve substantive and procedural access to key decisions for these stakeholders and their policy goals.

I. SECTION I

A. Introduction

RTO[1] stakeholder participation is "complicated, technical, and expensive,"[2] but participation is a necessary element of accountability. RTOs rely on stakeholders to hold the RTO accountable to its mission ensuring open access and facilitating efficient markets that serve the public interest. The term stakeholder is broader than market participant, it goes beyond those who have market interests to include all parties with an interest in the broader performance of the RTO. In fact, many RTOs intentionally differentiate between market participants and stakeholders and allocate rights and responsibilities to both groups. Since the number

1. We broadly use the term RTO to include both Regional Transmission Organizations and their counterpart, Independent System Operators (ISOs).

2. Michael H. Dworkin & Rachel A. Goldwasser, *Ensuring Consideration of the Public Interest in the Governance and Accountability of Regional Transmission Organizations*, 28 ENERGY L.J. 543, 583 (2023).

of affected stakeholders will exceed the number of market participants, stakeholder governance processes should include more parties than just those with a financial interest in the markets.

This article is the first half of a two-part effort focusing on the role of a particular stakeholder, eNGOs, in RTO stakeholder governance processes. eNGO participation in RTO stakeholder governance processes is not consistent across the seven RTOs. This article details the formal substantive and procedural participation rights of eNGOs in RTO governance processes in each RTO. The article compares the procedures for gaining access to the governance processes in each RTO. The companion article uses interviews with market stakeholders to discuss how those procedures are applied in practice and to develop recommendations for improving formal and informal participation opportunities. Section I explores the history or RTO governance, the challenges facing RTO stakeholder governance, and the unique role played by eNGOs in RTO stakeholder governance. Section II analyzes eNGO participation opportunities in each RTO's stakeholder governance process. Section III presents key comparisons between RTO stakeholder governance processes.

B. The Importance of RTO Stakeholder Governance Processes

The products of RTO stakeholder governance processes have economic and non-economic impacts. RTO decisions shape the makeup and ease of access to the regional grid, what type of resources are allowed to participate and the operating and market protocols that are critical to determining market outcomes. Recognizing these impacts and addressing them in a fair and non-discriminatory process is a key part of ensuring open access and creating market efficiency. Consistent stakeholder involvement is necessary to ensuring that all voices are heard and incorporated in a balanced process that supports broad public acceptance and accountability.

The responsibility to hold RTOs accountable in its mission to serve the public interest is a responsibility shared amongst many entities. RTOs deal with a public good, electricity which is imbued with the public interest.[3] Public interest is a broad term used across utility regulation to highlight that regulated markets have economic, social, and environmental impacts that should be weighed in governance processes. The question of course is who should then represent the public interest. Representing the public interest is not solely the purview of the government, of the state and local governments located within an RTOs' territory, and the RTO Board. The public interest has temporal and spatial elements that exceed the interests of governments and government officials; those elements that must

3. Munn v. Illinois, 94 U.S. 113, 125 (1876) (Regulation of industry in the public interest can be traced back to England. In the United States, *Munn v. Illinois* is a Supreme Court case upholding the power of governments to regulate private industries whose business is imbued with the public interest. The case forms the basis for the regulation of public utilities in the United States.); *see also* SCOTT HEMPLING, REGULATING PUBLIC UTILITY PERFORMANCE: THE LAW OF MARKET STRUCTURE, PRICING AND JURISDICTION 1-6 (2nd ed. 2021) (discussing purposes of regulatory law).

be integrated into and weighed by RTO governance processes. The ability to protect the public interest can also exceed the capacity of RTO boards.[4] To be effective, fair, and transparent, RTO governance processes should balance the interests of "direct participants in market transactions" with "the interest of those affected by, but not parties to, those sales and purchases."[5]

A diverse group of stakeholders is a benefit to an RTO. RTOs are voluntary organizations created under the Federal Energy Regulatory Commission's (FERC) guidance with powers derived from the Federal Power Act. Their legitimacy is gained by being accountable to stakeholders. Accountability is created by governance processes that are inclusive of affected parties and that are effective in delivering upon the RTO's mission. While participation in governance processes is important for accountability, it is only the initial step. Stakeholders must be able to effectively participate in the governance processes. Effective participation requires ensuring that barriers to participation are removed or minimized and that stakeholders can participate in all facets of the governance process and provide input into all aspects of RTO operations.

The services provided by an RTO are considerable. RTOs manage real-time and day ahead energy and ancillary service markets; monitor market participant actions; schedule transmission; plan for system upgrades and expansion; develop interconnection rules and managing the interconnection queue; and incentivizing investment in a reliable and efficient system. Moreover, they develop the rules for delivering these services. Subject to FERC approval, RTO governance processes are where decisions are made on market design, application of market rules, reforms to governance processes, how resources qualify to participate in the markets, how state and federal policies will be converted into market rules, and transmission system planning.

RTOs require constant stakeholder involvement to maintain their effectiveness. The RTOs are constantly responding to changing market dynamics; new state laws, regulations, and policies; new federal laws, regulations, and policies; and other exogeneous and internal pressures. Stakeholders, whether in an advisory role or as part of a shared governance structure, provide viewpoints and perspectives from inside and outside of the market. Capturing the views and perspectives of relevant stakeholders will produce fairer and more successful outcomes.[6] Capturing the views and perspectives of market and non-market participants expands the range of options considered, fosters ownership of outcomes, and reduces the likelihood of future conflict.[7]

eNGOs are critical to holding RTOs accountable to their mission. They represent an element of the public interest not provided by other stakeholders. As Dworkin and Goldwasser wrote, "Neither the states nor the federal government

4. Dworkin, *supra* note 2, at 548.

5. *Id.* at 547.

6. Donna Vogler, et al., *Stakeholder Analysis in Environmental and Conservation Planning*, 7 LESSONS IN CONSERVATION 7 (2017), https://www.amnh.org/content/download/158575/2593966/file/LinC7_Stakeholder%20Analysis.pdf.

7. *Id.*

have demonstrated the ability to hold these organizations accountable to the public."[8] eNGOs contribute expertise on the environmental and equity impacts of market rules and system planning. They can highlight unaddressed issues and present options for mitigating the impacts that may otherwise be absent from discussions. Lastly, eNGOs provide much needed social and cultural context and democratize the stakeholder governance process. Ensuring their effective participation has only grown in importance with an increasing and more urgent focus on a transition to a clean energy future.

C. The Value and Responsibility of RTOs

RTO energy markets have saved customers billions of dollars on their energy bills by improving the coordination and dispatch of an expanding definition of resources, while optimizing the use of available transmission capacity. Retrospective studies of the economic savings of individual RTOs top hundreds of millions and billions of dollars per year in savings in using markets operated on the principle of economic efficiency, allowing for the coordination and dispatch of the least-cost resource to meet energy demand while maintaining system reliability.[9] The growing interest for a more expansive RTO in the west, highlights how even regions at once skeptical of the benefits of broader organized markets, now appreciate the market efficiency benefits, particularly with the growing presence of intermittent renewable resources.

While RTOs have produced significant economic gains for market participants and utility customers, they are being asked to facilitate state environmental goals supported by growing federal incentives. The grid is transforming and will continue to transform as state and federal policies drive the construction of more renewable energy resources. The pressures on RTO markets to address state environmental policies and climate goals, to integrate more renewable energy resources, and to permit the participation of advanced energy technologies is increasing. The Energy Information Administration's Annual Energy Outlook 2023 forecasts that renewable energy generation resources will be the fastest growing source of electricity generation through 2050.[10] The growth in renewables will be driven by declining capital costs, by increasing state mandates for renewable energy procurement, and massive federal support contained the Inflation Reduction Act.[11] Renewable portfolio standards have been and continue to be a major driver of additions to renewable energy generation capacity; it is estimated that future

8. Dworkin, *supra* note 2, at 548.

9. Judy Chang et al., *Potential Benefits of a Regional Wholesale Power Market to North Carolina's Electricity Customers*, BRATTLE GROUP 6 (Apr. 2019), https://www.brattle.com/wp-content/uploads/2021/05/16092_nc_wholesale_power_market_whitepaper_april_2019_final.pdf (collecting retrospective studies performed by individual RTOs and utilities).

10. *Annual Energy Outlook AEO2023*, ENERGY INFO. ADMIN. 10 (Mar. 2023), https://www.eia.gov/outlooks/aeo/pdf/AEO2023_Narrative.pdf.

11. *Id.* at 5.

RPS demands will require approximately a 50% increase in renewable energy generation by 2030.[12] Annual additions of large-scale battery storage capacity have grown exponentially in the past decade and doubled in the past two years.[13] Much of that capacity was added in regions with RTOs.[14]

RTOs have been successful in efficiently incorporating renewable energy resources into their organized markets without compromising system reliability.[15] The challenge is how to continue the integration of greater volumes of renewable energy resources and how to accelerate the integration of the resources and technologies needed to manage resource intermittency.

D. The Need to Integrate Environmental Considerations into RTO Stakeholder Governance

RTOs are responsible for developing and administering the rules that determine how the markets operate, including what resources can participate in its markets. From their early days, RTOs have played a major role in the integration of renewable energy resources into the electricity grid. Large footprints combined with operational control of generator dispatch enabled them to manage the intermittent nature of renewable energy resources. Responsibility for preparing transmission plans shapes the future of the electricity grid. Now, RTOs are being pushed to account for the carbon emissions of the generation resources that participate in their markets and to reduce participation barriers for low-carbon and distributed energy resources.[16] Each obligations requires the active participation of stakeholder through RTO governance processes. Those processes seek advice and input from market participants, non-market participants, state agencies, and other stakeholders on proposed and finalized rule changes and relies on their involvement for successful adoption by FERC.

E. RTO and ISO Formation

RTOs operate the competitive wholesale energy markets that supply more than 60% of U.S. energy demand and plan for and operate, but do not own the transmission systems. In the United States, there are seven RTOs that operate the

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12. Galen Barbose, *U.S. Renewables Portfolio Standards 2019 Annual Status Update*, LAWRENCE BERKELEY NAT'L LAB'Y 15, 24 (July 2019), https://eta-publications.lbl.gov/sites/default/files/rps_annual_status_update-2019_edition.pdf.

