

United States Senate

WASHINGTON, DC 20510

February 6, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580

Re: FTC Petition For Investigation Of Electric Utility Industry's Abusive Practices that Stifle Renewable Energy Competition and Harm Consumer Protection

Dear Chair Khan:

We write in support of the May 18, 2022 Petition submitted by more than 230 organizations and advocates requesting a Federal Trade Commission (FTC) investigation of the electric utility industry. The electricity industry is undergoing the most transformational shift since its creation. Consumers increasingly want choice, states are establishing robust renewable electricity targets, and clean technologies and services are multiplying and undercutting the cost of incumbent fuel providers.

These trends threaten the 100-year-old utility business model predicated on increasing consumer demand and utility capital expenditures. Some utilities have responded by engaging in questionable practices to subvert these trends in the interest of protecting their profits over the pockets of their customers, harming poor communities and communities of color in particular. These utility practices stifle clean energy competition, thus threatening the successful implementation of President Biden's landmark Inflation Reduction Act. We believe these disturbing anti-competitive and anti-democratic incidents merit an FTC investigation.

In the early 20th century, state regulators granted investor-owned utilities exclusive service territories with a belief that economies of scale would inure to the consumer's benefit.¹ That did not prove to be the case. By the 1930s, three holding companies controlled nearly half of our country's utility industry, with one holding company owning 130 utilities.² The FTC initiated an investigation pursuant to 6(b) of the FTC Act, and its results helped foster passage of the Public Utility Act of 1935. The law provided the Securities and Exchange Commission (SEC) with oversight of utility mergers and acquisitions under Part I, otherwise known as the Public Utility Holding Company Act (PUHCA). The Federal Energy Regulatory Commission (FERC, then the Federal Power Commission) was granted oversight of the interstate sale of

¹ <https://eelp.law.harvard.edu/2021/01/is-the-utility-transmission-syndicate-forever/>

² <https://www.ucsusa.org/resources/public-utility-holding-company-act>

electricity for resale under Part II, otherwise known as the Federal Power Act. Congress chipped away at PUHCA overtime, fully repealing it in 2005 and transferring some of the SEC's authorities to FERC.

Unfortunately, the utility industry today bears resemblance to the 1930s' environment in which the FTC launched its prior investigation. Ohio-based utility FirstEnergy played a central role in the "largest criminal conspiracy in Ohio government political history."³ FirstEnergy was involved in a \$60 million bribery scheme to prop up its struggling nuclear and coal power plants. The scheme facilitated the passage of legislation that provided \$1 billion for the power plants, rolled back Ohio's clean energy standard, and insulated annual earnings from losses.⁴ FirstEnergy and its subsidiary FirstEnergy Solutions channeled millions of dollars to Generation Now, a 501(c)(4) that, among other things, create a campaign to pass the legislation. Discovery of the scheme led to the firing of top utility executives, the arrest of the House Speaker of the Ohio legislature, and the resignation of a state utility regulator. FirstEnergy paid a \$230 million fine as part of a deferred prosecution agreement with the Department of Justice and admitted its role in the scheme. Recently, FirstEnergy paid a \$3.9 million civil fine for withholding information about its payments to Generation Now and other entities involved in the scheme during a FERC audit.⁵

Florida Power & Light (FPL), a NextEra subsidiary and Florida's largest utility, engaged repeatedly in tactics to sway elections and undercut distributed solar deployment in the state. In 2016, the Southern Alliance for Clean Energy (SACE) pushed for a ballot initiative to increase solar deployment by allowing for retail competitive choice. In response, FPL and other utilities formed a 501(c)(4) called Consumers for Smart Solar. It pushed for a ballot initiative that would bar new solar companies from entering the state and establish a "constitutional protection for any state or local law ensuring that residents who do not produce solar energy can abstain from subsidizing its production."⁶ The SACE-led initiative did not make it onto the ballot. The Consumers for Smart Solar initiative, however, did. It failed. FPL then drafted legislation that would reduce the amount that distributed solar systems would be paid for providing electricity to the grid.⁷ The bill's purpose was to "address the potential impact on a public utility of a previously unanticipated surge, unaccounted for in the utility's last rate case, in the installation of customer-owned or leased renewable generation over the period specified in this subsection."⁸ This allowed utilities to recover any revenues lost from distributed solar, and without placing any

³ <https://www.dispatch.com/story/news/crime/2020/07/26/squodark-moneyrsquo-can-easily-fuel-bribery-schemes/112742468/>

⁴ <https://www.energyandpolicy.org/firstenergy-john-skory/>, <https://www.energyandpolicy.org/firstenergy-ceo-steven-strah-emails/>

⁵ <https://www.utilitydive.com/news/firstenergy-FERC-fine-HB-6-bribery-scandal/639490/>

⁶ <https://www.vox.com/science-and-health/2016/11/4/13485164/florida-amendment-1-explained>

