UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Petition For Rulemaking To Amend The Uniform System Of Accounts' Treatment Of Industry Association Dues	)))	Docket No. RM 21-15-000

MOTION TO INTERVENE AND PROTEST OF THE EDISON ELECTRIC INSTITUTE

I. INTRODUCTION

Pursuant to Rules 212 and 214 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure,[1] and the Commission's March 25, 2021, Notice of Petition for Rulemaking,[2] the Edison Electric Institute ("EEI") respectfully submits this Motion to Intervene and Comments opposing the Center for Biological Diversity's ("Petitioner") Petition for Rulemaking ("Petition").[3] The Petition requests that the Commission institute a rulemaking to amend the Uniform Standard of Accounts ("USofA") that utilities be required to record dues paid to industry associations in Account 426.4[4] rather than Account 930.2 as currently required.

As discussed herein, the Commission should deny the Petition because it fails to demonstrate that a sufficient change in circumstances has occurred or a problem exists that merits a generic solution as no money EEI may spend on lobbying activity is currently recoverable in rates that are subject to the jurisdiction of the Commission or state economic

[1] 18 C.F.R. §§ 385.212, 214 (2019).

[2] Center for Biological Diversity, Notice of Petition for Rulemaking, Docket No. RM 21-15-000 (Mar. 25, 2021),

[3] Petition For Rulemaking To Amend The Uniform System Of Accounts' Treatment Of Industry Association Dues, Docket No. RM21-15-000 (Mar. 17, 2021) ("Petition").

[4] The Petition references Account 426, which does not exist as a generic account. For purposes of these comments, EEI assumes that the Petition is referring to Account 426.4.

regulators. Rather, the Petitioner is, in essence, requesting that the Commission redefine lobbying activities to include activities that trade associations undertake with which the Petitioner may disagree. Defining lobbying, however, is within the purview of Congress, and the Commission should be wary of this thinly veiled proxy fight about what should be deemed lobbying.

In this effort, Petitioner makes several inaccurate and misleading statements about EEI's members and their leadership in the transition to clean energy. In addition, Petitioner fails to recognize or account for the significant benefits that participation in EEI provides to its members' customers or the EEI industry-wide initiatives. These include nationwide campaigns to increase military hiring; spur electric vehicle and charging infrastructure deployment; promote diversity, equity, and inclusion in the energy workforce; report carbon emissions to support customer clean energy goals; encourage the development of smart communities; and improve the customer experience, among others.

The First Amendment concerns raised in the Petition are also misplaced and rely on inapposite case law about public-sector unions and their dues. Paying for electricity services does not make customers members of EEI, and, in any event, dues spent on lobbying are not recovered in rates.

Finally, EEI's lobbying-related dues are accounted for appropriately within the current USofA framework, and any infrequent errors in this accounting are identified through regular audit procedures and then rectified. Accordingly, a rulemaking to explore different accounting treatment for trade association dues is neither necessary nor warranted. Thus, the Petition does not articulate a problem or a need for generic action and should be denied.

II. MOTION TO INTERVENE

Pursuant to Rule 214, EEI submits the following in support of its Motion to Intervene. EEI is the association that represents all shareholder-owned electric utilities in the United States, regardless of how they are structured.[5] Our members provide electricity for more than 220 million Americans and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than seven million jobs in communities across the United States. EEI's members also are committed to getting the electricity they provide customers as clean as they can as fast as they can, keeping affordability and reliability front and center.

Petitioner requests that the Commission amend the USofA to change the accounting treatment for industry association dues. As a result, all EEI members are directly affected by the issues raised in the Petition. Furthermore, EEI and its members provide a broad-based perspective on the issues raised in the Petition that cannot be adequately represented by any other party. EEI respectfully requests that the Commission grant this Motion to Intervene and allow EEI to become a party to the above-captioned proceedings.

III. CORRESPONDENCE AND COMMUNICATIONS

All communications and correspondence with respect to this Motion should be served upon the following individuals, who should be included on the official service lists compiled by the Secretary of the Commission in these proceedings:

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[5] Contrary to the erroneous claim made on page 18 of the Petition, EEI is not the "association for vertically integrated IOUs," but in fact represents all shareholder-owned electric companies, both in vertically integrated and restructured markets.

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IV. PROTEST

Petitioner requests that the Commission initiate a rulemaking to amend the USofA to require that utilities record dues paid to industry associations in Account 426.4 rather than Account 930.2. The reason given for Petitioner's request is that the dues will then be characterized as below-the-line and presumptively non-recoverable. Petitioner asserts that changes are necessary to address the problematic and political activity of associations like EEI.[6] As discussed below, the Petition is predicated on multiple misstatements of law and fact, does not accurately represent the regulatory and ratemaking process, is not supported by precedent, and does not provide a basis for the generic action requested. The Petition should be denied.

A. The Petition Does Not Provide a Basis for Relief and Should be Denied.

The Commission has "rejected petitions and requests that it implement a rulemaking when the requesting party fails to show a sufficient change in circumstances or that there is a sufficient problem to merit a generic solution."[7] As discussed below, the Petition does not

[6] Petition at p 1.