13. *Battery Storage in the United States: An Update on Market Trends*, ENERGY INFO. ADMIN. 5 (Aug. 2021), https://www.eia.gov/analysis/studies/electricity/batterystorage/pdf/battery_storage_2021.

14. *Id.*

15. *See* Kassia Miscek, *Surge of renewable generation leads to numerous SPP records, drop in lower prices*, S&P GLOBAL (Gary Gentile ed., Mar. 30, 2022) https://www.spglobal.com/commodityinsights/es/market-insights/latest-news/electric-power/033022-surge-of-renewable-generation-leads-to-numerous-spp-records-drop-in-power-prices (In SPP, renewable energy supplied more than 90% of load at different times in March 29 and 30, 2022); *see also* Dharna Noor, *Solar helps Texas carry energy load as heatwave puts power grid to test*, THE GUARDIAN (June 28, 2023), https://www.theguardian.com/us-news/2023/jun/28/texas-heatwave-power-grid-solar-energy (In ERCOT, renewable generation levels have set records in the summer of 2023 and are credited with helping maintain grid reliability during periods of extreme heat).

16. *See, e.g.*, *Carbon Pricing in Wholesale Energy Markets: Frequently Asked Questions*, NYISO (Apr. 16, 2020), https://www.nyiso.com/-/carbon-pricing-in-wholesale-energy-markets-frequently-asked-questions (NYISO's discussion on implementing carbon pricing).

competitive markets.[17] Of these seven RTOs, only Electricity Reliability Council of Texas ISO (ERCOT) comes under FERC's jurisdiction. Independent System Operators emerged from FERC Order 888, which was issued in 1996. FERC Order 2000, issued in 1999, led to the creation of Regional Transmission Organizations.[18] ERCOT become an independent system operator subject to Texas' jurisdiction in 1996.[19]

The unique history of each RTO is visible in their governance structures. Current compositions of stakeholder groups reflect who was a market participant when the RTO formed, and who has entered the marketplace since the RTO commenced operations. Many RTOs and ISOs trace their historical origins to tight power pools that coordinated dispatch and shared generation resources amongst member utilities.[20] Incumbency is a strong factor in determining the current composition of the stakeholders.[21] For example, a significant concentration of coal-fired generation in the Midwest RTOs (MISO, SPP, and PJM) is reflected in the composition of the stakeholder groups in those RTOs. State mandated divestiture of generation assets has also had a significant impact on the number and type of stakeholders in an RTO. Incumbency and historical development also affect the division of stakeholders into different groups and the allocation of voting rights. For example, ISO-NE has six stakeholder groups of which only the Alternative Resources group was added during the formation of the RTO.[22] The other five stakeholder groups pre-date the formation of the RTO and connect back to the operation of the New England Power Pool.[23] Many of the RTOs have extensive operations histories before becoming an ISO or RTO and that influences the current state of governance processes.[24] NYISO, CAISO, and ERCOT are contained

17. The seven RTOs and ISOs discussed in the article are the Independent System Operator of New England (ISO-NE), the New York Independent System Operator (NYISO), the PJM Interconnection LLC (PJM), the Midcontinent Independent System Operator (MISO), the Southwest Power Pool (SPP), the California Independent System Operator (CAISO), and the Electricity Reliability Council of Texas (ERCOT).

18. *Regional Transmission Organizations*, 89 FERC ¶ 61,285 (1999) (The NYISO and CAISO ultimately chose not to pursue FERC approval to transform their ISO into an RTO. For the purposes of this article the distinction between RTOs and ISOs is not important).

19. *ERCOT Organization Backgrounder*, ERCOT http://www.ercot.com/news/mediakit/backgrounder (last visited July 23, 2023).

20. *See, e.g.*, Jim Lazar, *Electricity Regulation In the US: A Guide*, THE REGUL. ASSISTANCE PROJECT 21 (2d ed. 2016), https://www.raponline.org/knowledge-center/electricity-regulation-in-the-us-a-guide-2/; *see also* W.M. Warwick, *A Primer on Electric Utilities, Deregulation, and Restructuring of U.S. Electricity Markets*, U.S. DEP'T OF ENERGY 45-46 (May 2002), https://www.pnnl.gov/main/publications/external/technical_reports/PNNL-13906.pdf (The New England Power Pool, the New York Power Pool, and the PJM Power Pool are the precursors to ISO-NE, NYISO, and PJM).

21. *See, e.g.*, Ari Peskoe, *Is the Utility Transmission Syndicate Forever?*, 42 ENERGY L.J. 1, 29-57 (May 5, 2021) (discussing on the development of transmission planning in RTOs and the power of incumbency); *see generally Electric Power Markets*, FERC, https://www.ferc.gov/electric-power-markets (last visited July 18, 2023) (discussing history on the development of the different power markets).

22. *Order Granting RTO Status Subject to Fulfillment of Requirements and Establishing Hearing and Settlement Judge Procedures*, 106 FERC ¶ 61,280 at P 54 (requiring addition of sixth sector to stakeholder governance structure).

23. *Id.* (acknowledging proposed transfer of NEPOOL's stakeholder governance structure).

24. *See, e.g.*, *NEPOOL's Evolution*, NEW ENG. POWER POOL, https://nepool.com/about-nepool/ (last visited on July 23, 2023) (the New England Power Pool was formed in 1971); *see also PJM History*, PJM, https://www.pjm.com/about-pjm/who-we-are/pjm-history (last visited on July 23, 2023) (PJM began in 1927);

within the borders of a single state which creates a different dynamic for addressing state government policy than is available to the multi-state RTOs.[25]

F. RTO Governance Models

There is no single model for RTO governance. RTOs are either single state entities (NYISO, ERCOT, or CAISO) or multi-state organizations (ISO-NE, PJM, MISO, and SPP).[26] Six of the seven RTOs are under FERC jurisdiction, while ERCOT operates outside of FERC jurisdiction.[27]

The RTOs operate under a unique governance model that combines stakeholders with an independent board. The governance model differs between RTOs, but it can be divided into two main models: shared governance and advisory-only. In the shared governance model, RTO stakeholders and the independent Board have shared governance where both the independent board and stakeholders must approve a proposal before it goes to FERC for standard review and approval.[28] Under the advisory-only process, stakeholders provide input into the development of proposals, but the RTO board can independently file a proposal for standard review by FERC.[29] For the FERC regulated RTOs, PJM and NYISO have a shared governance model, where FERC filing rights are shared between stakeholders and the independent board.[30] ISO-NE, MISO, SPP, and CAISO reserve filings rights to the independent board.[31]

G. Environmental Pressures from States, FERC, and RTOs

The electrical grid is on the precipice of a massive change to accommodate the transition to a clean energy system. The physical, economic, social, and environmental threat of climate change is imposing new conditions on our energy systems that are reshaping what resources will supply our energy needs. Pressures on the RTOs to address these threats are coming from state governments, FERC, market participants and stakeholders. Each party seeks to define and shape the role of the RTO in the energy transition.

State environmental policies and energy procurement mandates are a major driver in the energy transition and a major source of pressure on RTOs. In October 2020, five of the six New England governors officially announced their support for reforming ISO-NE's electricity markets and governance to accelerate climate

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see also Introduction to NYISO, N.Y. INDEP. SYS. OPERATOR, https://www.nyiso.com/documents/20142/3037451/Introduction-to-NYISO.pdf/f7ad7e5c-65e9-635a-0aee-62709c33c412 (last visited July 23, 2023) (the New York Power Pool was formed in 1966); *see also About Us*, SW. POWER POOL, https://www.spp.org/about-us (last visited July 23, 2023) (SPP was formed in 1941).

25. *The ISO Grid*, CAL. INDEP. SYS. OPERATOR, http://www.caiso.com/about/Pages/OurBusiness/The-ISO-grid.aspx (last visited August 16, 2023) (CAISO's operations do extend into a small part of Nevada).

26. *See* Lazar, *supra* note 20, at 22.

27. *Id.*

28. Jennifer Gardner, *RTO Stakeholder Process: Principle & Best Practices*, W. RES. ADVOC. 5 (Mar. 11, 2019), https://www.westerneim.com/Documents/Presentation-GovernancePanel-WRA.pdf.

29. *Id.* (Under this model, technically speaking, the section 205 filing rights at FERC are shared, while in the advisory-only model, the board unilaterally has section 205 filing rights).

30. *Id.*

31. *Id.*

change mitigation efforts.[32] The states sought alignment of the regional competitive energy markets with state decarbonization goals.[33] In their letter, the governors noted that the current market design does not recognize the full value of "State's ratepayer-funded investments in clean energy resources"; that the RTO "lacks a proactive transmission planning approach" that will facilitate the development and connection of "clean, dynamic, and distributed resources"; and that the governance structure is not transparent to the states and customers it serves and its mission is not responsive to the states' legal mandates and policy priorities.[34] While states can assert their request for market reforms, they are limited in their ability to introduce programs to achieve their decarbonization goals.[35] In *Hughes v. Talen*, the Supreme Court invalidated a Maryland proposal to compensate new generation resources because it directly interfered with the setting of wholesale electricity prices, a power exclusively reserved to FERC by the Federal Power Act.[36]

FERC itself is putting pressures on RTOs to respond to environmental issues. FERC has the authority to initiate proceedings on its own recognizance and to respond to issues brought before it by stakeholders.[37] In recent years, FERC has used its powers to issue orders on battery storage, distributed resources, and demand response that required the RTOs to adjust their market rules.[38] In April 2021, FERC issued a policy statement that it would make a situation-specific determination if wholesale market rules incorporating a state-established carbon price would fall under FERC's section 205 authority.[39] FERC has also evaluated proposals from RTOs that would affect the ability of renewable energy generation resources to participate in energy markets. For example, FERC's consideration of a minimum offer price rule (MOPR) for new generation resources in ISO-NE, NYISO, and PJM directly addresses market participation rules for renewables.[40]

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32. *New England's Regional Wholesale Electricity Markets and Organizational Structures Must Evolve for 21st Century Clean Energy Future*, NEW ENG. STATES COMM. ON ELEC. 1 (Oct. 4, 2020), http://nescoe.com/wp-content/uploads/2020/10/Electricity_System_Reform_GovStatement_14Oct2020.pdf.

33. *Id.*

34. *Id.* at 2.

