

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Rate Recovery, Reporting and Accounting)	
Treatment of Industry Association Dues and)	Docket No. RM22-5-000
Certain Civic, Political, and Related Expenses)	

COMMENTS OF THE ILLINOIS ATTORNEY GENERAL

The People of the State of Illinois (the “People”), by Illinois Attorney General Kwame Raoul, respectfully submit these comments in response to the December 16, 2021 Notice of Inquiry (“NOI”) in the above-captioned docket, in which the Federal Energy Regulatory Commission (“FERC” or the “Commission”) seeks comment on the accounting treatment of industry association dues and the ratemaking implications of changing the accounting and reporting of such dues.

Pursuant to Illinois state law, the Illinois Attorney General represents Illinois citizens and the public’s interest in adequate, safe, reliable, and cost-effective electric and natural gas service, including electric generation, transmission, distribution, and associated services. The Illinois General Assembly directed the Illinois Attorney General to intervene in, initiate, enforce, and defend all legal proceedings on matters related to the provision, marketing, and sale of natural gas and electric service to promote and protect the rights and interests of all Illinois citizens. 15 ILCS 205/6.5. The People have a direct and substantial interest in the outcome of this proceeding, and their interests cannot be represented adequately by any other party.

How utilities account for and report the expenditures of dues paid to trade associations, including the costs of public information and lobbying, and whether utilities should recover a portion of those dues from ratepayers, are questions that are important to maintaining a fair balance between corporate and shareholder interests and consumer interests. Through this NOI,

the Commission can build public trust in the electricity and natural gas sectors by developing clear guidelines on recoverable expenses and disclosure when utilities seek to recover industry association dues in rates. All electricity and natural gas customers deserve to know what costs are included in rates, including an assurance that money they pay to the utility will benefit customers, not shareholders.

BACKGROUND

Recent high-profile political scandals involving investor-owned utilities have shown that it is critical for regulators to account for utility spending on political activity, whether it is direct utility spending or through trade association dues. It is not unusual for utilities to pursue their policy and regulatory objectives in state and federal legislatures and agencies through the political process, and accounting for these efforts requires careful reporting and scrutiny.

In Illinois, Commonwealth Edison Company (“ComEd”), the state’s largest electric utility, entered into a Deferred Prosecution Agreement (“DPA”) with the United States Department of Justice on July 16, 2020. In the DPA, ComEd agreed to pay a \$200 million fine to resolve an allegation that the utility engaged in a bribery scheme with the goal of achieving of state legislation favorable to ComEd.¹ This was the largest fine ever levied at Chicago’s federal courthouse. ComEd admitted that it arranged jobs and monetary payments for various associates of a high-level elected official for the State of Illinois to assist ComEd with respect to legislation beneficial to the electricity provider.

This was not a single, isolated incident as the company admitted that these activities began in 2011 and ran through 2020. From 2011 to 2019, the Illinois General Assembly

¹ See U.S. Dept. of Justice, Commonwealth Edison Agrees to Pay \$200 Million to resolve Federal Criminal Investigation into Bribery Scheme (July 17, 2020), <https://www.justice.gov/usao-ndil/pr/commonwealth-edison-agrees-pay-200-million-resolve-federal-criminal-investigation>; see also ICC Dockets No. 21-0607 & 21-0739; 220 ILCS 5/4-604.5.

considered several bills and passed legislation directly impacting ComEd's operation and profitability, including Public Act 97-0616 (220 ILCS 5/16-108.5), Public Act 98-0015 (amending 220 ILCS 5/16-108.5), and the Future Energy Jobs Act, Public Act 99-906. Public Act 97-0616, known as the Energy Infrastructure Modernization Act ("EIMA"), created formula rates in Illinois and allowed electric utilities to achieve guaranteed annual returns on their distribution investments as those expenses were reported in the utilities' FERC Form 1. As such, the FERC Form 1 plays a pivotal role in setting electricity delivery rates in Illinois. Illinois's reliance on the FERC Form 1 as the basis for distribution rates makes Illinois extremely interested in FERC rules that promote transparency and guard against the use of either utility or trade association funds to promote utility and shareholder interests in the political process.

COMMENTS

I. The Commission Should Treat Industry Association Dues as Presumptively Nonrecoverable to Ensure that All Utility Political Spending Is Presumptively Unrecoverable.

The People recommend that FERC require industry association dues to be clearly identified and limited to "below-the-line" accounts, making them presumptively non-recoverable. This accounting structure would increase transparency of industry associations dues and ensure that all costs associated with lobbying and other activities that seek to promote utility legislative, policy, and regulatory objectives are treated as below-the-line expenses. Moreover, this alteration would correctly shift the burden to utilities and associations to demonstrate that the costs they seek to collect from ratepayers are unrelated to political and policy advocacy.