[7] *Eric S. Morris v. North American Electric Reliability Corporation and SERC Reliability Corporation*, Order Denying Complaint and Dismissing Petition for Rulemaking, 153 FERC ¶ 61,266 at P 12 (2015) citing *Tenaska Power Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 107 FERC ¶ 61,308 at P 33 (2004) (rejecting

demonstrate any change in circumstances and does not highlight a problem that merits a generic solution. The Petition alleges that self-interest may prevent utilities from accurately allocating association dues as required by the Commission but does not document even one specific instance of purposeful misconduct that would merit the allegation or the requested generic relief. The Petition also fails to recognize the transparency that is provided by company and association reports, the frequent audits and opportunity for review of such information by federal and state commissions, and the benefits provided by membership in an association.

Unlike some organizations whose membership and funding are obtained from multiple sources, including federal government grants, EEI, like all trade associations, is funded through membership dues. EEI's membership list is available on EEI's website. EEI member companies and annual dues statements to members clearly reflect the amount of the dues used for lobbying so that they may be placed in the appropriate account. EEI members have an obligation to provide reliable electric service at just and reasonable rates that are regulated at the federal and state level, and the portion of association dues included in those rates demonstrably supports and is consistent with that objective. The Petition fails to articulate why the multiple levels of oversight over and transparency of the determination of such amounts are insufficient to ensure appropriate rate-making treatment or why Commission precedent should be overturned. Accordingly, the Petition should be denied.

request to implement a rulemaking, stating that the requesting party had not shown that circumstances had sufficiently changed as to warrant re-examining issues); *Midwest Indep. Transmission Sys. Operator, Inc.*, 104 FERC ¶ 61,060, at P 21 (2003) (rejecting petition for rulemaking when there had not been a substantial change in circumstances), *aff'd*, 388 F.3d 903 (D.C. Cir. 2004); *Natural Gas Supply Ass'n*, 115 FERC ¶ 61,327 at PP 10-11 (2006) (rejecting request for rulemaking to establish natural gas quality and interchangeability standards, stating that gas quality and interchangeability issues arise under discrete circumstances, and as there was no evidence of an industry wide problem, petitioner had not justified its specific nationwide standards); *Amoco Prod. Co.*, 26 FERC ¶ 61,271 at 61,624 (1984) (rejecting request to implement a rulemaking to amend the definition of minimum rate gas, stating there was insufficient evidence to support generic relief).

B. Current Commission Accounting Process Provides for Oversight and Opportunity for Review of Any Amounts Included in Account 930.2.

As a preliminary matter, nothing in the Petition indicates that current USofA regulations are deficient or fail to assure that trade association dues are recorded accurately or appropriately. As Commission-regulated entities, electric utilities have numerous reporting requirements, including annual financial and operating reports that are included in the mandatory FERC Form 1. All filed FERC Forms 1 are available on the Commission's website for review. Any stakeholder can review the FERC Form 1 filed by any regulated entity, including amounts recorded in Account 930.2.

The USofA, which is the required system of accounting for FERC From 1, provides basic account descriptions and definitions that are useful in understanding the information reported in that Form. This standardized accounting system allows for consistency when revenues and expenses are examined by the Commission—as well as by state commissions—when rate cases are filed or when the Commission conducts audits.

Within FERC Form 1 and the USofA, there is account number 930.2, Miscellaneous General Expenses. Under the USofA definition of Miscellaneous General Expenses, association dues are charged to this account and are presumptively recoverable thorough cost of service rate recovery.[8] There is a specific line item that lists the amount of such dues on page 335 of the Form No. 1. While these amounts are presumptively recoverable, such recovery is neither mandatory nor automatic, and these amounts are reviewable by the Commission through audits or rate cases, by state commissions, and by all interested stakeholders. As discussed below, rate cases provide an opportunity for parties to contest specific allocations. The Commission audit

[8] 18 C.F.R. Part 101, § 930.2 (emphasis added); *see also* 18 C.F.R. Part 201, § 930.2.

staff also does a thorough job of reviewing inputs, catching errors, and ensuring that accounting changes are made, if needed, and refunds granted.[9] In addition, state commissions also routinely require additional supporting information when assessing whether to permit recovery of amounts included in Account 930.2.[10] Thus, there is significant oversight and review of these inputs.

Contrary to the assertions in the Petition, the Commission already has specifically addressed what expenses may be included in Account 930.2 and the utility has the responsibility of appropriately breaking down the costs.[11] In *Delmarva,* the Commission stated

> The Commission has allowed utilities to allocate EEI contributions to wholesale customers only to the extent the contributions are for research and development programs to which wholesale customers themselves could not contribute. However, that portion of EEI contributions used for lobbying activities may not, under any circumstances, be included in the utility's cost of service. Thus, the portion of EEI expenditures that a utility may include, if any, in its cost of service depends on the purpose for which the contributions were made. The burden of breaking down EEI expenditures falls upon the utility seeking to include such contributions in its cost of service.[12]

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[9] *See, e.g.*, Audit Report of Division of Audits within Department of Enforcement, Docket No. FA15-10-000 at 28 (2018); Audit Report of Division of Audits within Department of Enforcement, Docket No FA15-11-000 at 23 (2018). Commission Audit Staff reviewed both Entergy Arkansas's and Entergy Gulf States Louisiana's compliance with Accounts 930.2 and 426.4 and identify an issue with the classification of 2012 EEI lobbying expenses. Entergy Arkansas and Entergy Gulf States Louisiana refunded the misclassified amounts and updated their accounting policies and procedures to ensure industry association membership dues are accounted for consistently with the Commission's requirements.