35. Hughes v. Talen Energy Mktg., LLC, 578 U.S. 150, 162-63 (2016).

36. *Id. at 166.*

37. 16 U.S.C. § 824e(a).

38. Notice of Proposed Rulemaking, *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 172 FERC STATS & REGS. ¶ 61,247, 85 Fed. Reg. 68,450 (2020); Order on Rehearing and Clarification, *Demand Response Compensation in Organized Wholesale Energy Markets*, 134 FERC ¶ 61,187 at P 2, 76 Fed. Reg. 16,658 (2011); Notice of Proposed Rulemaking, *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 157 FERC ¶ 61,121, 81 Fed. Reg. 86522 (2016); Notice of Proposed Rulemaking, *Reform of Generator Interconnection Procedures and Agreements*, 157 FERC ¶ 61,212, 81 Fed. Reg. 4464 (2018).

39. Notice of Proposed Policy, *Carbon Pricing in Wholesale Electricity Markets*, 173 FERC ¶ 61,062 at P 4-6, 85 Fed. Reg. 66965 (2020).

40. *Order Accepting Tariff Revisions Subject to Condition,* 179 FERC ¶ 61,102 at P 10 (2022); *Letter to FERC on PJM Interconnection L.L.C., Docket No. ER21-2582-000 Revisions to Application of Minimum Offer Price Rule*, PJM 7 (July 30, 2021), https://www.pjm.com/directory/etariff/FercDockets/6239/20210730-er21-2582-000.pdf; *PJM MOPR Proposal Takes Effect by Notice of FERC*, PJM INSIDE LINES (Sept. 30, 2021), https://insidelines.pjm.com/pjm-mopr-proposal-takes-effect-by-notice-of-ferc/.

FERC's authority to modify an RTO's section 205 filing is limited. When issuing orders to address emerging issues, FERC provides broad guidance and instructions that each RTO must comply with as it develops specific changes to its tariffs and/or market rules. RTOs then develop and submit proposals to FERC for its approval. FERC is limited in its ability to modify RTO proposals filed under section 205. The U.S. Court of Appeals for the District of Columbia found that when FERC reviews a section 205 filing it may not "transform the proposal into an entirely new rate of FERC's own making."[41] The ruling increases the emphasis on the filings emerging from the stakeholder governance process. Section 205 puts FERC in a "passive and reactive role" with limited options beyond accepting or rejecting proposals filed by utilities or RTOs.[42] FERC does not have the authority "to impose a new rate scheme of its own making without the consent of the utility" or RTO that filed the original proposal.[43] FERC can propose modifications to a utility's proposal if it receives the consent of the utility, but that power is limited too.[44] FERC's proposal cannot involve its "own original notion of a new form of rate" or an "entirely new rate scheme."[45] FERC cannot suggest "modifications that result in an 'entirely different rate design' than the utility's original proposal or the utility's prior rate scheme."[46]

RTO stakeholders and market participants have been calling for changes to RTO practices. Some stakeholders have been seeking to improve environmental outcomes and RTO markets often clash with stakeholders who are challenging RTO efforts to address environmental pressures. Two examples highlight the conflicting interests that RTOs must balance. Stakeholders and environmental advocates have called for action to resolve uneconomic dispatch practices of coal plants by vertically integrated utilities in MISO.[47] The stakeholders argue that using a "must run" status has enabled uneconomic dispatch which costs consumers hundreds of millions of dollars while providing a financial lifeline to aging coal plants.[48] The problem of uneconomic dispatch has been acknowledged by MISO's external market monitor and SPP's internal market monitor who have both issued reports on the problematic nature of self-commitment of coal generation by vertically utilities and their impact on price formation and market efficiency.[49] In a

41. NRG Power Mktg., LLC v. FERC, 862 F.3d 108, 110 (D.C. Cir. 2017).

42. Advanced Energy Mgmt. All. v. FERC, 860 F.3d 656, 656, 662 (D.C. Cir. 2017).

43. *NRG*, 862 F.3d at 109.

44. *Id.* at 114.

45. City of Winnfield v. FERC, 744 F.2d 871, 875-76 (D.C. Cir. 1984).

46. *NRG*, 862 F.3d at 109; W. Res., Inc, v. FERC, 9 F.3d 1568, 1568 (D.C. Cir. 1993).

47. Catherine Morehouse, *MISO: Majority of coal is self-committed, 12% was economic over 3-year period*, UTIL. DIVE (May 7, 2020), https://www.utilitydive.com/news/miso-majority-of-coal-is-self-committed-12-was-uneconomic-over-3-year-pe/577508/.

48. Jeremy Fisher et al., *Playing With Other People's Money: How Non-Economic Coal Operations Distort Energy Markets*, SIERRA CLUB (Oct. 2019), https://www.sierraclub.org/sites/www.sierraclub.org/files/Other%20Peoples%20Money%20Non-Economic%20Dispatch%20Paper%20Oct%202019.pdf; Joseph Daniel, *The Coal Bailout Nobody is Talking About*, THE EQUATION – UNION OF CONCERNED SCIENTISTS (Sept. 2018), https://blog.ucsusa.org/joseph-daniel/the-coal-bailout-nobody-is-talking-about.

49. Catherine Morehouse, *MISO integrated utilities lost $492M from 2016-2019 via uneconomic coal dispatch: Market Monitor*, UTIL. DIVE (Oct. 2020), https://cdn.misoenergy.org/20201008%20MSC%20Item%2004%20IMM%20Coal%20Dispatch%20Study481336.pdf.; *A Review*

separate proceeding, another MISO market participant filed a complaint with FERC seeking a ruling that MISO's tariff discriminates against demand response providers.[50] Two NYISO market participants filed a complaint against NYISO with FERC seeking an order declaring the minimum price offer floor rules are unjust, unreasonable, and unduly discriminatory and establishing a just and reasonable replacement rate.[51]

H. Issues Within the RTO Stakeholder Governance Process

RTOs are a significant focus of the pressures for states, FERC, and market participants and other stakeholders. An RTO's control over market rules, generator interconnection, transmission system planning, operational control and dispatch of resources makes it the critical player in efforts to integrate renewables and distributed energy resources into the electrical grid. The control also attracts pressure from states, FERC, market participants, and other stakeholders to adapt and change in response to different and sometimes competing goals and objectives.

In the past couple of years, research on the effectiveness of RTO stakeholder governance processes has identified concerns with the ability of RTOs to resolve complex issues. James et al. reported on the concerns of stakeholders that governance processes were affected by growing tension between incumbents and new entrants to the markets, the influence of the principal-agent relationship between RTO staff and RTO board members, the willingness to pursue short-term fixes over long-term solutions, and the rigid composition of stakeholder voting sectors as the profile of the market participants has changed.[52] Simeone highlighted mounting issues in PJM that the stakeholder governance processes were having in adapting to drivers of change - flat load growth, increasing renewable energy supply mandates, growth of financial transmission rates trade volumes, low priced natural gas, and capacity market design controversies.[53] PJM has been challenged to effectively address issues important to the economic viability of incumbent and new entrant market participants, the balance of power between stakeholders, and the allocation of financial costs and benefits.[54] A study of PJM stakeholder voting patterns by Yoo identified strong coalitions and pivotal voters that, when working

of the Commitment and Dispatch of Coal Generators in MISO, POTOMAC ECON. (Sept. 2020), https://www.potomaceconomics.com/wp-content/uploads/2020/09/Coal-Dispatch-Study_9-30-20.pdf.

50. Michael Phillis, *FERC Told Its Power Demand Rule Limits Market Access*, LAW 360 (Oct. 2020), https://www.law360.com/energy/articles/1321631/ferc-told-its-power-demand-rule-limits-market-access; Combined Notice of Filings, *Voltus, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 85 Fed. Reg. 68,867 (2020).

51. Catherine Morehouse, *Gas generators ask FERC to apply PJM MOPR logic to NYISO*, UTIL. DIVE (Oct. 2020), https://www.utilitydive.com/news/gas-generators-ask-ferc-to-apply-pjm-mopr-logic-to-nyiso/587138/; Notice, *Cricket Valley Energy Center, LLC. v. N.Y. Indep. Sys. Operator, Inc.*, 85 Fed. Reg. 66,964 (2020).

52. Mark James et al., *How the RTO Stakeholder Process Affects Market* Efficiency, R STREET (Oct. 5, 2017), https://www.rstreet.org/research/how-the-rto-stakeholder-process-affects-market-efficiency/ [hereinafter R STREET].

53. Christina Simeone, *PJM Governance: Can Reforms Improve Outcomes*, KLEINMAN CTR. FOR ENERGY POL'Y 16 (May 9, 2017), https://kleinmanenergy.upenn.edu/research/publications/pjm-governance-can-reforms-improve-outcomes/.

54. *Id.* at 31.

in concert under PJM's sector-weighted voting rules, could limit the ability of the governance process to pass reforms to market rules or operational rules.[55] Relatedly, Yoo and Blumsack modeled how decision processes for establishing RTO market rules can materially affect market outcomes and investment incentives, such as capacity market reforms.[56]

With markets tasked to address environmental issues with economic and non-economic impacts, there is value in exploring how environmental advocates participate in today's governance process as well as options for enhancing effective participation. The remainder of this article analyzes the substantive and procedural rights afforded to eNGOs to contribute their perspective in each RTO's tariff and governing documents.

II. SECTION II

A. RTO eNGO Participation

1. NYISO

NYISO is a single state ISO operating in New York State.[57] NYISO's three membership categories are market participants, non-market participants and non-voting entities.[58] eNGOs, consumer advocacy organizations, and government agencies fall into the non-market participant category.[59] As of July 2023, there are twenty-seven generation owner members, thirty-five other supplier members, fourteen end use consumers members, nineteen public power and environmental party members (six of which are environmental), and fifty-two non-voting entity members.[60]

NYISO employs a shared governance model where stakeholders vote to advance proposed rule changes to the board.[61] Market rule changes must be approved by 58% of stakeholders before the rule can be advanced to the board of

55. Kyungjin Yoo, *Voting Behavior in PJM Regional Transmission Organization*, PA STATE UNIV. 9 (June 2016), https://usaee.org/aws/USAEE/asset_manager/get_file/527966?ver=0.

