UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

REPLY COMMENT OF THE VIRGINIA OFFICE OF THE ATTORNEY GENERAL, DIVISION OF CONSUMER COUNSEL

The Virginia Office of the Attorney General, Division of Consumer Counsel ("Virginia Consumer Counsel") submits this Reply Comment in response to comments filed responding to the Notice of Inquiry issued in this docket on December 16, 2021.[1] Virginia Consumer Counsel is the statutory representative for millions of electric and natural gas utility ratepayers in Virginia who pay through rates for the costs of their utilities' industry association dues.[2]

BACKGROUND

On December 16, 2021, the Federal Energy Regulatory Commission ("FERC" or "Commission") issued the NOI, wherein it seeks comments on the rate-based recovery, reporting, and accounting treatment of industry association dues, certain civic and political expenses, and charitable donations.[3] On February 22, 2022, Virginia Consumer Counsel filed its Initial Comment to the NOI ("Initial Comment"). Virginia Consumer Counsel argued that when seeking from customers the recovery of costs of trade association dues, utilities should bear the

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[1] *Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses*, Notice of Inquiry, 177 FERC ¶ 61,180 (Dec. 16, 2021) [hereinafter "NOI"].

[2] Va. Code § 2.2-517.

[3] NOI at P 10, P 10 n.18.

burden of proving that such costs "provide a benefit to ratepayers."[4] Virginia Consumer Counsel noted, in particular, the recent decision of *Newman v. FERC*[5] as an example of how the presumptively recoverable nature of costs booked to "above-the-line" accounts stacks the deck in utilities' favor.[6] While ratepayers were successful in challenging the costs at issue in that case, such result is exceptional. Virginia Consumer Counsel also supported the development of guidance that would amplify transparency with respect to how trade association dues are spent, and suggested that requiring utilities to bear the initial burden of proving ratepayer benefit would be a useful first step towards that transparency.[7] Finally, Virginia Consumer Counsel supported the Commission codifying its well-established precedent "disallowing the cost recovery of donations for charitable, social, or community welfare purposes included in Account 426.1."[8]

REPLY COMMENT

Virginia Consumer Counsel files this Reply Comment to note two observations regarding the initial comments of trade associations filed in this docket. First, the refusal of trade associations to respond to the NOI's specific, detail-oriented inquiry with specific, detail-oriented responses raises red flags regarding the rigor with which trade associations track their expenses. Second, appeals to the definition of lobbying activities in the Internal Revenue Code and Lobbying Disclosure Act improperly limit the bucket of costs for which shareholders, rather than ratepayers, should be responsible to pay.

[4] Initial Comment at 5 (quoting NOI at P 12).

[5] *Newman v. Fed. Energy Regulatory Comm'n*, No. 20-1324, 2021 U.S. App. LEXIS 38373 (D.C. Cir. Dec. 28, 2021).

[6] Initial Comment at 5-8.

[7] *Id.* at 8-9.

[8] *Id.* at 9 (quoting NOI at P 10 n.18).

A. Comments Submitted by Trade Associations in This Docket Tend to Show That They Are Unable – or Unwilling – to Track Expenses in Such a Way That Utility Members, Members of the Public, or the Commission Can Evaluate Whether They May Properly Be Recovered Through Rates.

The NOI requests several specific data points that industry associations are uniquely capable of providing.[9] For instance, Question 3 asks what internal controls and accounting methodologies are used to track trade association costs to determine how they are billed to members, including (a) what cost categories are used in internal accounting and budgetary processes to account for membership dues and what the budgets by cost category were for the three most recent fiscal years, (b) what processes are used to derive and inform utility member of how various programs are categorized, (c) how associations derive and inform jurisdictional companies of the portions of invoice payments associated with lobbying, public outreach on legislative and regulatory issues, and other nonrecoverable costs, and (d) the extent to which such methodologies and underlying budgetary information is conveyed to utility members.[10]

The Edison Electric Institute's ("EEI") apparent response to this inquiry is that, in preparing reports mandated by the federal Lobbying Disclosure Act, it "compiles the amounts associated with lobbying through a careful accounting process and takes great pains to make sure that these amounts are accurate under the law."[11] EEI adds the conclusory statement that "[t]his process includes strong internal controls and compliance regimes to track (1) contacts with covered Legislative and Executive Branch officials; (2) time spent preparing to lobby Legislative and Executive Branch officials; and (3) time spent undertaking such activities with other

[9] NOI at P 16.

[10] *Id.*

[11] Initial Comments of the Edison Electric Institute ("EEI Comments") at 7.

groups," as well as "time spent engaged in state-level legislative lobbying efforts."[12] EEI does not describe what its "strong internal controls" are, beyond stating that its calculations are "subject to annual internal audits, the results of which are reported to our Board of Directors every June during our Annual Meeting."[13] The American Gas Association ("AGA") similarly defers to "IRS audit and [annual review] by external auditors during the audit of AGA's financial statements" in answering the NOI's inquiry into existing internal controls.[14]

From these responses, it appears that EEI and AGA believe that compliance with federal reporting requirements – applicable to a much broader swath of entities than regulated electric and gas utilities – and inclusion of cost categorization in an annual, macro-level review of the association's finances, collectively count as a sufficient internal control for FERC regulatory purposes. Furthermore, it is troubling that neither entity provides any standards by which their respective boards or external auditors review their costs, nor any indication that their boards or auditors are appropriately briefed on the Commission's "intended use" and "reason behind" tests for association expenses paid for through utility member dues. These associations would have the Commission and the public assume that these internal controls are providing sufficient scrutiny without any specific indication that they are in actuality. That EEI – the association that is the subject of the petition that gave rise to this NOI – and AGA provided only general answers to this detail-oriented question is cause for significant concern. As noted by Commissioner Christie, "[a]s always with energy regulation, the devil is in the details."[15]

[12] *Id.*

[13] *Id.*

[14] Comments of the American Gas Association ("AGA Comments") at 11.