[10] More member company dues are recovered in rates approved by state public utility commissions than Commission-jurisdictional transmission rates. Public utility commissions across the country conduct open and transparent rate reviews to determine the costs that regulated electric companies appropriately can recover in rates. During these proceedings, EEI's member companies provide necessary record evidence to support each recoverable expense, including a portion of their trade association dues. As part of the process, commission staff and other intervening parties have an opportunity to review, refute, and request more evidence. Commissions then make decisions based on that record of evidence.

[11] *See, e.g.*, *Delmarva Power & Light Co*., 58 FERC ¶ 61,169 (1992), *order on reh'g*, 58 FERC ¶ 61,282 (1992), *further order on reh'g,* 59 FERC ¶ 61,169 (1992) ("*Delmarva*"); *Wisconsin Power and Light Company*, Opinion No. 141, 19 FERC P 61,288, at 61,569-70, *order on reh'g*, 20 FERC ¶ 61,203 (1982); *Pub. Serv. Co. of New Mexico*, Opinion No. 133, 17 FERC P 61,123 at 1,248-49 (1981), *order on rehearing*, Opinion No. 133-A, 18 FERC ¶ 61,036, *opinion and order on appeal*, Opinion No. 133-B, 21 FERC ¶ 61,215 (1982), *aff'd sub nom*.; *City of Gallup v. FERC*, 702 F.2d 1116 (D.C. Cir. 1983); *Illinois Power Company*, 15 FERC ¶ 61,050 at 61,094 (1981), *order granting partial reh'g,* 19 FERC P 61,073 (1982); *Union Electric Company*, 8 FERC P 63,026 at 65,345 (1979), *summarily affirmed,* Opinion No. 94, 12 FERC ¶ 61,239 (1980).

[12] *Delmarva,* 58 FERC ¶ 61,169 at 61,509.

In *Pacific Gas and Electric* ("*PG&E*"), the Commission upheld the Presiding Judge's finding that the allocation of EEI dues in a transmission rate case was reasonable.[13] In response to concerns that PG&E had not met the *Delmarva* standard, the Presiding Judge found that PG&E and Commission trial staff had shown that EEI membership provided benefits to customers and that the allocation was just and reasonable.[14] In support of the benefits provided to customers, PG&E indicated that

> PG&E's membership categorization in EEI is at the "US Investor-Owned Electric Companies" level, and that this category of membership entitles PG&E to numerous services that benefit Network Transmission customers. Among these are access to information regarding reliability, physical and cyber security best practices as well as best practices regarding inspections, operations and preventative and corrective maintenance. Many of these areas are applicable to PG&E's electric transmission system. In that regard, PG&E states, employing best practices for these activities results in more efficient operations and can lower the overall cost of network transmission O&M expenses.[15]

This case illustrates that existing policies and regulations provide transparency and the ability to challenge the amounts included in Account 930.2. It also is a clear and specific example of the Commission effectively exercising its authority to review and approve such recovery when electric utilities appropriately justify such requests.

Consistent with these regulations and Commission precedent, EEI works with its members to ensure that lobbying expenses are not inadvertently included in Account 930.2. On an annual basis, EEI provides members with dues statements that clearly delineate—both in terms of percentage and a dollar amount—the portion of EEI's dues that are allocated to lobbying activities. A review of a dues statement, therefore, allows EEI members to easily

[13] *Pacific Gas and Electric*, Order on Initial Decision, 173 FERC ¶ 61,045 at P 221, 228 (2020).

[14] *Pacific Gas and Electric,* Initial Decision, 165 FERC ¶ 63,001 at P 776, 780 (2018).

[15] *Id.* at P 776 (internal citations omitted).

determine which amounts are recorded appropriately in Account 930.2 and which are not.

As Petitioner acknowledges, the portion of industry association dues that are associated with lobbying already are separately recorded in Account 426.4, as required by the Commission. Petitioner requests that the Commission open a rulemaking proceeding to require utilities to allocate all association dues to Account 426.4, regardless of the benefits provided to wholesale or transmission customers and regardless of long-standing existing Commission precedent, to minimize inappropriate or inaccurate accounting. As demonstrated above, appropriate processes are already in place and function to ensure that allocations are made to the appropriate accounts. These processes include audits by Commission accounting staff, oversight by state commissions, and rate cases before the Commission. Petitioner does not provide any examples of mis-recorded dues that were not corrected, other than to make unfounded and erroneous assertions about EEI's policies positions and activities. Petitioner has not provided a sufficient basis to overturn Commission precedent on this issue or to require a rulemaking to adjust current accounting rules. Moreover, the Petitioner has not made a showing that errors are occurring and that rates include unrecoverable amounts. Accordingly, the existing regime functions appropriately and as intended by the Commission and a generic rulemaking is unnecessary.

C. Only Congress Can Change the Legal Definition of "Lobbying" and Current Processes Ensure that Lobbying Activities As Defined by Congress Are Reported Accurately.

While Petitioner may wish to deem all EEI activities as lobbying by redefining the definition of "lobbying" for USofA purposes, neither Petitioner nor the Commission can unilaterally change the definition that has been legislated by Congress. This definition forms the basis of all political activity reporting, not just activity undertaken by energy companies, and is the rationale for EEI's determination as to which portion of dues cannot be recovered in

customer rates. The Commission should be wary of any Petition that requests it to take a position on how to define lobbying, an issue clearly outside the jurisdictional competence and expertise of the Commission, and squarely within the purview of Congress.