56. Seth Blumsack & Kyungjin Yoo, *RTO Governance Structures can Affect Capacity Market Outcomes,* 53RD HAW. INT'L CONF. ON SYS. SCI. 3091 (2020) (In general Yoo and Blumsack found that the current voting system had difficulty passing market rule changes for contentious issues like capacity market reform. The material effects included failure to pass rules which would reduce capacity market prices and lower PJM's installed capacity margin).

57. *Frequently Asked Questions*, NYISO, https://www.nyiso.com/faq (last visited Sept. 11, 2023).

58. *New York Independent System Operator Agreements*, NYISO § 2.02 (Mar. 5, 2013), https://www.nyiso.com/documents/20142/1399438/iso-agreement.pdf/67c82172-de39-f855-c29e-e04e32e81285?t=1553789716713 [hereinafter *NYISO Agreements*].

59. *Id.*

60. *2023 Parties to the Agreement*, NYISO (2023), https://www.nyiso.com/documents/20142/1408883/2023-Committee-Membership-Roster.pdf/6311ae12-4032-f75c-821b-78d056788505.

61. *Shared Governance: How Our Stakeholders Have a Voice in Shaping the Electric Grid*, NYISO (Mar. 27, 2019), https://www.nyiso.com/-/shared-governance-how-the-new-york-iso-gives-stakeholders-a-voice-in-shaping-the-future-of-the-electric-grid.

directors.[62] Vote allocations are preserved for each committee.[63] The three committees that Members can join are the Management Committee, Operating Committee, and Business Issues Committee.[64] NYISO has a weighted-sector voting system in each of its committees.[65] Generation Owners receive 21.5% of the vote, Transmission Owners receive 20%, End-Use Consumers receive 20%, Other Suppliers receive 21.5%, and Public Power and Environmental Parties receive 17%.[66] Work is done at the committee level and through associated subcommittees and working groups.[67] Sector-weighted voting is limited to votes taken in committee as the subcommittees and working groups work by consensus.[68] Governance sector members in each committee include generation owners, other suppliers, transmission owners, public power and environmental parties, end-use consumers, and non-voting entities.[69]

There are two formal participation opportunities for eNGOs in NYISO's governance process. First, an eNGO can become a governance sector member in the public power and environmental parties group, but the eNGO must be certified by the NYISO Board of Directors[70] and pay a $100 annual fee.[71] Most members must pay an annual fee of $5,000; however, that fee is reduced for small consumers and not-for-profit organizations, which only pay $100 annually.[72] The Public Power and Environmental Parties sector holds 17% of the stakeholder votes. However, eNGOs can only receive 2% of the total votes in each committee and that vote percentage is capped at 2% even when other members of the sector are not exercising their full voting rights.[73] State Public Power Authorities and Municipal Electric Systems and Cooperatively Owned Electric Systems of the Public Power and Environmental Parties groups receive 8% and 7% of the allocated voting rights.[74] Each committee is supposed to meet monthly where an eNGO may "request that additional or supplemental information or documentation be disseminated by ISO personnel and/or through ISO communications media, including, but not limited to, the ISO site on the world wide web."[75] The Management Committee, which includes representatives from each market sector, is responsible for searching for and recommending potential directors to the Board.[76] The second way an eNGO can participate in the process is by becoming a non-voting entity

62. *NYISO Agreements*, *supra* note 58, § 7.10.
63. *Id.* §§ 8.03, 9.
64. *Id.* § 4.
65. *Id.* § 7.06.
66. *NYISO Agreements*, *supra* note 58, §§ 7.06(a), 8.03, 9.02.
67. *Id.* § 4.
68. *Id.* § 2.02.
69. *Id.* §§ 7.04, 8.03, 9.02.
70. *NYISO Agreements*, *supra* note 58, § 2.02.
71. *Id*.
72. *Id*.
73. *NYISO Agreements*, *supra* note 58, §§ 7.06(e)(iii), 8.03, 9.02.
74. *Id*.
75. *NYISO Agreements*, *supra* note 58, §§ 7.11, 8.03, 9.02.
76. *Bylaws of the New York Independent System Operator, Inc., art. III, section 2* (2017), https://www.nyiso.com/documents/20142/1399438/By_Laws_NYISO_2017.pdf.

member.[77] These members can still join committees, take part in committee meetings, and present issues to the committees, but they have no voting rights.[78] A non-voting entity member still pays $100 annual fee and must "have a significant interest in a sector but do not qualify for membership in that sector or qualify for membership in a sector but choose not to join that sector."[79] Non-members are allowed to attend committee meetings, but not allowed to participate.[80]

The final informal opportunity for an eNGO to participate in the NYISO governance process is through the Environmental Advisory Council (EAC) of NYISO.[81] The EAC, which was formed in 2005, consists of ten members who advise the President of NYISO on the environmental implications of NYISO activities.[82] In NYISO, membership on the EAC is done by invitation only, with members invited to join because of their experience working on issues that cut across the environment and the energy industry.[83] The EAC is not a body that represents stakeholders; it is a body that continues to provide advice to NYISO.[84] eNGOs and other public interest groups can attend meetings, but they do not have guaranteed slots on the EAC.[85] NYISO's EAC provides advice to the President of NYISO on specific issues raised by the ISO.[86] EAC's purpose is to "provide guidance, as requested, on identifying, evaluating and remedying, as necessary, the environmental implications of existing or planned activities regarding: market design; system operations and reliability; electric system planning; strategic planning; and such other initiatives as may arise."[87] The EAC holds bi-annual meetings which are open to market participants and non-market participants like state agencies may also participate in meetings.[88] EAC meetings are split between closed sessions and open sessions where members of the public can attend and participate.[89] In NYISO, EAC meetings are attended by staff and by a member of the Board of Directors, which telegraphs to the staff that this is a body supported by the board and that the information and discussions generated by the EAC are

77. *NYISO Agreements*, *supra* note 58, § 2.02.

78. *Id*.

79. *Id*.

80. *Bylaws of The Business Issue Committee of the New York Independent System Operator*, NYISO § 4.16 (2017), https://www.nyiso.com/documents/20142/1399438/By_Laws_NYISO_2017.pdf.

81. *Environmental Advisory Council Charter*, NYISO (2017), https://www.nyiso.com/documents/20142/1397146/EAC-Charter.pdf [hereinafter *NYISO EACC*].

82. *Id*.

83. *How Our Environmental Advisory Council Adds a Clean Perspective to NYISO Decisions*, NYISO BLOG (Nov. 17, 2021), https://www.nyiso.com/-/how-our-environmental-advisory-council-adds-a-clean-perspective-to-nyiso-decisions [hereinafter NYISO BLOG].

84. *NYISO EACC*, *supra* note 81.

85. *Role of the Environmental Advisory Council*, NYISO, https://www.nyiso.com/documents/20142/1397146/role_env_council.pdf. (Last visited Sept. 22, 2023) [hereinafter *NYISO REAC*].

86. *Id*.

87. *Environmental Advisory Council Mission Statement*, NYISO, https://www.nyiso.com/documents/20142/1397146/mission_statement.pdf/95d2df75-9a90-9dca-8316-18b518e710ce?t=1539227065217 (last visited Sept. 22, 2023).

88. *NYISO REAC*, *supra* note 85.

89. *Id*.

valuable to the board.[90] The General Counsel of the ISO also participates in EAC meetings which reinforces the importance of the discussions.[91] In NYISO, EAC agendas are developed by the ISO often with experts brought in to educate EAC members and to facilitate deeper discussions.[92]

2. PJM

PJM is a multi-state RTO operating in thirteen states and the District of Columbia.[93] PJM, like NYISO, uses the shared governance model where market rule changes must receive stakeholder or member approval before the rules are presented to a board of managers.[94] Rules are developed and flow through PJM's committee structure. There are Senior Standing Committees, Standing Committees, and subcommittees and task forces under each Standing Committee.[95] The two Senior Standing Committees are the Members Committee and the Markets and Reliability Committee, which reports to the Members Committee.[96] The three Standing Committees are the Operating Committee, the Planning Committee, and the Markets Implementation Committee.[97] In total, there are more than forty-five committees, subcommittees, taskforces, and forums.[98]

The Senior Standing Committees (Members Committee and the Markets and Reliability Committee) consist of five sectors: Generation Owners, Other Suppliers, Transmission Owners, Electric Distributors, and End-Use Customers.[99] Each Voting in these committees shall have one vote.[100] Each Member can appoint a representative to represent that Member in the Standing Committees as well as three alternate representatives.[101] For the Members Committee, quorum is meet when a majority of the Voting Members from each of at least three sectors are present, but if a sector has more than twenty Voting Members only ten Voting Members need to be present.[102] Quorum is only needed for the Members Committee.[103] In the Senior Standing Committees, each sector receives one vote and each Voting Member receives one vote within the sector.[104] To pass a pending motion in the Senior Standing Committees, the sum of affirmative sector votes

90. NYISO BLOG, *supra* note 83, at 2.

91. *Id*.

92. *Id*.

93. *About PJM: Who We Are*, PJM 1, https://www.pjm.com/about-pjm (last visited Sep. 16, 2023).

94. R STREET, *supra* note 52, at 4.

95. *PJM Manual 34: PJM Stakeholder Process*, PJM § 5.1 (Jan. 25, 2023), https://www.pjm.com/~/media/documents/manuals/m34.ashx [hereinafter *PJM Manual*].

96. *Id*.

97. *Id*.

98. *Committee Structure Diagram*, PJM, https://www.pjm.com/-/media/committees-groups/committee-structure-diagram.ashx (last visited July 19, 2023).

99. *Amended and Restated Operating Agreement of PJM Interconnection, L.L.C.,* PJM INTERCONNECTION, LLC, § 8.1.1 (July 14, 2011), https://pjm.com/directory/merged-tariffs/oa.pdf [hereinafter *PJM Operating Agreement*].

100. *Id*.

101. *Id*. § 8.2.

102. *Id*. § 8.3.3.

103. *PJM Operating Agreement*, *supra* note 99, § 8.3.3.

104. *Id.* § 8.4(b)

"shall be greater than (but not merely equal to) the product of .667 multiplied by the number of sectors that have at least five Members and that participated in the vote."[105] Once passed, the motion is presented to the Board of Managers.