[15] NOI (Christie, Comm'r, concurring) at P 8.

B. Applying Definitions of Lobbying in Other Federal Statutes to the Commission's Review of Association Expenses Would Improperly Limit the Scope of Expenses for Which Shareholders Should Be Responsible.

Another troubling aspect of trade association comments filed in this docket is that their discussions are largely limited to lobbying proper. That is, both EEI and AGA appeal to federal statutory definitions of lobbying, imploring the Commission to similarly adopt those definitions for rate regulatory purposes.[16] The AGA even characterizes the threshold determination as "distin[guishing between] lobbying and non-lobbying activities."[17] The NOI's inquiry, however, is not so limited or simplistic, but is concerned with "the rate recovery, reporting, and accounting treatment of industry association dues and *certain civic, political, and related expenses*."[18]

Internal Revenue Code § 162(e) defines "lobbying and political expenditures" as:

> any amount paid or incurred in connection with—
> (A) influencing legislation,
> (B) participation in, or intervention in, any political campaign on behalf of (or in opposition to) any candidate for public office,
> (C) any attempt to influence the general public, or segments thereof, with respect to elections, legislative matters, or referendums, or
> (D) any direct communication with a covered executive branch official[19] in an attempt to influence the official actions or positions of such official.[20]

The Lobbying Disclosure Act defines "lobbying activities" as "lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and

[16] EEI Comments at 9; AGA Comments at 9-10.

[17] AGA Comments at 8.

[18] NOI at P 1 (emphasis added).

[19] Internal Revenue Code § 162(e)(5) defines "covered executive branch official" to include the President and Vice President, as well as "any officer or employee of the White House Office of the Executive Office of the President, and the 2 most senior level officers of each of the other agencies in such Executive Office," and "(i) any individual serving in a position in level I of the Executive Schedule under section 5312 of title 5, United States Code, (ii) any other individual designated by the President as having Cabinet level status, and (iii) any immediate deputy of an individual described in clause (i) or (ii)."

[20] 26 U.S.C. § 162(e).

other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others."[21] It defines "lobbying contacts" as:

> any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official[22] that is made on behalf of a client with regard to—
> (i) the formulation, modification, or adoption of Federal legislation (including legislative proposals);
> (ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;
> (iii) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or
> (iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.[23]

Proposing to limit the bucket of nonrecoverable costs to lobbying as defined in these statutes is not a satisfactory response to the issues raised in the NOI. *Newman* provides a clear example of why. As noted in Virginia Consumer Counsel's Initial Comment, that case did not concern lobbying expenses proper, but rather the retention of public relations professionals to recruit "prominent business and labor leaders" to testify in support of utility initiatives proposed before state utility commissions.[24] This is likely not activity that would fall within the definition of lobbying under the Internal Revenue Code or the Lobbying Disclosure Act. Yet it is certainly not activity that is undertaken "for the benefit of ratepayers." Accordingly, it is unreasonable to

[21] 2 U.S.C. § 1602(7).

[22] The statute also provides definitions of "covered executive branch official" – which is similar to but slightly broader than that provides in IRC § 162(e) – and "covered legislative branch official." Both definitions are limited to federal officials.

[23] *Id.* § 1602(8).

[24] *Newman v. Fed. Energy Regulatory Comm'n*, No. 20-1324, 2021 U.S. App. LEXIS 38373, at *4-5 (D.C. Cir. Dec. 28, 2021).

characterize these statutory definitions as sufficiently "broad"[25] to be appropriately applied in the specific context of electric and gas rate regulation.

CONCLUSION

Virginia Consumer Counsel suggested in its Initial Comment that trade associations may state in comments that because they always book expenses appropriately, additional oversight or regulatory guardrails are not necessary.[26] Indeed, EEI and AGA devote entire sections of their Comments – in the AGA's case, well more than half of its filing – to their work purportedly benefitting utility customers.[27] Virginia Consumer Counsel notes that these sections are, as with discussion regarding internal controls, conclusory and high-level. But as noted in Virginia Consumer Counsel's Initial Comment, "the overarching question posed by the NOI is not whether utilities are playing fair as a matter of fact, but whether it is the utility or the ratepayer who should bear the initial burden of proving whether the utility is playing fair."[28] Taking the trade associations' representations regarding their activities at face value, their utility members should have no problem carrying the burden of proving that the portion of dues attributable to such activities are for the benefit of ratepayers. But the Commission should not be swayed by these broad overtures to consumer-oriented initiatives in its consideration of whether current Commission guidance is sufficient to resolve the issues of accounting and transparency it raises.

For the above stated reasons, Virginia Consumer Counsel continues to: (1) request that the Commission place on regulated utilities the burden of proving that costs of trade association

[25] EEI Comments at 6.

[26] Initial Comment at 7.

[27] EEI Comments at 13-17; AGA Comments at 14-32; *see also* Comments of the Interstate Natural Gas Association of America at 9-11.

[28] Initial Comment at 7.

dues sought to be recovered from ratepayers are actually intended to provide a benefit to ratepayers; (2) support additional guidelines to improve the transparency of the nature of trade associations' use of utility member dues; and (3) support codifying in regulations the Commission's well-established precedent barring recovery from ratepayers of utilities' charitable giving.[29]

Respectfully submitted,

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Dated: March 23, 2022

[29] Trade associations' initial comments are largely silent on the NOI's inquiry regarding charitable donations. *See* NOI at P 10 n.18.

Document Content(s)