EEI is a tax-exempt trade association recognized as such by the Internal Revenue Service ("IRS") pursuant to Section 501(c)(6) of the Internal Revenue Code ("IRC") of 1986, as amended. EEI files an exempt organization information return ("Form 990") annually, as required. Like all trade associations, EEI is funded through membership dues. EEI member companies pay dues on a sliding scale based on the number of customers they serve and the size of their assets. Our membership includes all investor-owned electric companies in the U.S., which range in size from Fortune 500 companies to smaller regional electric companies and regardless of whether they operate in restructured markets or are vertically integrated. As noted, annual dues invoices clearly indicate what percentage of member dues relate to lobbying at the state and federal level. In 2019, for example, about 14 percent of the entire dues payment was related to this advocacy and therefore not recoverable. In 2020, this amount 12.4 percent.

This advocacy/lobbying portion of EEI's dues, which, as noted, is legally not recoverable, is calculated using the IRC definition of "lobbying and political activities" under section 162(e), in addition to the definitions in the Lobbying Disclosure Act, as amended ("LDA"), and as permitted by the LDA. The IRC definition broadly captures not only federal lobbying, but also state and grassroots lobbying and political activity. EEI uses the IRC definition because it is broad, capturing both federal and state-level activities, which is important to members whose retail electricity rates are approved by state public utility commissions.[16]

[16] EEI also opts to use the IRC definition because such amounts are not tax deductible. *See* IRC §§ 162(e); *see also* 26 C.F.R. § 1.162-29. Using the same definition for IRS reporting and for other mandatory lobbying disclosures is reasonable from an accounting and membership perspective and legally permissible. *See* 2 U.S.C. § 1610.

EEI elects to use this same broad definition for reporting in its mandatory LDA reports,[17] which are filed quarterly with the Secretary of the Senate and the Clerk of the House of Representatives and are publicly available.[18] Any false statements or concealments in these reports are federal crimes.[19] In addition, the Government Accountability Office is required by law to audit these reports annually.[20] The U.S. Attorney's Office for the District of Columbia is charged with enforcing the requirements of the LDA and investigates all referrals for non-compliance made by the Secretary of the Senate or the Clerk of the House of Representatives.

When making these reports, EEI 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. This process includes strong internal controls and compliance regimes to track contacts with covered Legislative and Executive Branch officials, time spent preparing to lobby these individuals, and time spent undertaking such activities with other groups. EEI's calculations are subject to our own annual internal audit, the results of which are reported to our Board every June during our Annual Meeting.

This Petition, however, is not really about whether EEI or other trade associations accurately account for and report their lobbying expenses. At the heart of this Petition for

[17] *See* 2 U.S.C. § 1601 et seq. The LDA definition of lobbying would require EEI to report contacts with the Commission but would exclude any state-level lobbying.

[18] Registrations and report are available online at the House website, http://lobbyingdisclosure.house.gov, as well as the Senate website, http://www.senate.gov/lobby.

[19] *See* the False Statements Accountability Act of 1996, amending 18 U.S.C. § 1001. In addition, whoever knowingly fails: 1) to correct a defective filing within 60 days after notice of any such defect by the Secretary of the Senate or the Clerk of the House; or 2) to comply with any other provision of this Act may be subject to a civil fine of not more than $200,000, and whoever knowingly and corruptly fails to comply with any provision of this Act may be imprisoned for not more than five years or fined under Title 18 of the U.S.C. or both. See LDA § 1606.

[20] The Honest Leadership and Open Government Act of 2007 ("HLOGA") amended the LDA. Among these changes, HLGOA included a provision for GAO to annually audit the extent of lobbyists' compliance with LDA. *See* Pub. L. No. 110-81, 121 Stat. 735 (Sept. 14, 2007), codified at 2 U.S.C. §1614. 22 U.S.C. GAO's most recent report was published in April 2021, https://www.gao.gov/assets/gao-21-375.pdf.

Rulemaking is the fact that Petitioner disagrees with the definition of lobbying used by the LDA and the IRS to the extent that it does not include time spent participating in rulemakings or other regulatory proceedings or engaged in litigation on these matters.[21] Because regulatory issues are important, particularly in an industry as heavily regulated as energy, Petitioner deems them to be political in nature. But, that is not how Congress has chosen to define lobbying or political activity. To EEI's knowledge, however, while Petitioner and others associated with this Petition have attempted to influence how this Commission and many state public utility commissions account for trade association dues, they have not actually sought relief from the only entity that can change the definition of lobbying: Congress. Likely, this is because such a change in how lobbying is defined and what lobbying expenses must be reported would harm their bottom line as a tax-exempt organization, rendering no longer tax-deductible Petitioner's own extensive engagement in regulatory proceedings and related litigation and imperiling their status as a 501(c)(3) organization,[22] which can lobby but only if it is a small portion of its activities.[23]

The Commission should be wary of engaging in this proxy war about the appropriate definition of lobbying, which is intended to limit trade association participation in rulemakings and litigation while allowing other, similarly situated non-profit entities to continue to participate

[21] While filing comments with federal agencies is not lobbying, all contacts with Cabinet level officials, their immediate deputies, and all employees of the White House Office of the Executive Office of the President, as well as the time spent on these activities, must be reported as lobbying.