PJM membership is not available to environmental organizations. To qualify as a PJM Member, an applicant must (a) be a transmission owner, generation owner, other supplier, electric distributor, or end-use customer, (b) accept all obligations in the PJM Operating Agreement, and (3) pay all the necessary fees.[106] All voting members pay an annual fee of $5,000 and market participants pay an application fee of $2,000 plus a $1,500 risk policy review fee.[107] Membership applications are submitted to the President of PJM for approval.[108] Stakeholders can also become an Associate Member if the party does not qualify as a Member.[109] Associate Members pay half the annual membership, the application fee is waived, may participate in all stakeholder processes, and participate in trainings offered by PJM, but these members shall not vote in stakeholder activities, working groups, or committees.[110] No annual fee affiliate membership is available for families of companies operating in PJM.[111] Affiliate members can vote at senior task force or lower level standing committee meetings.[112] There are no environmental groups in any PJM membership category.[113] In PJM, prospective board members are identified by an eight-person Nominating Committee which is made up of representatives from each of the five stakeholder sectors and three current Board members.[114]

Environmental organizations do participate at PJM as user group members. Under PJM's operating agreement, five or more Members can form a User Group.[115] The Operating Agreement required that the Members Committee create a User Group comprised of "bona fide public interest and environmental organizations."[116] This is one opportunity for eNGOs to be involved in the PJM governance process. Under PJM's operating agreement, meetings of User Groups shall be open to all Members and to the Office of the Interconnection.[117] PJM has a single user group, the Public Interest and Environmental Organization User Group

105. *Id.* § 8.4(c)

106. *Id.* § 11.6(a)

107. *Membership Enrollment*, PJM, https://www.pjm.com/about-pjm/member-services/membership-enrollment.aspx (last visited July 24, 2023).

108. *PJM Operating Agreement*, *supra* note 99, § 11.6(c).

109. *Id.* § 11.7(a)

110. *Id.* § 11.7(b)

111. *Membership & Sector Selection*, PJM 2, https://www.pjm.com/about-pjm/member-services/membership-and-sector-selection.aspx (last visited July 24, 2023).

112. *Id.*

113. *Member List,* PJM, https://www.pjm.com/about-pjm/member-services/member-list.aspx (last visited Sept. 13, 2023).

114. *The PJM Board of Managers Maintains RTO's Independence*, PJM (2023), https://www.pjm.com/-/media/about-pjm/newsroom/fact-sheets/pjm-board-nominations-fact-sheet.ashx.

115. *PJM Operating Agreement*, *supra* note 99, § 8.7.

116. *Id.* at § 8.7(b).

117. *Id.* at § 8.7(c).

(PIEOUG).[118] PIEOUG is further divided as it contains both an Environmental and Public Interest Chair and a Consumer Advocates Chair.[119] The purpose of PIEOUG is to provide access to the stakeholder process for organizations that are otherwise not eligible for membership.[120] Membership is limited to "bona fide" public interest and environmental organizations that are interested in PJM activities.[121] Certain organizations are explicitly identified as being ineligible for PIEOUG membership. Non-eligible entities include PJM Members other than consumer advocates; any organization eligible for PJM membership except consumer advocates and those who are eligible for membership in the End Use Customer sector or as an Affiliate Member only as an incidental result of their status as a retail electric consumer; organizations substantially funded by a PJM Member; and organizations whose primary mission is furthering the interests of other PJM members except CAPS.[122] The user group has sixty-three members, of which twenty-nine are voting members and the remainder are affiliate members. Voting members include Environmental Defense Fund, Earthjustice, Natural Resources Defense Council, while the affiliate members are primarily connected to utilities and generators operating in the PJM area.[123]

Although meetings are open to any participant who is eligible to attend a PJM stakeholder meeting, voting rights are only allocated to active PIEOUG members.[124] In PJM, the meeting agenda is developed by the members; non-members are allowed to attend and participate, but their participation can be curtailed by the Chair.[125] PIEOUG is granted the right to make an annual presentation directly to the Board of Managers at the Annual meeting.[126] The three-hour time slot granted to PIEUOG is split between environmental groups and consumer advocates.[127] The PIEOUG also has the right to submit, upon an affirmative vote of three-fourths or more of the members, any recommendation or proposal for action to the Chair of the Members Committee.[128] The Chair must refer the matter for consideration by the applicable Standing Committee for a recommendation to the Members Committee.[129] "If the Members Committee does not adopt a recommendation or proposal submitted by [PIEOUG], then upon a vote of nine-tenths or more of the

118. *User Groups*, PJM, https://www.pjm.com/committees-and-groups/user-groups.aspx (last visited July 10, 2023).

119. *PJM Public Interest Environmental Organization Users Group Charter*, PJM (2021), https://www.pjm.com/-/media/committees-groups/user-groups/pieoug/2021/20210105/20210105-charter-clean.ashx [hereinafter *PIEOUGC Charter*].

120. *Id.* at 1.

121. *PJM Operating Agreement*, *supra* note 99, § 8.7(b).

122. *PIEOUGC Charter*, *supra* note 119, § 3(18) (2021)

123. *Public Interest & Environmental Organizations User Group*, PJM, https://www.pjm.com/committees-and-groups/user-groups/pieoug (last visited Sept. 16, 2023).

124. *PIEOUGC Charter*, *supra* note 119, § 2(11), (13).

125. *Id.* § 4(21).

126. *Id.* § 4(22).

127. *Id.*

128. *PIEOUGC Charter*, *supra* note 119, at Appendix 2.

129. *Id.*

members, the recommendation or proposal can be submitted directly to the PJM Board for its consideration."[130]

The final way that eNGOs can participate in the PJM governance process is by attending Member Stakeholder meetings. Under PJM's rules, stakeholder meetings are open to the public unless otherwise noted, but there are limitations on sharing information from brainstorming sessions, creating recordings or transcriptions of meetings, and broadcasting the meetings.[131]

3. MISO

MISO is a multi-state ISO operating in fifteen Midwestern states and the Canadian province of Manitoba.[132] Section 205 filing rights are jointly held between MISO, the transmission owners, and the Organization of MISO States (OMS), but it is not a shared governance model as stakeholders provide advice to MISO but hold no section 205 filing rights.[133] Transmission owners retain sole filing authority for transmission rate designs in its territory and capital investment recovery exclusively from its customers, but transmission owners share authority when the costs are distributed across multiple transmission footprints.[134] OMS holds section 205 filings rights for cost allocation.[135]

MISO is the only RTO that has an exclusive environmental organization-only stakeholder group. In MISO, there are three types of participation groups: Stakeholders, Market Participants, and Members.[136] Any person or group with an interest in the MISO process can become a stakeholder and stakeholders and market participants can become members.[137] Market Participants are companies certified by MISO to participate in its energy markets.[138] A certified Market Participant can submit bids to purchase energy, submit offers to supply energy and operating reserve, hold financial transmission rights and auction revenue rights, and other market related activities.[139] Market Participant applications must demonstrate that they are an "appropriate person" which is accomplished by producing evidence of sufficient financial reserves or access to credit.[140] However, not all stakeholders

130. *Id.*

131. *PJM Manual*, *supra* note 95, § 4.5.

132. *About MISO: Operating the power grid, managing the energy markets, planning the future grid*, MISO 1, https://www.misoenergy.org/about/ (last visited Sept. 18, 2023).

133. R STREET, *supra* note 52, at 4.

134. *Id.* at 4-5.

135. *Agreement of Transmission Facilities Owners to Organize the Midcontinent Independent System Operator, Inc., Delaware Non-Stock Corporation*, MISO Appendix K § E.3 (Nov. 19, 2013), https://cdn.misoenergy.org/MISO%20TOA%20(for%20posting)47071.pdf [hereinafter *Agreement of Transmission Facilities*].

136. *Stakeholder Governance Guide*, MISO 5-6 (May 17, 2023), https://cdn.misoenergy.org/Stakeholder%20Governance%20Guide105455.pdf [hereinafter *SGG*].

137. *Id.*

138. *Market Participation Registration*, MISO, https://www.misoenergy.org/markets-and-operations/market-participation/#t=10&p=0&s=FileName&sd=asc (last visited July 24, 2023).

139. *Id.*

140. *Minimum Participation Requirements*, MISO 1, https://cdn.misoenergy.org/Minimum%20Participation%20Requirements70105.pdf (last visited July 24, 2023).

can become members. Members are a person or business entity which is an Eligible Customer or Owner.[141] An Eligible Customer may be any electric utility, Market Participant, Federal Power Marketing Agency, or any person generating electric energy for sale or resale.[142] An Owner is a "utility or other entity which owns, operates, or controls facilities for the transmission of electricity in interstate commerce."[143] Members can join MISO upon an approved application by the Chief Executive Officer or President and the payment of membership fees.[144] Members pay an initial fee of $15,000 and an annual fee each year thereafter of $1,000.[145] Being a Member entitles a company or organization to vote to elect the members of the Board of Directors in addition to enjoying the full rights of a stakeholder.[146]

MISO has eleven stakeholder groups.[147] The stakeholder groups are Transmission Owners; Municipal and Cooperative Electric Utilities and Transmission-Dependent Utilities; Independent Power Producers and Exempt Wholesale Generators; Power Marketers; Eligible End-Use Customers; State Regulatory Authorities; Public Consumer Advocates; Environmental; Coordination Members; Competitive Transmission Developers; and Affiliates.[148] Of the eleven stakeholder groups, three are excluded from becoming Members: Public Consumer Advocates, State Regulatory Authorities, and Environmental Advocates of the Advisory Committee which prevents them from being able to vote on matters pertaining to the MISO Board.[149] As of July 2023, there are eleven members of the environmental stakeholder group.[150]

MISO stakeholder group vote allocations vary depending upon the committee. There are four senior committees in MISO that report directly to the Board of Directors: Owners Committee, Advisory Committee, OMS Committee, and the Alternate Dispute Resolution Committee.[151] Stakeholder participation occurs on the Advisory Committee and the Planning Advisory Committee.[152] The Planning Advisory Committee operates as a subcommittee to the Advisory Committee.[153] Each of the eleven stakeholder groups are represented on these committees and

141. *Agreement of Transmission Facilities*, *supra* note 135, at section I, K.

142. *MISO's Tariff*, MISO 2, https://cdn.misoenergy.org/Guide to MISO Region Engagement476181.pdf (last visited, July 24, 2023).

