



February 25, 2022

Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426
Docket No. RM22-5-000

Dear Chairman Glick:

We are encouraged by the recent Federal Energy Regulatory Commission (FERC) Notice of Inquiry (NOI) on how utilities account for industry trade association dues, as well as civic and political activities. For too long, utilities have financed the political activities of trade associations using funds from captive ratepayers. These trade associations then lobby for policies that frequently run counter to ratepayers' interests. FERC should develop bright line for how utilities classify operating and non-operating expenses so that it is clear what can and cannot be recovered from ratepayers. Given the increasingly political nature of utility trade associations, we also urge FERC to treat trade association dues as non-operating expenses and therefore presumptively not recoverable from ratepayers.

The Supreme Court has called into question whether organizations can require unwilling participants to contribute funds that it uses for political activities. In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), the Supreme Court decided that public sector employees cannot be required to pay any portion of union dues because the unions could be engaged in political activities they may not support. While we disagree with the Court's decision, it reasons that utility ratepayers, who may not support the political activities of their utility's trade associations, should not be required to pay any portion of the trade association's dues.

Yet current law allows utilities to do just that. FERC's Uniform System of Accounts (USofA) states that "operating expenses," including "membership fees and dues in trade, technical, and professional associations paid by a utility for employees," may be recovered through rates charged to customers.¹ Non-operating expenses are not recoverable. These include "expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances... or for the purpose of influencing the decisions of public officials...."² Trade associations, so-called social welfare organizations, and some nonprofit groups are increasingly political, and many of their activities can be viewed as seeking to influence public opinion or decisions of public officials. Such organizations, however, view their activities not through the lens of the USofA, but rather the IRS definition of lobbying. This gap allows trade associations to characterize their activities in a

¹18 C.F.R. pt. 101, Account 930.2

²18 C.F.R. pt. 101, Account 426.4

manner that, under the current system, permits utilities to pass along much of their association dues to their ratepayers – even for political activities with which they disagree.

There are numerous examples of organizations to which utilities commonly pay dues or make donations that have engaged in political activity that is against the interest of ratepayers.

- The Edison Electric Institute (EEI) is a trade association that represents electric investor-owned utilities. It “provides public policy leadership, strategic business intelligence, and essential conferences and forums.” The NOI notes a National Association of Regulatory Utility Commissioners audit that regulators relied on to find EEI spent up to 50 percent of its income on advocacy and lobbying; however, in an invoice to one of its investor-owned utilities, it attributed only 7 percent of dues to lobbying. The other 93 percent of its dues counted as an operating expense.³ EEI also helped to finance the now defunct Utility Air Regulatory Group, which opposed over 200 clean air and public health matters.
- The U.S. Chamber of Commerce is by far the largest lobbying organization in the country.⁴ It also engages in electioneering, litigation, and general influencing activities. It has been at the forefront of efforts to kill climate action, from organizing the effort to block the Obama administration’s greenhouse gas regulations⁵ to leading the charge against the Build Back Better Act,⁶ which if passed would devote \$550 billion to fighting climate change. According to a disclosure by Sempra Energy, only 20 percent of the \$1.02 million it paid in dues to the Chamber in 2020 was non-tax deductible.⁷ While that 20 percent may reflect the IRS definition of lobbying and electioneering, 100 percent of dues paid to the Chamber go towards influencing activities. The Chamber exists to influence – that is its very purpose.
- Among its activities, the American Gas Association (AGA) advocates against updates to building codes that would result in more efficient or all-electric energy codes. Updated codes save consumers money, improve public health, and reduce greenhouse gas emissions. Yet AGA’s Codes and Standards team, a team outside of its Governmental Affairs and Public Policy division, has a “primary goal ... to retain the option of placing a natural gas appliance in homes and businesses.” It also coordinates with anti-

³ Federal Energy Regulatory Commission Docket No. RM22-5-000, Notice of Inquiry, page 13

⁴ Open Secrets, <https://www.opensecrets.org/federal-lobbying/top-spenders?cycle=a>

⁵ “Move to Fight Obama’s Climate Plan Started Early,” New York Times, August 3, 2015, <https://www.nytimes.com/2015/08/04/us/obama-unveils-plan-to-sharply-limit-greenhouse-gas-emissions.html>

⁶ “U.S. Chamber Vows to Defeat Reconciliation, Hails Voting Deadline for Bipartisan Infrastructure Deal,” U.S. Chamber of Commerce, August 24, 2021, <https://www.uschamber.com/infrastructure/us-chamber-vows-defeat-reconciliation-hails-voting-deadline-bipartisan-infrastructure>

⁷ <https://www.sempra.com/sites/default/files/content/files/node-media-document/2021/2020%20Sempra%20Energy%20Political%20-%20combined.pdf>

electrification front groups like Partners for Energy Progress.⁸ It is unclear whether AGA identifies its advocacy as lobbying or how it classifies the work of its Codes and Standards team. No independent audit has been performed.⁹

- Two PJM member utilities formed the Potomac-Appalachian Transmission Highline (PATH), LLC to build a multi-state transmission line. From 2009 to 2011, PATH spent more than \$6 million on public relations contractors to pressure state officials to provide the necessary certificates for the project. The contractors produced promotional materials, ran public opinion polls, enlisted individuals to join supportive “reliable power coalitions”, and hired lobbyists. The utilities booked these costs as recoverable. Most recently, FERC issued orders agreeing with the utilities’ approach. In December 2021, the D.C. Circuit vacated and remanded FERC’s orders and required the utilities to reimburse their customers for these charges because they were used for political activities.¹⁰

Updating the USofA to fully encompass all influencing activities will provide FERC with the requisite information to ensure utility rates are just and reasonable. It can also aid state commissions in their oversight of non-FERC jurisdictional utilities.

FERC must also deem industry association dues as presumptively non-recoverable. Without this change, it will remain incumbent on ratepayers and their advocates to call attention to accounting violations. FERC is standing up its Office of Public Participation to engage members of the public in its proceedings, and we commend it for appointing a director and deputy director. Even with the Office of Public Participation, however, most ratepayers will still not have the time or means to intervene in utility rate cases. The only way to provide the transparency needed to ensure just and reasonable rates is to deem association dues as presumptively non-recoverable.

Characterizing industry association dues as presumptively non-recoverable does not mean that utilities cannot recover these expenses. It only means that they must justify dues as truly operational and not political in nature. If utilities choose to engage in industry associations, then it should be incumbent on utilities to disclose and justify what they want to charge to customers.

We look forward to your next steps.

⁸ Federal Energy Regulatory Commission Docket No. RM21-15-000, Comments of Public Interest Organizations, April 27, 2021 page 14

⁹ Federal Energy Regulatory Commission Docket No. RM21-15-000, Comments of Public Interest Organizations, April 27, 2021 page 14

¹⁰ Newman v. FERC. United States Court of Appeals, No. 20-1324 (2021).
[https://www.cadc.uscourts.gov/internet/opinions.nsf/CEEC71D3AAB2CAE9852587B900589358/\\$file/20-1324-1928335.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/CEEC71D3AAB2CAE9852587B900589358/$file/20-1324-1928335.pdf)

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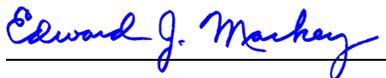
Sincerely,



Sheldon Whitehouse
U.S. Senator



Jeff Merkley
U.S. Senator



Edward J. Markey
U.S. Senator



Dianne Feinstein
U.S. Senator



Elizabeth Warren
U.S. Senator



Bernard Sanders
U.S. Senator