[22] For example, since January 1, 2020, Petitioner has sought review of agency action in 25 cases currently pending before the D.C. Circuit Court of Appeals and 30 cases currently pending before the 9th Circuit Court of Appeals, to note just two of the federal appeals courts. Despite this volume of litigation, which necessarily involves extensive participation in rulemaking processes in the preceding years, Petitioner reported just over $112,000 in lobbying expenses on its 2019 Form 990.

[23] Public charities, like Petitioner, lose that status if a substantial portion of their activities are deemed to be lobbying. *See* IRS, Lobbying, https://www.irs.gov/charities-non-profits/lobbying. Petitioner relies heavily on materials produced by the Energy and Policy Institute ("EPI"). It is hard to know what effect a change in definition of lobbying would have on EPI as it has no corporate form, reports nothing about its activities, lobbying or otherwise, and does not report the source of its operating funds.

fully in these activities. Determining how lobbying is to be defined is outside of the Commission's jurisdiction, and taking action intended to limit participation in public proceedings is inconsistent with the Commission's goals and mission. Consistent with the law and how it defines "lobbying," EEI accurately segregates its dues into amounts that may be recoverable and amounts that are not recoverable by law. These amounts are audited multiple times by multiple entities and misstatements are punishable as crimes. Given the Commission's long-standing process for ensuring that only amounts that are justified be potentially recoverable, as discussed above, Petitioner's desire to redefine lobbying via the USofA—which would apply to trade associations but not to themselves—does not provide sufficient reason for the Commission to open a rulemaking to address the accounting for different portions of trade association dues. Moreover, the Commission should be skeptical of Petitioner's efforts to use the Commission to create such a one-sided and self-serving definition of lobbying. Only when and if Congress does change the definition of lobbying, would the rulemaking Petitioner seeks be appropriate.

D. EEI's Members Are Leading the Clean Energy Transformation and the Petition Misstates EEI's Position on Clean Energy Issues.

In its efforts to cast EEI's activities as political in nature, Petitioner makes several misleading and incorrect statements about EEI, its members, and their positions on environmental, climate change, and other important energy issues. While it is not clear why Petitioner's opinions concerning the "correct" positions on such issues are relevant to the Commission's accounting practices, the facts about EEI members' clean energy progress and support for continued progress speak for themselves and have been recognized by other

environmental groups.[24]

EEI and our member companies are committed to getting the energy we provide as clean as we can as fast as we can, without compromising on the reliability and affordability that our customers value. To date, 48 EEI member companies have made carbon reduction commitments—28 of them include net-zero goals. In all of our outreach with the Administration and with Members of Congress, we emphasize that, with the right policies and the right technologies, a 100 percent clean energy future can be more than a goal. It can be a reality.

We also know that actions speak louder than words. Today, 40 percent of our nation's electricity comes from carbon-free sources—nuclear, hydropower, wind, and solar. Equally important—our sector's carbon emissions were 40 percent below 2005 levels as of the end of last year.[25] They are at their lowest level in more than 40 years—and continue to fall.[26] The switch from coal to natural gas and renewable energy was the single most effective tool over the past decade for reducing carbon emissions. And, over the last five years, battery storage and renewable deployment have increased significantly. We are proud that we made this progress while keeping rates steady and while ensuring that electricity remains affordable and reliable.

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[24] *See, e.g.*, Joint EEI/NRDC Statement to NARUC (Feb. 14, 2018), https://www.nrdc.org/sites/default/files/nrdc-eei-joint-statement-state-utility-regulators_2018-02-13.pdf. The Statement opens with a recognition of common ground on clean energy progress:

> This statement presents joint recommendations by the [EEI] and the Natural Resources Defense Council (NRDC) to the National Association of Regulatory Utility Commissioners (NARUC), based on extensive mutual experience and interchange. Our perspectives and constituencies are very different, but we find much common ground on clean energy progress, grid infrastructure needs, opportunities for regulated electric companies in electricity resource portfolio management and investment, and the potential need for collaboratively developed rate design and other regulatory reforms.

[25] *See Energy Information Administration,* Monthly Energy Review at 128 (Mar. 2021), https://www.eia.gov/totalenergy/data/monthly/pdf/mer.pdf.

[26] *See id*. at 196.

Despite this progress, Petitioner focuses on a few incorrect assertions to support their position about the activities of the trade association and that its members are anti-clean energy despite the fact that these members have reduced greenhouse gas and other emissions more than most countries. A cursory review of their "evidence" quickly reveals how thin it is.

For example, Petitioner asserts that EEI touted its efforts to "prevent improved standards in the Toxic Substances Control Act ["TSCA"]" citing a report provided to members in 2016.[27] What that report actually states is that EEI supported the reauthorization of TSCA, which was supported by other environmental groups, including the Environmental Defense Fund ("EDF").[28] The *Frank R. Lautenberg Chemical Safety for the 21st Century Act* that reformed TSCA passed in both houses of Congress—with the House voting 398-1 in support—and was signed by President Obama into law in 2016. EEI supported this law, which provided needed updates to TSCA, and gave EPA the authority necessary to protect American families from the health effects of dangerous chemicals. TSCA reform had significant support, including from former Environmental Protection Agency ("EPA") Administrator Gina McCarthy—now Domestic Climate Advisor to President Biden—who said upon the President Obama's signing, "this law is a huge win for public health,"[29] and EDF's Lead Senior Scientist Richard Denison who stated, "President Obama's signature today launches a new law that will help to improve public health for years to come."[30] While Petitioner may have wanted a different outcome than what was achieved in this bipartisan legislation, its characterization of EEI's support for TSCA reform as

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[27] *See, e.g.*, Petition at 10.