143. *Agreement of Transmission Facilities*, *supra* note 135, at section I, P.

144. *Id*. at section V, A, 1.

145. *Id*. at Article Six.

146. *Id*. at Appendix F, section 4.3.

147. *MISO Region Engagement*, MISO, https://www.misoenergy.org/stakeholder-engagement/miso-engagement/ (last visited Sept. 22, 2023).

148. *SGG*, *supra* note 136, at 9.

149. *Membership Application for Non-Transmission Facilities Owner,* MISO 1, n.1, https://cdn.misoenergy.org/Non-Transmission%20Owners%20Membership%20Application92000.pdf (last visited Sept. 22, 2023).

150. *Stakeholder Group Participation,* MISO 8, section VIII. (June 15, 2023), https://cdn.misoenergy.org/Stakeholder%20Group%20Participation95902.pdf (last visited July 10, 2023).

151. *MISO Board of Directors*, MISO, https://cdn.misoenergy.org/Entity%20Org%20Chart67933.pdf (last visited Sept. 22, 2023).

152. *Planning Advisory Committee (PAC) CHARTER*, MISO 1, https://cdn.misoeergy.org/2023%20PAC%20Charter628872.pdf (last visited Sept. 22, 2023).

153. *Id.* at 2.

given sector-weighted voting rights.[154] The Advisory Committee reports to the Board and consists of twenty-five representatives with assigned seats and votes.[155] Two representatives are to be from the environmental stakeholder group in which one seat is assigned to a Member who was a member of Mid-Continent Area Power Pool (MAPP) as of March 1, 2020 or a Member "who is actively involved in the MAPP region."[156] The MAPP was the regional reliability council that existed prior to the formation of MISO and it was replaced by the Midwest Reliability Organization.[157] There needs to be 25% of members present for quorum, and a vote of majority shall control.[158] The Advisory Committee can raise concerns to MISO and the Board, but it shall not exercise control over MISO or the Board.[159] The two environmental representatives are chosen by the environmental stakeholder organizations, but the Board must certify the environmental stakeholder organizations to participate in the representative selection process.[160] The Board is not supposed to unreasonably withhold certification.[161] The Planning Advisory Committee is comprised of one representative from each of the eleven stakeholder groups.[162] Stakeholders can participate in the subcommittees and working groups under the Advisory Committee.[163] Meetings of the Committees and Board shall be open to the public, materials from the meetings shall be posted to MISO's website, and any party can provide written and/or oral comments at the meetings.[164]

4. ISO-NE

ISO-NE is a multi-state RTO operating in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.[165] ISO-NE's governance structure is unique amongst RTOs. The Board of Directors retains section 205 filing rights for market rules, but stakeholders can force ISO-NE to file alternative market rules with FERC, known as the "jump ball."[166]

ISO-NE has several layers of committees, which play an advisory role to ISO-NE unless expressed agreed upon NEPOOL and the ISO.[167] The primary stakeholder advisory body is the Participants Committee, which consists of

154. *Id.* at 1.

155. *Agreement of Transmission Facilities*, *supra* note 135, art. 2, § VI(A)(1).

156. *Id.*

157. *Mid-Continent Area Power Pool Load and Capability Report*, MAPP CENTER § I-3, (May 1, 2007), https://nocapx2020.info/wp-content/uploads/2007/12/lc-2007-final-mapp.pdf.

158. *Agreement of Transmission Facilities*, *supra* note 135, art. 2, § V(B)(5).

159. *Id.* at art. 2, § VI(A)(1).

160. *Id.* at art. 2, § VI(A)(2)(b).

161. *Id.*

162. *Agreement of Transmission Facilities*, *supra* note 135, app. B, § 2.

163. *Id.* at art. 2, § VII(A).

164. *Id.*

165. *Participants Agreement among ISO New England Inc. as the Reg'l Transmission Org. for New England and the New England Power Pool and the entities that are from time to time parties hereto constituting the Individual Participants,* ISO-NE, § 11.1.5 (Apr. 1, 2023) [hereinafter *ISO-NE Participants Agreement*].

166. *Id.*

167. *Id.* § 8.5.

NEPOOL Participants.[168] Under the Participants Committee are several Standing Technical Committees: "the Markets Committee, the Reliability Committee, and the Transmission Committee."[169] Together these committees make up the Principal Committees.[170] The Participants Committee or Technical Committee can form other committees, subcommittees, task forces, and working groups under each committee.[171] Even though the committees play mainly an advisory role to ISO-NE, if a market rule receives 60% or more vote from the Participants Committee, then ISO-NE must file the alternate market-rule proposal to FERC.[172] FERC receives the ISO-NE proposal and the Participant Committee's proposal and must decide between them, which is why this process is known as the "jump ball."[173]

The main parties in the ISO-NE governance process are the ISO, NEPOOL Participants, and Individual Participants.[174] NEPOOL Participants and Individual Participants are both considered Governance Participants.[175] NEPOOL Participants are current and future parties to Second Restated New England Power Pool Agreement.[176] An Individual Participant is "an entity that meets the requirements for" NEPOOL participation but does not wish to become an official NEPOOL Participant.[177] Individual Participants can attend and take part in all committee and NEPOOL meetings, but they may not vote or take part in a sector.[178] Individual Participants must sign the Participants Agreement and pay the application fee and annual fees that NEPOOL Participants also pay.[179] The application fees are $500 for an End User Participant, $1,000 for an Alternative Resources applicant, and $5,000 for all other applicants.[180] Annual fees range between $500 to more than $5,000 based upon if the participant is a NEPOOL Participant or an Individual Participant and the participant's sector type.[181]

Participants can join one of six sectors. The six sectors within the Principal Committees are the Generation Sector, Transmission Sector, Supplier Sector, Alternative Resources Sector (three subsectors for Renewable Generation, Distributed Generation, and Load Response), Publicly Owned Entity Sector, and End Use Sector.[182] Each NEPOOL Participant shall belong to only one of the six sectors and have only one voting member in the principal committees.[183] A vote in any

168. *Id.* § 7.2.
169. *ISO-NE Participants Agreement*, *supra* note 165, § 8.2.1.
170. *Id.* § 1.1.
171. *Id.* § 8.2.1.
172. *Id.* § 11.1.5.
173. *ISO-NE Participants Agreement*, *supra* note 165, § 11.1.5.
174. *Id.* §§ 6.1-6.3.
175. *Id.* § 1.1.
176. *Id.*
177. *ISO-NE Participants Agreement*, *supra* note 165, § 6.3.1.
178. *Id.* §§ 6.3.1, 7.2.
179. *Id.* §§ 6.3.1, 6.3.3.
180. *Id.* § 6.3.3.
181. *Second Restated NEPOOL Agreement,* NEPOOL § 14 (Jun. 25, 2019), https://www.iso-ne.com/static-assets/documents/2015/01/op_2d_rna.pdf.
182. *ISO-NE Participants Agreement*, *supra* note 165, §§ 7.2, 7.3.2.
183. *Id.* § 7.3.1.

of the Principal Committees must have quorum, which is met by a majority of the sectors present.[184] Any matter to be voted on is considered a motion and must have "equal or greater than two-thirds of the aggregate Sector Voting Shares" to pass in which each sector has one vote.[185] Membership on the Participants Committee entitles an entity to weigh in on the endorsement of proposed nominees for the ISO Board of Directors.[186]

eNGOs can join the End Use Sector and receive voting privileges. The End Use Sector includes End User Participants and End User Organizations.[187]

An End User Participant means

> [A] NEPOOL Participant which is (a) a consumer of electricity in the New England Control Area that generates or purchases electricity primarily for its own consumption, (b) a non-profit group representing such consumers, (c) a Government Entity, or (d) a Related Person of another End User Participant and which (i) is licensed as a competitive supplier under the statutes and regulations of the state in which the End User Participant which is its Related Person is located and (ii) participates in the New England Market solely to serve the load of the End User which is its Related Person.[188]

An End User Organization includes "an End User Participant which is (a) a registered tax-exempt non-profit organization with (i) an organized board of directors and (ii) a membership (A) of at least 100 Entities that buy electricity at wholesale or retail in the New England states."[189] As of July 2023, there are thirty-eight voting members in the End Use Sector and forty-five companies represented.[190] Some of the current eNGOs in the End Use Sector include Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, and the Union of Concerned Scientists.[191]

An eNGO can join the Environmental Advisory Group (EAG), which is a subgroup of the Planning Advisory Committee (PAC).[192] The EAG is an open stakeholder forum that assists the Planning Advisory Committee, the Reliability Committee, and the Power Supply Planning Committee and the ISO.[193] The EAG was constituted to assist the committees and the RTO in understanding how state and federal environmental requirements will affect operation of the region's power system and the environmental consequences of the operation of the power system

184. *Id.* § 8.3.6.

185. *Id.* § 8.3.7.

186. *Participants Committee,* ISO-NE, https://www.iso-ne.com/committees/participants/participants-committee (last visited Aug. 4, 2023).

187. *AMENDMENT NO. 6 TO PARTICIPANTS AGREEMENT*, ISO-NE (Jan. 4, 2011), https://www.iso-ne.com/static-assets/documents/2015/10/pa_amendments_composite_10_2015.pdf.

188. *Id.* § 1.3.

189. *Id.* § 1.2.

190. *NEPOOL Participants by Sector with Related Persons*, NEPOOL 15-16 (Sep. 1, 2020) https://nepool.com/uploads/C-Sector_Roster.pdf.

191. *Id.*

192. *Environmental Advisory Group*, ISO-NE 1, https://www.iso-ne.com/committees/planning/environmental-advisory/ (last visited July 10, 2023) [hereinafter ISO-NE].