These changes are necessary because while industry associations may provide appropriate support to utilities, a gray space currently exists where industry association dues may be recoverable even when the organizations engage in lobbying that promotes the interests of the

utilities and/or their shareholders. Ordinarily, the FERC Form 1 bars utilities from collecting from customers expenditures intended to influence public opinion. *See* Account 426.4 (expenditures for certain civic, political, and related activities); Account 930.1 (general advertising expenses). However, current FERC rules allow for utilities to route expenditures intended to influence public opinion through industry association dues, the costs of which *are* recoverable from ratepayers. *See* Account 930.2 (miscellaneous general expenses).

For example, electric industry dues support the Edison Electric Institute (“EEI”), which has historically opposed the development and state support of distributed generation. EEI has stated that it believes that distribution generation shifts costs to stakeholders and is poor public policy.² However, in a 2013 policy paper, EEI showed that its concerns rested more with utility profits, stating that distributed generation “could directly threaten the centralized utility model” because it could allow customers to leave the grid altogether, or use it only as a source of backup power, thereby “rais[ing] the potential for irreparable damages to revenues and growth prospects.”³ This position is not pro-consumer. A pro-consumer position would support whatever grid structure best supported reliability and customer needs, rather than focusing on the revenues of delivery utilities.

Examples of other recent EEI advocacy include:

- Urging Congress to continue its work on climate and clean energy tax legislation;⁴

² Jeff St. John, Edison Electric Institute Declines to Support Petition Seeking Federal Overturn of Net Metering, GREENTECH MEDIA (June 4, 2020), <https://www.greentechmedia.com/articles/read/edison-electric-institute-wont-endorse-petition-seeking-federal-overturn-of-net-metering>.

³ Edison Electric Inst., Disruptive Challenges: Financial Implications and Strategic Responses to a Changing Retail Electric Business at 3 (2013) (available at: <https://www.ourenergypolicy.org/wp-content/uploads/2013/09/disruptivechallenges-1.pdf>).

⁴ Edison Electric Inst., EEI Urges Congress to Continue its Work on Climate and Clean Energy Tax Legislation (Jan. 4, 2022), <https://www.eei.org/resourcesandmedia/newsroom/Pages/Press%20Releases/EEI%20Urges%20Congress%20to%20Continue%20Its%20Work%20on%20Climate%20and%20Clean%20Energy%20Tax%20Legislation.aspx>.

- Urging Congress to reject a 15% corporate minimum tax on book income.⁵

Other examples of industry association actions that appear to be advocacy or image enhancement include the following from the American Gas Association (AGA), which represents more than 200 local energy companies:

- Celebrating passage of the recent Bipartisan Infrastructure Bill and highlighting the important provisions for utilities and their customers;⁶
- Issuing comments stating that natural gas customers will save 67% this winter (2021) and promoting natural gas as a mean to lowering customers' carbon footprint;⁷
- Releasing a study showing that the natural gas industry is essential to achieving a net zero emissions future;⁸
- Praising the United States Department of Energy for a \$35 million program focused on developing methane reduction technologies.⁹

FERC's rules already require that utility political activities be accounted for below-the-line when utilities themselves incur costs to influence political decisions. In *Newman v. FERC*, the Court reviewed a FERC 2020 rehearing order which found that a utility's costs incurred to *indirectly* influence public opinion could be recovered from ratepayers, while reaffirming that funds spent by the utility to *directly* influence public opinion were unrecoverable.¹⁰ The D.C. Circuit rejected this distinction, finding that *all* utility spending designed to influence public

⁵ Edison Electric Inst., EEI Welcomes Progress on Build Back Better Act, Urges Congress to Reject 15-Percent Corporate Minimum Tax on Book Income (Nov. 5, 2021), <https://www.eei.org/resourcesandmedia/newsroom/Pages/Press%20Releases/EEI%20Welcomes%20Progress%20on%20Build%20Back%20Better%20Act,%20Urges%20Congress%20to%20Reject%2015-Percent%20Corporate%20Minimum%20Tax%20on%20Book%20Income.aspx>.

⁶ Am. Gas Ass'n, Infrastructure Bill Passes: Positive Outcomes for Natural Gas Customers and Communities (Nov. 6, 2021), <https://www.aga.org/news/news-releases/infrastructure-bill-passes-positive-outcomes-for-natural-gas-customers-and-communities/>.

⁷ Am. Gas Ass'n, Natural Gas Customers Will Save Money and Lower Their Carbon Footprint Compared to Other Forms of Energy (Oct. 26, 2021), <https://www.aga.org/news/news-releases/natural-gas-customers-will-save-money-and-lower-their-carbon-footprint-compared-to-other-forms-of-energy/>.

⁸ Am. Gas Ass'n, America's Natural Gas Industry Will be Essential to Achieve a Net-Zero Emissions Future (Feb. 8, 2022), <https://www.aga.org/news/news-releases/new-pageamericas-natural-gas-industry-will-be-essential-to-achieve-a-net-zero-emissions-future/>.