[28] *See* Richard Denison, EDF, *Why Passage of the Lautenberg Act Is Really a Big Deal* (June 10, 2016), http://blogs.edf.org/health/2016/06/10/why-passage-of-the-lautenberg-act-is-a-really-big-deal/.

[29] Gina McCarthy, EPA Blog, *TSCA Reform: A Bipartisan Milestone to Protect Our Health from Dangerous Chemicals* (June 22, 2016), https://blog.epa.gov/2016/06/22/tsca-reform-a-bipartisan-milestone-to-protect-our-health-from-dangerous-chemicals/.

[30] Denison, n.28, *supra*.

intended to block improved chemical protections or as "controversial" is as absurd as it is incorrect.

Similarly, Petitioner asserts that EEI advocated for a "delay" in the start of the Clean Power Plan ("CPP").[31] What EEI did was participate in the rulemaking process. EEI filed more than 500 pages of technical and legal comments to inform the rulemaking process (just as Petitioner did). EEI's comments discussed how the interconnected electric grid functioned and how different options for reducing emissions might perform and might impact grid operations. Throughout the process, EEI engaged in good faith discussions with EPA on how a final rule could result in emissions reductions while protecting the affordability and reliability of electricity for customers. After careful review of the entire record before it, EPA issued a final CPP that included a different starting date for compliance than proposed but had a more stringent final goal. In any event, while the Supreme Court ultimately stayed CPP implementation—litigation in which EEI was not involved—EEI's members achieved the goals of the CPP more than 10 year early, reducing emissions by 33 percent over 2005 levels by the end of 2019. Again, Petitioner's supposed evidence of EEI's support for activities it deems unacceptable is contrived and misleading.[32]

As noted, Petitioners real objective is to redefine lobbying, just for trade associations, via Commission action. Regardless of whether Petitioner likes any action EEI took in these instances or feels compelled to twist facts to support their assertions,[33] this should have no

[31] *See, e.g.*, Petition at 10.

[32] In some instances, Petitioner's assertions go beyond absurd to potentially actionable. Petitioner intimates that EEI supported the horrific, anti-democratic insurrection at the U.S. Capitol on January 6, 2021. In 2016, EEI made a one-time donation to a group associated with the Republican Attorneys General Association that made robocalls in 2021 urging the march to the Capitol. To imply that this means we supported the insurrection is slanderous.

[33] Petitioner makes so many factual errors in discussing EEI activities that it would takes pages to list and correct them all. Given that most of these are a distraction from the issue at hand, it is not worth the time of the

bearing on the Commission's assessment of this Petition for Rulemaking and should not blind the Commission to the Petition's true purpose. Petitioner does not assert that EEI misreported either of these activities with respect to lobbying disclosure rules. Consistent with the law, the first was reported as lobbying, and all time related to EEI's support of TSCA reform was reported to members (and in our required LDA reports) as part of their dues that was unrecoverable lobbying expenses. Also consistent with the law, the second was not reported as lobbying, other than any contacts with then-EPA Administrator McCarthy and her senior staff.

E. Member Company Customers' First Amendment Rights are Not Implicated by FERC's Accounting Procedures.

Petitioner argues that reclassification of trade association dues within the USofA is necessary to protect the First Amendment rights of customers. Despite Petitioner's assertions, however, the Petition's reliance on recent Supreme Court precedent that addresses mandatory membership dues for public-sector unions is not relevant or controlling. Moreover, as already noted, no EEI dues associated with lobbying are recovered, consistent with the law.

The Petitioner points to *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,[34] arguing that this recent Supreme Court decision stands for the proposition that paying for electricity is a form of compelled speech prohibited by the First

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Commission or EEI to engage in that exercise. But, for context, here is a sampling of other errors: 1. EEI does solely support the Energy Wildlife Action Committee ("EWAC"); among other members is the American Clean Power Association, which represents clean energy vendors and related companies; 2. The Utility Air Regulatory Group, for which EEI provided accounting services and which had several non-EEI members, no longer exists; 3. None of the activities of the Utility Water Advisory Group ("UWAG") are lobbying; like Petitioner, UWAG participates in regulatory proceedings in which they file comments on water issues for EPA to consider; 4. With respect to the ozone standards, EEI was the lone industry voice that did not seek for EPA to leave the standards at the current levels at the time of the 2015 rulemaking; based on the scientific record and other statutory factors, EEI advocated for EPA to increase the stringency of the standards, just not as much as Petitioner wanted; 5. EEI does not deny that climate change is human caused; EEI recently supported President Biden's decision to return the U.S. to the Paris Agreement. *See, e.g.,* EEI's statement issued last week in support of the newly announced nationally determined contribution ("NDC"), EEI Responds to President Biden's NDC Announcement, Reinforces Commitment to Be Part of the Climate Solution (Apr. 22, 2021).

[34] No. 16-1466, 585 U.S. __, 138 S.Ct. 2448 (2018).