⁷ <https://www.utilitydive.com/news/florida-passes-net-metering-bill-that-will-gut-rooftop-solar-advocates-say/620000/>

⁸ <https://www.flsenate.gov/Session/Bill/2022/741/BillText/er/PDF>

restrictions on the terms of the recovery. FPL courted legislators in a swanky lounge space.⁹ The bill passed. Governor Ron DeSantis vetoed it. In his veto message, he acknowledged the bill would hurt consumers.¹⁰

The *New York Times* recently called attention to another example of utility inference in elections and renewable energy.¹¹ For multiple election cycles, Arizona Public Service (APS), Arizona's largest utility, bankrolled campaigns, dark money groups, and candidates who would oppose renewable energy. Similar to FPL, it began with a fight about how to compensate distributed solar customers.¹² During the 2014 election cycle, two dark money groups, Save Our Future Now and the Arizona Free Enterprise Club, emerged and began funneling money and producing material in opposition to Arizona Corporation Commission candidates who demonstrated a favorable disposition to solar. The group also provided millions in support of candidates with positions more favorable to APS. Ultimately, those candidates prevailed. During the 2016 election cycle, the Energy Freedom Coalition, an advocacy group supporting solar energy, worked to garner signatures for a ballot initiative. APS responded by going to the legislature to advance a measure that would undo the initiative. The initiative failed.¹³ During the 2018 election cycle, APS spent nearly \$40 million opposing an initiative that would have required the utility to use more renewable energy.¹⁴ The head of the utility "secretly donated more than \$10 million to help elect state regulators who would sabotage renewable energy requirements it opposed."¹⁵ Finally, in 2019, and with enough commissioners in support, the company was subpoenaed. The documents it produced confirmed what APS sought for years to avoid saying publicly: it bankrolled multiple dark-money groups and candidates to support utility profitability over consumer choice and savings.¹⁶

Only the FTC possesses the authority to investigate the full extent of possible utility anti-competitive and anti-democratic activities waged at the expense of consumers. Section 6(b) of the FTC Act confers broad investigatory powers on the Commission. It empowers the Commission to require an entity to file "annual or special . . . reports or answers in writing to specific questions' to provide information about the entity's 'organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals.'"¹⁷

⁹ <https://www.politico.com/news/2022/08/02/florida-power-light-lounge-lobbyists-00049128>

¹⁰ <https://www.flgov.com/wp-content/uploads/2022/04/4.27.22-Veto-Transmittal-Letter.pdf>

¹¹ <https://www.nytimes.com/2022/11/29/us/politics/electric-utilities-biden-climate-bill.html>

¹² <https://www.azcentral.com/story/money/business/energy/2019/03/29/arizona-public-service-admits-spending-millions-2014-corporation-commission-races/3317121002/>

¹³ <https://www.energyandpolicy.org/arizona-public-service/>

¹⁴ <https://www.energyandpolicy.org/strings-attached-how-utilities-use-charitable-giving-to-influence-politics-increase-investor-profits-arizona-public-service/>

¹⁵ <https://www.nytimes.com/2022/11/29/us/politics/electric-utilities-biden-climate-bill.html>

¹⁶ *Ibid.*

¹⁷ <https://www.ftc.gov/about-ftc/mission/enforcement-authority>

Section 6(f) authorizes the Commission to share publicly information that it obtains, where disclosure would serve the public interest.

We acknowledge that not every utility engages in activities like those detailed above. We also acknowledge that a Section 6(b) investigation involves a significant commitment of agency time and resources. The examples enumerated above and in the May 18, 2022 petition, however, demonstrate that such an investigation is worth an expenditure of the Commission's limited resources. Furthermore, there are instances of utility trade associations and dark-money groups supported by trade associations working to oppose common-sense and broadly supported policies at the expense of customers.¹⁸ We urge the Commission to consider making any information of public interest available. Public disclosure will allow government officials to consider appropriate remedies, as Congress did in 1935.

The Director of FTC's Office of Policy Planning recently said, "Competition is still the best way to ensure that our electric grid is built out in a way that lowers rates, increases innovation, and improves sustainability and resiliency." We agree. That is why we urge the FTC to launch a 6(b) investigation and give a closer examination to utility practices stifling such outcomes.

Sincerely,



Sheldon Whitehouse
United States Senator



John Hickenlooper
United States Senator



Chris Van Hollen
United States Senator



Elizabeth Warren
United States Senator

¹⁸ Sen. Whitehouse et al., comment letter to FERC, available: <https://www.whitehouse.senate.gov/news/release/senators-urge-ferc-to-stop-utility-companies-from-charging-customers-for-polluter-lobbying>

CC: Rebecca Kelly Slaughter, Commissioner, Federal Trade Commission
Christine S. Wilson, Commissioner, Federal Trade Commission
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