

E&E Energywire

Infrastructure deal targets FERC public outreach

BY MIRANDA WILLSON
08/05/2021 07:19 AM EDT

ENERGYWIRE | Part of the bipartisan Senate infrastructure bill released last week could stifle a Federal Energy Regulatory Commission initiative aimed at helping people affected by its decisions, according to some consumer and landowner advocates.

Section 40432 in the expansive [infrastructure package](#) would scrap term limits for the director of FERC's new Office of Public Participation and make it easier to oust the official.

Launched in June, the FERC office is designed to help members of the public engage in the often highly technical proceedings carried out by the five-person commission. The independent agency, which regulates large energy facilities such as natural gas pipelines and oversees wholesale electricity markets, has faced accusations of being inaccessible.

Some groups who lauded the establishment of the Office of Public Participation, however, now warn it could become a political tool subject to the leanings of the commission's chair if the language in the proposed infrastructure bill becomes law.

By removing a provision in the Federal Power Act that sets the director's term at four years and prevents the FERC chair from firing them without cause, the bill would give the chair more sway over the office, said Tyson Slocum, director of the energy program at Public Citizen.

"In general, Congress understood that this role of coordinating assistance could sometimes come into political conflict with the leadership at FERC, so they wanted to have a little bit of independence there," Slocum said. "If you remove that independence, you essentially just have a director that serves at the whim of whoever's chair."

Existing law was written to ensure that the office would remain independent, said Megan Gibson, a senior staff attorney at the Niskanen Center, a think tank that has represented landowners in FERC proceedings. The director should focus on engaging with and informing members of the public, particularly landowners, not on carrying out the "political will" of the chair or commission, Gibson said.

"The proposed amendment is rather unfortunate and reflects a misunderstanding of the fundamental importance of the independence of the OPP director and the law," Gibson said in an email.

The concerns come on the heels of a new report that also emphasizes the importance of the office's autonomy. Commissioned by the Natural Resources Defense Council and compiled by the consulting firm M.J. Bradley & Associates, the [report](#) summarizes the more than 12 hours of testimony and 100-plus written comments FERC received this spring regarding how the Office of Public Participation should function.

A key finding from the report is that the office should be independent from the commissioners while still having the authority to meaningfully affect their decisions. Many commenters said it should help make the agency more accessible to the public; provide technical and educational assistance to those affected by pending projects or decisions; and pay special attention to helping landowners, environmental justice communities and tribal governments, according to the report.

“The overwhelming agreement was that the OPP should be a neutral body, that it shouldn't be a voting member of the commission but that it also has to actually have some influence,” said Gillian Giannetti, an attorney at the NRDC's Sustainable FERC Project.

As a first step, the office could also work to address "low-hanging fruit" to improve transparency and accessibility, according to Giannetti. That could include updating FERC's website to make it more user-friendly, providing members of the public with template documents for common actions such as motions to intervene in a proceeding and holding informational webinars, she said.

'If it ain't broke, don't fix it'

Although FERC is still searching for a director to lead the Office of Public Participation, the office has been up and running on a limited basis, responding to landowner and “public procedural questions,” an agency spokesperson said.

Stacey Steep, an attorney-adviser at FERC, is currently the transition lead for the new office, according to FERC's website. A job listing for the director states that the position will be the “principal advisor to the Chairman and Commissioners charged with coordinating and providing assistance to the public” with respect to the commission's authorities.

“The full scope of OPP's activities will not commence until a Director and additional staff are on board,” a FERC spokesperson said in an email. The commission aims to hire a director and deputy by Sept. 30.

The changes in the infrastructure package appear to be mostly “technical,” the spokesperson added.

Although the director of the office was never going to be completely independent from the commission, the language in the bill nonetheless would make them “subservient to the FERC chair,” said Ari Peskoe, director of the electricity law initiative at Harvard Law School's Environmental and Energy Law Program. The provision could also reduce the continuity of the office’s policies, as it would make it easier for an incoming FERC chair to replace the director, Peskoe said.

“That said, FERC Chairs could take different approaches, with some being more hands-on and others letting the Director set policies,” Peskoe said in an email.

With the infrastructure package having not yet been voted on by the full Senate or the House of Representatives, Slocum of Public Citizen said he is in touch with congressional staff to try to amend the language about the office.

A spokesperson for the Senate Energy and Natural Resources Committee said the changes offer “important updates” to the 1978 Public Utility Regulatory Policies Act that first ordered the office's creation. The tweaks would “most importantly [resolve] a constitutional separation of powers issue and then [make] several other necessary updates that make the role more aligned with other career director positions at FERC,” the spokesperson said.

Still, Slocum and Gibson said there is no legal need to change the existing law and that its effect would be to compromise the effectiveness of an office they see as long overdue.

“It’s fine as it is. If it ain't broke, don’t fix it,” Gibson said. “There’s a reason they put that in there, and the reason is pretty obvious.”