Amendment because the cost of electricity may have included trade association dues that may include lobbying activities. As discuss above, EEI's lobbying activities are not included in retail electric bills. Moreover, the actual holding in *Janus* is not as broad as Petitioner asserts. Indeed, a review of the facts at issue and basic First Amendment jurisprudence demonstrate that *Janus* is inapposite. EEI assumes that Petitioner raises these arguments here not because it believes that the Commission could or should decide them, but to lay the groundwork for future litigation.[35] To that end, EEI provides the following response.

First Amendment rights are only implicated where the *government* is infringing on free speech rights. "The Constitution's protections of individual liberty and equal protection apply in general only to action by the government."[36] While the state action doctrine is recognized as complex and complicated, Petitioner has not even attempted to address it in this context. Instead, Petitioner appears to think that the mere payment of dues means that *Janus* must apply, but this is contrary to foundational principles of First Amendment jurisprudence, not the mention the text of the First Amendment itself.

In *Janus*, of course, there was clear state action. The State of Illinois[37] passed a law that required public-sector employees to pay dues to a union, which was the sole entity with which it would engage in bargaining. As part of the law, employees who did not opt to join the union were charged an agency fee to support the union's non-political activities, like collective bargaining.[38] In light of these facts, the Supreme Court found that the Illinois statute violated non-union members' First Amendment rights because the agency fee compelled them to

[35] Assuming, *arguendo*, that Petitioner could demonstrate Article III standing.

[36] *Edmonson v. Leesville Concrete Co*., 500 U.S. 614, 619 (1991)(internal citations omitted).

[37] The First Amendment is applicable to the States via the Fourteenth Amendment.

[38] *See Janus*, Slip. op. at 2-3.

subsidize the union's speech.[39] While this case has significant ramifications for public-sector employees and their unions, it has no relevance to the Petitioner's stated concerns.

As noted, Petitioner has not identified who the state actor is in this context. Clearly, neither EEI nor its members are state actors. Absent some government compulsion, there can be no First Amendment violation that arises from payments to a speaker, even if those payments are used for expressive purposes.[40] While the Commission created a system for how to account for various expenditures, some of which may be recoverable through rates for electricity or related services that are approved by the Commission or state utility commissions, the Commission is not compelling anyone to pay their electric bills (and, in fact, has no explicit authority to force a customer to pay). This is quite different than the facts in *Janus*, where the agency fee was automatically deducted from non-union members' pay checks.

Moreover, it is hard to say that a payment for electricity or related services was a payment in support of EEI's expression. Any such payment would be compensation for services received, the rate for which could include expenditures that the electric company made to join its trade association. The potential inclusion of EEI's dues in some accounts that may be factored into the determination of a company's electricity rates does not mean that any customer of that company has been compelled to become an EEI members.[41] This attenuation between the customer's payment and EEI's speech further differentiates this situation from the one deemed

[39] *See id*. at 7-11.

[40] *See U.S. v. United Foods, Inc*., 533 U.S. 405, 413 (2001) ("[A] threshold inquiry must be whether there is some state imposed obligation which makes group membership less than voluntary ....).

[41] No customer could reasonably believe that paying for electricity creates some sort of relationship between that customer and the electric company's trade association or any other activity that might be supported by the utility's revenues. For example, no customer would consider themselves the employer of anyone who worked at the company simply because their bill payments included the costs of employees' salaries, nor would they consider themselves the owners of any equipment that was purchased with the amounts they had supplied by paying their bills.

unconstitutional in *Janus*.

In an effort to support their *Janus* analogies, Petitioner references a New York State case in which the court held that customers should not be required to subsidize electric utilities' political activity.[42] This point is not in dispute, of course, and the cited case has significantly less relevance given that it predates the Commission's decision in *Delmarva*, which held that the costs of political activity cannot be recovered in rates.

Moreover, as explained above, EEI clearly segregates dues into two categories: dues associated with political activity as defined by the IRS and dues that is not associated with political activity. While Petitioner seems to think that *Janus* stands for the proposition that separating political activity from non-political activity is so hard that it should not even be attempted, it does not. In any event, Petitioner's actual objective is not to minimize the potential that some customers may erroneously pay for some activities that should have been deemed political but were not, but to have all activity that it does not like deemed political and the associated costs therefore unrecoverable.

Accordingly, Petitioner's First Amendment concerns are misplaced and unsupported. Recent Supreme Court precedent does not support the request for a rulemaking.

F. Petition Does Not Recognize Benefits Provided to Customers.

Since EEI's membership covers all U.S. investor-owned electric companies, we have the ability to organize and deliver industry-wide initiatives. This has resulted in nationwide campaigns to increase military hiring; spur electric vehicle and charging infrastructure deployment; promote diversity, equity, and inclusion; report carbon emissions to support customer clean energy goals; encourage the development of smart communities; and improve the

[42] Petition at 25.

customer experience, among others.[43] These industry-wide benefits have resulted in direct benefits to customers and facilitated larger changes in the industry. The Petition fails to recognize or acknowledge these benefits.