193. *Id.*

and to identify and evaluate the environmental impacts of current and future electricity generation, transmission operations, and planning activities in the RTO.[194] "EAG meetings are public, and any entity" can designate a member to the EAG.[195] The PAC and EAG are not one of the Principal Committees so there are no voting rights in these groups. EAG membership is open to members of all five stakeholder sectors with no specific rights reserved for public interest or environmental organizations.[196] Any stakeholder can designate a member to EAG as well as can state agencies, local governments, retail customers, public interest groups, and consultants.[197] As of July 2023, there are twenty-six EAG members including eNGOs such as Conservation Law Foundation and Green Berkshires, Inc.[198]

5. SPP

SPP operates a multi-state RTO connecting Manitoba, Canada to New Orleans, Louisiana. SPP uses an advisory-only governance model where the Board of Directors retains section 205 filing rights.[199] Membership in SPP is voluntary, but is "open to any electric utility, Federal Power Marketing Agency, transmission service provider, any entity engaged in the business of producing, selling and/or purchasing electric energy for resale, and any entity willing to meet the membership requirements" and "any entity eligible to take service under the SPP OATT."[200]

SPP governance practices divide members in into different groups depending upon the committee. In the Members Committee and the Markets and Operations Policy Committee (MOPC), members are divided into two sectors (Transmission Owning and Non-Transmission Owner/Transmission Using) that vote on actions.[201] Each sector will vote resulting in a percent of approving votes for that sector.[202] For an action to pass the average of the two percentages in the two sectors must be at least 66%.[203] The Members Committee works with the Board of Directors to manage and direct the SPP.[204] It includes twenty four representatives of which six are IOU Members, five are cooperative Members, two are municipal Members, three are independent power producers/marketers Members, one is a Federal Power Marketing Agency Member, two are alternative power/public interest Members, one is an independent transmission company Member, one is a

194. *Id.*

195. *Id.*

196. ISO-NE, *supra* note 192.

197. *Id.*

198. *Participants Directory: Committee Details: Environmental Advisory Group*, ISO-NE, https://www.iso-ne.com/participate/participant-asset-listings/directory?id=21&type=committee (last visited Sept. 12, 2023).

199. R STREET, *supra* note 52, at 4.

200. *Southwest Power Pool Governing Documents Tariff*, SW. POWER POOL, INC., § 2.1, (Nov. 8, 2022), https://www.spp.org/documents/13272/current%20bylaws%20and%20membership%20agreement%20tariff.pdf [hereinafter SW. POWER POOL, INC.].

201. *Id.* § 3.9.1.

202. *Id.*

203. *Id.*

204. SW. POWER POOL, INC., *supra* note 200, § 5.1.

large retail customer Member, and one is a small retail customer Member.[205] To qualify as a representative in the Members Committee, the representative "must be an officer or employee of a Member" and "must be the Member's representative to the Membership" group.[206] Representatives are "nominated by the Corporate Governance Committee and elected" by the Members.[207] The Members Committee is only allowed to meet with the Board of Directors.[208] The MOPC, through its designated organizational groups, develops and recommends policies and procedures related to the technical operations of SPP.[209] Every SPP Member appoints a representative to the MOPC and eNGOs are eligible to hold one or both alternative power/public interest slots.[210] Members of the Board of Directors are nominated by the Corporate Governance Committee and elected by Members.[211] The Corporate Governance Committee consists of eleven members including one representative for the alternative power/public interest Members.[212]

For other committees and groups, membership numbers and composition vary according to the committee. For example, the Strategic Planning Committee is comprised of up to fourteen members with up to four representatives (but no less than three) from the Board of directors, five representatives from the Transmission Owning Member sector as nominated by the Corporate Governance Committee, and five representatives from the Transmission Using Member sector as nominated by the Corporate Governance Committee.[213] The Corporate Governance Committee is comprised of up to eleven members with representatives selected by the different Member groups.[214] Representatives are selected by investor owned utilities Members; co-operative Members; municipals Members; independent power producers/marketers Members; state power agencies Members; alternative power/public interest Members; independent transmission company Members; large/small retail Members; and by Federal Power Marketing Agency Members.[215] Votes conducted in Organizational Groups or task forces are done by a simple majority with each representative having one vote.[216]

SPP fees have been a barrier to eNGO participation. The annual membership fee is $6,000 plus an application fee to be determined by the Board of Directors.[217] An eNGO or other "legitimate public interest group" can request a waiver of the annual membership fee, but the waiver is subject to annual review.[218] The initial waiver request is directed to the President and the renewal is subject to Board

205. *Id.* § 5.1.1.1.
206. *Id.* § 5.1.1.2.
207. *Id.* § 5.1.2.
208. SW. POWER POOL, INC., *supra* note 200, § 5.1.5.
209. *Id.* § 6.1.
210. *Id*.
211. *Id.* at §4.3.
212. SW. POWER POOL, INC., *supra* note 200, § 6.6.
213. *Id*. at § 6.2.
214. *Id*. at § 6.6.
215. *Id.*
216. SW. POWER POOL, INC., *supra* note 200, § 3.9.2.
217. *Id*. at § 8.2.
218. *Id*.

approval.[219] Exit fees have been a point of contention in SPP and many entities, including public interest organizations and renewable energy developers, had long argued that potential large exit fees discouraged them from becoming SPP stakeholders. The American Wind Energy Association filed a complaint with FERC that the exit fees were a barrier to membership.[220] Multiple public interest groups intervened in support of AWEA's claims that exits fees limited participation opportunities.[221] FERC found the exit fees were "unjust and unreasonable because it creates a barrier to membership, is not needed to maintain SPP's financial solvency or avoid cost shifts, and is excessive as a means of ensuring stability in membership and members' financial commitment."[222] FERC ordered SPP to revise its governing documents to eliminate this exit fee for non-transmission owners.[223] Transmission owners are still subject to the exit as their departure from the RTO may affect the RTO's ability to recover costs or service its debt.[224] Members withdrawing from SPP must pay a withdrawal deposit that will cover any costs of their exit. FERC did not order SPP to eliminate its $50,000 withdrawal deposit from non-transmission owner stakeholders who are exiting the RTO.[225] However, in SPP's latest amendments to its bylaws and membership agreement, it did remove the withdrawal fee for non-load serving entities.[226]

An eNGO can get involved in the SPP governance process by attending SPP meetings. All SPP meetings are open unless an Organization Group decides to limit attendance at the meeting to safeguard confidential information.[227] An eNGO could attend any open meeting but would not have any voting rights unless it joined the SPP.[228]

6. CAISO

CAISO is a large state ISO operating in the State of California.[229] CAISO's governance process differs from the other RTOs as it operates through a governor-appointed board governance process and does not divide its stakeholder into member sectors.[230] Quorum of the Board exists when two-thirds of the Board members are present,[231] and an initiative needs a majority vote to pass.[232] The Governor of

219. *Id*.

220. *American Wind Energy Assoc. v. Sw. Power Pool, Inc.*, 167 FERC ¶ 61,033 (2019).

221. *Id.* at 61,150.

222. *Id.* at 61,156.

223. *Id.* at 61,147.

224. 167 FERC ¶ 61,033, at 61,154.

225. SW. POWER POOL, INC., *supra* note 200, § 4.2.1(b).

226. *Id.*

227. *Id.* § 3.5.

228. *Id*.

229. *About Us: A reliable and accessible power grid*, CAISO, http://www.caiso.com/about/Pages/default.aspx (last visited Sept. 22, 2023).

230. R STREET, *supra* note 52, at 4.

231. *Amended and Restated Bylaws of California Independent System Operator Corporation,* CAISO § 11, http://www.caiso.com/Documents/ISO-Corporate-Bylaws-amended-and-restated.pdf (last visited Sept. 22, 2023).

232. *Id.* § 12.1.

California appoints the five members of the Corporation Board of Governors (Board), and the Board members are appointed to three-year staggered terms by the Governor subject to confirmation by the Senate of the State of California.[233] Selection of the Board is done pursuant to the Board Selection Policy which establishes the process for stakeholders to identify and rank potential candidates.[234] When a Board member is to be replaced, the Board Nominee Review Committee is tasked with considering and recommending potential new board members.[235] The Committee consists of thirty-six stakeholders, who are drawn in equal numbers from six different representative groups including public interest groups which include consumer advocates, environmental groups, and citizen participation groups.[236] The Committee ranks potential candidates from an initial search in order of preference, presents that ranked order to the ISO, and once confirmed by the ISO, the ranked order is sent to the Governor.[237] The Committee works with an independent executive search firm to identify potential candidates who represent as many of the following qualifications as possible: electric industry expertise, markets expertise, general corporate/legal/finance expertise, and public interest expertise, which can include present or former executives of environmental or consumer organizations.[238]

CAISO's governance is akin to an agency rulemaking process. CAISO seeks stakeholder input through public comments rather than through stakeholder committees. CAISO has a recurring and non-recurring stakeholder process for gathering input.[239] In the recurring stakeholder process, there is an annual roadmap process to determine which initiatives CAISO will undertake the following year.[240] There are two submission deadlines (January and July) for initiatives to go into a catalogue.[241] Once the catalog is updated, the comment period for the catalog and the initiatives is opened.[242] In September, a draft three-year roadmap and draft annual policy plan are published.[243] October and November are reserved for editing these drafts.[244] Finally, in December these final drafts are presented to the

233. *Board Selection Policy Version # 5.1*, CAISO 1 (Aug. 17, 2022), http://www.caiso.com/Documents/Board-Selection-Policy.pdf [hereinafter *Board Selection Policy*].

234. *Id*.

235. *Id*. at 2.

236. *Id*. at 4-5.

237. *Board Selection Policy*, *supra* note 233, at 5-6.

238. *Id*. at 3-4.

239. *Policy Initiatives*, CAISO (July 10, 2023), https://stakeholdercenter.caiso.com/StakeholderInitiatives; *Recurring Processes*, CAISO (July 10, 2023), https://stakeholdercenter.caiso.com/RecurringStakeholderProcesses.

240. *Annual Policy Initiatives Roadmap Process – 2023*, CAISO (Jun. 30, 2022), https://stakeholdercenter.caiso.com/RecurringStakeholderProcesses/Annual-policy-initiatives-roadmap-process-2023 [hereinafter *Annual Policy Initiatives*].

241. *Id*.

242. *Market and Infrastructure Policy, Draft 2023 Policy Initiatives Catalog*, CAISO (Feb. 16, 2023), http://www.caiso.com/InitiativeDocuments/Draft2023PolicyInitiativesCatalog.pdf.

243. *Annual Policy Initiatives*, *supra* note 240.

244. *Id*.