⁹ Am. Gas Ass'n, Gas Utilities Support Methane Reduction Innovations (Apr. 9, 2021), <https://www.aga.org/news/news-releases/gas-utilities-support-methane-reduction-innovations/>.

¹⁰ *Newman v. Fed. Energy Regulatory Comm'n*, 22 F.4th 189, 194 (D.C. Cir. 2021).

opinion was unrecoverable pursuant to Account 426.4.¹¹ The Court stated that FERC's interpretation ignored that Account 426.4 was created to cover all political spending and created a theoretical "end-run[]" around Account 426.4 where utilities could carry out their political activity, and still obtain cost recovery, by hiring intermediaries to promote their positions.¹²

As can be seen from the above examples, industry association actions can include the same situation described in *Newman v. FERC* where utilities' positions are promoted indirectly through industry associations rather than explicitly on behalf of a particular company. The People's recommendation that industry and trade association dues must be affirmatively demonstrated to support utility operations and ratepayer interests to be recoverable is based on the same principles and corrective measures adopted by the *Newman* court. This promotes transparency and accountability by classifying industry and trade association spending designed to influence political and policy decision-making and public opinion as nonrecoverable, thereby placing this spending on the same terms applicable to similar utility spending.

These proposed changes are proactive steps that will promote public confidence in utility ratemaking and address concerns that utilities use money collected from ratepayers to pursue lobbying and other political activities that promote utility interests by, e.g., shifting risk from shareholders to consumers or enriching utility shareholders, rather than advancing consumer interests.

¹¹ See *id.* at 196-198.

¹² *Id.* at 202.

II. States' Use of the FERC Form 1 in Ratemaking Make Commission Rules Requiring Transparency Critical to Just and Reasonable Rates on the Federal and State Levels.

In general, the FERC Form 1 is designed to reflect utilities' actual cost of service. Illinois heavily relies on the FERC Form 1 to set utility rates. As mentioned above, Illinois uses the FERC Form 1 in setting formula rates for its electric utilities. *See* 220 ILCS 5/16-108.5(c)(4) &(d). Moreover, Illinois also uses the FERC Form 1 to set cost recovery for utility energy efficiency plans and uncollectibles expenses. *Id.* 5/8-103B(d)(3)(A)) (energy efficiency); *id.* at 5/16-111.8(a) (uncollectibles expenses). Thus, it is critically important that the FERC Form 1 be accurate and exclude improper political spending by both utilities and their industry and trade associations.

If FERC accounting does not adequately break out costs such as lobbying in association dues and elsewhere, those costs may then flow through to not just federal rates, but state rates too. Illinois explicitly excludes costs associated with political activity or lobbying from recovery and bars utility recovery for goodwill advertising. *See* 220 ILCS 5/9-224 (political activity and lobbying); *id.* at 5/9-225 (goodwill advertising). However, an improperly structured FERC Form 1 could allow Illinois utilities to unlawfully collect from Illinois ratepayers the costs for political expenses, lobbying, or goodwill advertising through industry association dues if such dues are reported in a lumpsum under Account 930.2 without more detailed reporting. Thus, more detailed reporting for industry association dues that properly breaks out political and policy advocacy as well as goodwill advertising costs embedded in association fees serves to protect consumers and fairly balances consumer and shareholder interests.

III. CONCLUSION

The People appreciate the Commission's efforts to reexamine the reporting and accounting rules for industry and trade association dues and the need to identify costs that may not be recoverable under federal and/or state law and regulation. We request that the Commission take a more proactive approach to cost recovery of industry and trade association dues and set clear guidelines as to what is recoverable to assure that political and policy advocacy and goodwill advertising are not included in rates paid by consumers. The burden of proof to recover costs from the public should be borne by the utilities. Improving the transparency in industry and trade association activities so that they must affirmatively report the costs that are recoverable while identifying excluded costs will better protect customers' interests and fairly allocate costs between consumers and shareholders.

Respectfully submitted,

/s/

Susan L. Satter
Bureau Chief, Public Utilities Bureau
Office of the Illinois Attorney General
100 W. Randolph St., 11th Floor
Chicago, Illinois 60601
Susan.Satter@ILAG.gov
312-350-2769

Dated: February 22, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have on this day caused to be served a copy of the foregoing upon all parties on the service list in these proceedings in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2021).

/s/

Susan L. Satter
Bureau Chief, Public Utilities Bureau
Office of the Illinois Attorney General
100 W. Randolph St., 11th Floor
Chicago, Illinois 60601
Susan.Satter@ILAG.gov
312-350-2769

Dated: February 22, 2022

Document Content(s)

RM 22-5-000 Illinois AG Comments FINAL.pdf.....1