In addition to these industry-wide initiatives, a utility's membership in an industry association provides significant benefits to its customers, which the Petition also fails to recognize or acknowledge. EEI provides member companies with a significant range of services that benefit electricity customers, beyond any lobbying activity that we report consistent with federal requirements. These include for example:

Grid Resilience, Power Restoration

There is perhaps no stronger customer benefit than the work EEI does with our members on storm response and recovery. EEI and member companies have devoted significant time and resources to strengthen the reliability and resiliency of the energy grid, which directly benefits customers. During weather events, EEI provides a coordinating function between members and with the federal and state governments. EEI also provides strategic communication support aimed at ensuring that customers have the most up-to-date information on safety and restoration.

The work EEI does with our members through the mutual assistance process has evolved to meet the needs of increasingly strong and frequent storms, an increasingly connected society that runs on reliable power, and new technologies that help restore power more quickly. These efforts paid off during recent storms. By applying the lessons learned from Superstorm Sandy and the tools developed, including developing the government-industry partnership and cross-sector coordination embodied in the Electricity Subsector Coordinating Council ("ESCC"), EEI

[43] *See, e.g.*, Troops to Energy Jobs; D&I Commitment; Smart Communities; Carbon Reporting Database; Leading by Example-EV Fleets.

and our member companies have further streamlined response and restoration efforts. As one example, there was widespread recognition that our members' investments in the energy grid, their streamlined and enhanced storm response, and their enhanced coordination resulted in a much faster, successful restoration effort for 3.1 million customers impacted by Hurricane Matthew. That same commitment to safe, efficient power restoration was on display during historic storms like Hurricane Irma.

Grid Security

EEI was instrumental in the creation and growth of the ESCC and remains active in its leadership and staffing. The ESCC serves as the principal liaison between the federal government and the electric power industry, with the mission of coordinating efforts to prepare for, and respond to, national-level disasters or threats to critical infrastructure. The ESCC includes electric company CEOs and trade association leaders representing all segments of the industry. Its counterparts include senior Administration officials from the White House, relevant Cabinet agencies, federal law enforcement, and national security organizations.

EEI is also leading the industry in efforts to partner with the federal government to address new cybersecurity threats. As cybersecurity risks proliferate, EEI's member companies are organizing themselves to pool resources in the face of cyber incidents or attacks that exceed the capacity of individual member companies to respond. Building on our successful mutual assistance model, EEI through the ESCC has also launched a Cyber Mutual Assistance ("CMA") Program to provide emergency cyber assistance within the electric power and natural gas industries. Currently more than 170 entities, representing electric and natural gas investor-owned companies, public power utilities, electric cooperatives, Regional Transmission Organizations and Independent System Operators, and Canadian energy companies, participate

in the CMA Program. These entities cover more than 80 percent of U.S. electricity and natural gas customers, and over 1.25 million electricity customers in Canada.

Meetings and Conferences

EEI offers dozens of meetings and conferences each year, providing information, data exchange, and an opportunity for policy discussions aimed at ensuring the continued provision of affordable, reliable, and increasingly clean electricity in a rapidly changing world. The following is a list of some of the meetings held by EEI to promote dialogue and development of best practices across the industry. Even during the pandemic, with all in-person meetings cancelled, EEI hosted more than 1,000 webinars, virtual meetings, and conferences.

- **Accounting -** These conferences provide a forum for member companies to discuss current issues in the electric and natural gas industries and an opportunity for professional development, including continuing professional education credits for certified public accountants employed throughout the industry. These meetings include speakers from accounting standard setting bodies, including the Financial Accounting Standards Board, Securities and Exchange Commission, and FERC, and independent public accounting firms. The meetings also provide opportunities for industry accounting professionals to meet with their peers, including breakout sessions to focus on specific accounting topics, to discuss accounting requirements and best practices that benefit customers through cost-effective, efficient, and accurate financial records and reports.

- **Business Diversity -** The Annual EEI Business Diversity Conference focuses on priorities for our industry, our customers, our suppliers, and our other stakeholders, and is designed for EEI member company representatives who work in the external affairs, procurement, supply chain, and community relations fields. The goal of this program is to identify and promote the utilization of diverse suppliers capable of meeting our industry's various procurement needs, consistent with many state requirements for members to use more diverse suppliers. This program is committed to pursuing relationships with diverse suppliers and using innovative approaches designed to continually improve business opportunities.

- **National Key Accounts –** EEI's National Key Accounts is a customer-oriented program where leading multi-site customers and electric company account representatives collaborate to develop efficient energy management strategies that can be integrated into facilities nationwide. By organizing a network of electric companies, trade allies, and industry leaders, the EEI National Key Accounts program

provides customers with vital advice on electricity needs and new, cutting-edge technologies.

- **Occupational Safety and Health -** Among other things, the meeting offers a safety benchmarking workshop, part of a comprehensive effort by EEI to help the industry establish best practices for occupational safety and health. In recent years, this group has undertaken work aimed at reducing the incidence of severe injuries and fatalities.

- **Transmission, Distribution, Metering, & Mutual Assistance -** EEI's Transmission, Distribution, Metering & Mutual Assistance Conference is the premier conference that focuses on transmission, distribution, metering, and mutual assistance issues for the investor-owned electric sector. This conference addresses the critical engineering and operations areas that are important to transmission, distribution, metering, and mutual assistance professionals.

As discussed above, these services provide benefits to customers.

III. CONCLUSION

As discussed herein, EEI respectfully requests that the Commission deny the Petition as it fails to demonstrate that a sufficient change in circumstances has occurred or a problem exists that merits a generic solution.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 26th day of April 2021.

/s/ Lopa Parikh

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