Board and EIM Governing Board for final approval.[245] Once approved, stakeholders and CAISO will know which initiatives will be addressed the following year. In the non-recurring stakeholder process; there are three stages of proposal development, decision, and implementation.[246] The non-recurring process is where issues can be brought up as they arise. In the proposal development an issue is introduced through an issue paper which is translated to a straw proposal.[247] Next, the straw proposal is classified as either a draft proposal, draft business requirement specification, or draft tariff before it is edited into a final proposal.[248] That final proposal is either sent to the Board or the Energy Imbalance Market (EIM) Governing Body.[249] Here, the Board or EIM Governing Body review the proposal, make any edits, and vote to file the tariff with FERC.[250] Throughout this whole process, stakeholders can provide public comments on these proposals and on the implementation of the final FERC-approved tariff.[251]

Without a formal stakeholder governance structure, eNGOs still have several ways of participating in the CAISO governance process. First, eNGOs can participate in the stakeholder processes mentioned above through public comment. Second, eNGOs are able to attend and comment at any CAISO meeting.[252] eNGOs can also participate in the quarterly Board meetings or any other special Board meeting.[253] The only meeting eNGOs cannot participate in are Board executive sessions.[254] eNGOs have access to any meeting materials that are not confidential, can record meetings, and elect to receive notices of meetings.[255] CAISO runs an Stakeholder Symposium which brings together members of the public to discuss issues before and that could come before it.[256] eNGOs can also completing the survey CAISO regularly sends out on different aspects of participating in CAISO governance. In August 2019, CAISO issued a Stakeholder Process Survey to determine the effectiveness of seeking comments and responding to the comments.[257] In November 2020, CAISO surveyed stakeholders on the effectiveness of its communications related to the development of policy.[258]

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245. *Id*.

246. *Id.*

247. *Annual Policy Initiatives*, *supra* note 240.

248. *Id*.

249. *Id*.

250. *Id.*

251. *Annual Policy Initiatives*, *supra* note 240.

252. *Open Meeting Policy Version # 3.10,* CAISO 4, 7, https://www.caiso.com/Documents/CaliforniaISOOpenMeetingPolicy.pdf.

253. *Id*. at 5-6.

254. *Id*. at 7.

255. *Id*. at 2-3.

256. *California ISO 2022 Stakeholder Symposium*, CAISO 1, https://californiaiso.swoogo.com/2022StakeholderSymposium (last visited Sept. 17, 2023).

258. *2020 California ISO Stakeholder Process Communications Survey Results and Response*, CAISO 1, https://www.caiso.com/PublishedDocuments/2020-California-ISO-Stakeholder-Process-Communications-Survey-Results-and-Responses.pdf (last visited Sept. 17, 2023).

7. ERCOT

ERCOT is a single state ISO operating the bulk power grid in Texas.[259] As the only non-FERC jurisdictional RTO, ERCOT is "governed by a board of directors and subject to oversight by the Public Utility Commission of Texas" (PUCT).[260] ERCOT uses an advisory governance model where the eleven-member Board of Directors retains management of ERCOT affairs.[261] The Board underwent significant changes following Winter Storm Uri. The number of members was reduced from sixteen to eleven and all members are to be selected by a Board Composition Committee who three members are appointed by the governor, lieutenant governor, and the speaker of the house of representatives.[262] Prior to the passage of SB2, eight board members were selected from six different market participant sectors and five members were to be unaffiliated with any market segment.[263] After the bill passed, the market segment-specific and unaffiliated member slots were eliminated and prospective board members were required to have executive-level experience in one of the following professions: finance; business; engineering, including electrical engineering; trading; risk management; law; or electric market design.[264] Another major change was any rules adopted by or enforcement actions taken by ERCOT must be approved by the PUCT, whereas in the past the rules and enforcement actions were only subject to oversight and review.[265]

Membership opportunities in ERCOT for eNGOs are limited. To become a member of ERCOT, an entity must qualify for one of the following segments: cooperative, independent generator, independent power marketer, independent renewable energy provider, investor-owned utility, municipal, or consumer in one of three sub-segments (commercial – large and small, industrial, and residential).[266] ERCOT's three membership categories are Corporate Members, Associate Members, and Adjunct Members.[267] Corporate Members are the only members that can vote on matters submitted to the general membership including election of Technical Advisory Committee Representatives and amendments to the bylaws.[268] Associate Members have all the rights contained in the bylaws except the

259. *About ERCOT,* ERCOT (Sept. 17, 2023), https://www.ercot.com/about.

260. *Id*.

261. *Amended and Restated Bylaws of Electric Reliability Council of Texas, Inc.,* ERCOT § 4.1-4.2 (Jul. 31, 2020), https://www.ercot.com/files/docs/2021/11/16/06_Amended_and_Restated_Bylaws__eff_07.31.2020_.pdf.

262. TEX. UTIL. CODE ANN. § 39.1513(a) (West 2021).

263. Spencer Grubbs, *Winter Storm Uri, The 87th Legislature Takes on Electricity Reform*, TEX. COMPTROLLER (Oct. 2021), https://comptroller.texas.gov/economy/fiscal-notes/2021/oct/winter-storm-reform.php.

264. TEX. UTIL. CODE ANN. § 39.151(g-1) (West 2021).

265. Grubbs, *supra* note 263.

266. *Amended and Restated Bylaws of Electric Reliability Council of Texas, Inc.,* ERCOT § 3.1(a) (Oct. 12, 2021), https://www.ercot.com/files/docs/2021/11/16/06_Amended_and_Restated_Bylaws__eff_07.31.2020_.pdf [hereinafter ERCOT BYLAWS 2021].

267. *Id.* § 3.2.

268. *Id.* § 3.2(a).

right to vote on any matter submitted to the general membership.[269] Adjunct Members can be approved for membership if they do not meet the definitions and requirements to join as a Corporate or Associate Member and cannot vote on matters submitted to the general membership nor serve on the TAC or any TAC subcommittee.[270] As eNGOs do not fall into the membership categories that are eligible to become Corporate or Associate Members, they would have to seek membership as an Adjunct Member.[271] Annual dues are $2,000 for Corporate Members, $500 for Associate Members, $500 for Adjunct Members, $100 for Corporate Residential and Commercial Consumers Members, and $50 for Associate Residential and Commercial Consumers Members.[272] Any member can request a waiver of the annual dues for good cause, but it is subject to the Board of Directors approval.[273]

The Technical Advisory Committee is the key committee in ERCOT and eNGOs are prevented from being members of the committee. TAC members are drawn from the six market segments and confirmed by ERCOT's board.[274] TAC conducts studies and plans necessary to accomplish the purposes of ERCOT.[275] TAC, with the assistance of its subcommittees, makes recommendations to the Board of Directors on market design rule changes and system reliability enhancements.[276] eNGOs can participate at open Board meetings. Board meetings and subcommittee are to be open to the public unless in executive session.[277] Public input is solicited on any issue before the Board.[278]

III. CONCLUSION

Ensuring that eNGOs had a seat at the governance table was not a priority when utilities and other market participants worked to initially establish RTOs. However, the importance of environmental issues in the energy sector and across these regions has increased dramatically and, at the same time, the pathway to effective participation for eNGOs is not straightforward. There are challenges and barriers that require organizations to take extra steps to secure their participation opportunities and, in some cases, prevent them from fully participating. Our review of stakeholder governance processes identifies how eNGOs can participate, limits on participation, and the costs of engagement. Looking across the different RTOs, we see the influence of history on the shape and function of current governance processes.

No two RTOs share the same governance structure or afford the exact same participation opportunities. There is no significant difference between single-state and multi-state RTOs in the formal participation opportunities for eNGOs. High

269. *Id.* § 3.2(b).
270. ERCOT BYLAWS 2021, *supra* note 266, § 3.2(c).
271. *Id.* § 3.6(b).
272. ERCOT BYLAWS 2021, *supra* note 266, § 3.4
273. *Id.*
274. *Id.* § 4.8, 5.1(a).
275. *Id.* § 5.2.
276. *Technical Advisory Committee*, ERCOT (Feb. 20, 2023), https://www.ercot.com/committees/tac.
277. ERCOT BYLAWS 2021, *supra* note 266, § 4.6(e).
278. *Id.* § 4.6(d).

degrees of variability between all RTOs remains the only constant element that can be drawn from the comparison. eNGOs are often paired with other stakeholders who share different views and represent different interests. Only in MISO, do environmental organizations have their own stakeholder sector and in PJM and ERCOT, there is no direct representation opportunity. Changes to governance structure may or may not provide for a greater diversity of voices. MISO created an eleventh stakeholder sector by moving Other out of the Environmental Organization sector, thus ensuring that the sector did not contain potentially competing viewpoints. While in ERCOT, recent governance changes removed a participation opportunity for eNGOs. CAISO has no stakeholder sector structure, NYISO groups Environmental Organizations with Public Power, although they are each subsectors. Even the use of environmental advisory groups is not consistent across all RTOs and between RTOs which do offer this participation opportunity.

Board advising opportunities are highly variable. eNGOs may have direct access through specially designed consultation processes or can participate on key advisory committees. Alternatively, access to key committees if often limited or non-existent. For example, eNGOs cannot serve on ERCOT's Technical Advisory Committee which is responsible for advising the Board of Directors on key technical and policy matters. Some RTOs require multiple qualifying steps, such as a leadership position on a lower-level committee, to be eligible to join key advisory committees. Additional steps create procedural barriers that may artificially limit participation.

Board nomination procedures are equally variable. In PJM, eNGOs do not participate in the nomination process because they cannot join a stakeholder sector. In other RTOs, like ISO-NE, eNGOs can serve on the nominating committee that presents directors for a vote or vote to endorse a slate of directors, but they do not have a formal vote on who is elected to the Board. In some cases, such as SPP, all members, including eNGOs, may vote on potential candidates to the Board.

In most RTOs, membership fees – admission and annual – are reduced for public interest and consumer advocate groups and some RTOs, like SPP, allow for those groups to apply for a waiver of fees. CAISO's open process does not require stakeholders to apply for membership nor does it require them to submit a fee; however, it does not negate the resource cost of participation. Lowering initial and annual fees can encourage greater participation, but those costs are minimal as compared to the cost of participating in stakeholder governance processes. Lower cost participation opportunities, like NYISO's non-voting entity option, often have reduced participation rights that provide access to meetings without the ability to vote on proposals. Analyzing how eNGOs participate in RTO markets today is an important first step to informing FERC, state governments, RTOs and other stakeholders how to improve the participation of this important interest group at a time that decarbonization of the energy system is of paramount importance.