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December 1, 2023

Harry S. Lanphear  
Administrative Director  
Maine Public Utilities Commission  
18 State House Station  
Augusta ME 04333-0018

Re: *Commission Initiated Inquiry into Possible Amendments to Chapter 83 of the Commission's Rules, Docket No. 2023-00283*

Dear Mr. Lanphear:

On behalf of the Maine Water Utilities Association (the "Association"), I am pleased to provide comments in response to the above-noted Notice of Inquiry into Possible Amendments to Chapter 83 of the Commission's Rules (the "NOI") issued November 1, 2023.

**About MWUA.** The Maine Water Utilities Association is a nonprofit association based in Augusta that provides support for water works professionals throughout the State of Maine in advocating for safe drinking water through educational and technical programming as well as advocacy on the local, state, and national level. The Association was formed in 1925 and counts approximately 109 water utilities in Maine as members.

**Overview of comments.** In the NOI, the Commission seeks comments with regard to the definitions of "educational expenditures" and "major political activities." The NOI also sought general comments with regard to the rulemaking.

At this time, the Association does not have comments regarding the two terms noted above, but we do have general comments regarding the rulemaking as it relates two specific areas of the new law:

1. Expenditures for "lobbying or grassroots lobbying" by consumer-owned water utilities (COWUs), which issue is addressed in 35-A M.R.S.A. §302(2)(C).
2. Expenditures for political activities as addressed in 35-A M.R.S.A §302(2)(A), including with regard to referendum questions, the operation of governing bodies of COWUs, and the process for electing governing bodies of COWUs.

In both instances, we believe that any modifications to Ch. 83 related to this NOI should preserve the constitutionally-protected ability of consumer-owned water utilities to continue to engage in lobbying activities and public communications regarding referendum questions related to the activities of water utilities. We also believe that any modification of Ch. 83 needs to ensure the ability of COWUs to utilize staff resources to communicate with their own governing bodies as

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well as conduct elections to enable the selection of individuals to serve on governing bodies of COWUs.

**Background.** By way of background, this rulemaking is the result of LD 325, An Act to Require Transparency in Public Utility Advertising Expenditures, which bill was signed into law on June 23, 2023 and codified as P.L. 2023, ch.286. This legislation, initially presented as a concept draft, was ultimately modified by the Legislature into a bill that amended existing law governing political and advertising expenditures by public utilities, which law was further addressed as part of Chapter 83 of the Commission's Rules. The law prior to the 2023 amendment read as follows:

*The following expenses, whether paid directly or indirectly, through reimbursement or otherwise, incurred by a public utility shall not be included or incorporated in operating expenses:*

*1. Contributions to political groups or candidates. Contributions or gifts to political candidates, political parties, political or legislative committees or any committee or organization working to influence referendum petitions or elections.*

Based on this statutory direction, the Commission adopted Chapter 83 of its rules which more broadly restricted the ability of public utilities to charge ratepayers for expenditures related to "political activities," which term is broadly defined to include both "lobbying" expenditures as well as expenditures related to "referendum petitions or elections." Chapter 83, §1(B). The language prohibiting rate recovery of costs associated with political expenditures is further set forth in Section 5(A) of the rule:

*A. Political Activities. It is the policy of the Commission and it adopts the standard that no public utility shall recover from any person other than its shareholders or other owners for any expenditures, contributions, expenses, or costs of such utility incurred with respect to political activities. This subsection applies to all direct or indirect expenditures, contributions, expenses, and costs incurred by a public utility with respect to political activities, or through another corporation, organization, association, or individual which engages in political activities on behalf of the utility.*

Chapter 83, §5(A).

Notably, there are no exceptions or exemptions for consumer-owned utilities for expenditures related to lobbying or referendum campaigns, yet under this regulatory rubric, consumer-owned utilities are permitted to recover in rates costs related to lobbying or referendum campaigns (e.g. bond issues). We believe this to be the case based on the foregoing language in Section 5(A) of Chapter 83 which allows "shareholders or other owners" to recover the costs of expenditures related to "political expenditures." In particular, because the "consumers" are the "other owners" of consumer-owned utilities, consumer-owned utilities have historically been permitted to recover in rates their costs related to such activities. For the reasons noted below, this regulatory rubric makes sense and is essential for the proper operation of consumer-owned utilities.

**Any revision to Chapter 83 must preserve the ability of consumer-owned utilities to engage in protected speech and perform basic operations associated with the operation and election of governing bodies.** If the Commission or any other instrumentality of government were to prohibit consumer-owned utilities from recovering the cost of lobbying activities or expenditures related to certain political activities, it would amount to an impermissible restriction on free speech under the First Amendment of the United States Constitution. With regard to lobbying in particular, “lobbying” is simply the act of communicating with elected and other government officials where compensation is involved, and to the extent that employees of consumer-owned utilities are compensated for their communications to government officials related to their work, prohibiting recovery of such compensation would effectively restrict the speech itself. The same is true of expenditures by consumer-owned utilities to retain a consultant to engage in lobbying on their behalf on issues of importance to such utilities. Likewise, if a consumer-owned utility is required to engage in a public referendum campaign pursuant to its charter or other law, including with regard to certain borrowing activities, there are costs involved in such activities – including educating the public about the issues. Prohibiting the recovery of such costs would effectively restrict the ability of consumer-owned utilities to engage in speech related to referendum campaigns, including speech on utility bond issues legally required to have voter approval.

Ironically, the issue of restriction of protected speech does not arise under P.L. 2023, ch. 286 with respect to investor-owned utilities because they have shareholders able to finance communications associated with “political activities.” In this regard, restricting who pays for such activities does not restrict the ability of such utilities to engage in protected speech. This contrasts with consumer-owned utilities who have no source of funds other than revenues received in rates; hence, a restriction on rate recovery of costs associated with “political activities” – including lobbying and referendum activities – amounts to full restriction on constitutionally-protected free speech.

As an additional note of concern, consumer-owned utilities are in many cases units of government themselves, and as such, there is a risk that operations related to the governing bodies of consumer-owned utilities can be construed as a “political activity” that cannot be recovered in rates, which would be an absurd result – yet possible without careful drafting of Chapter 83. For example, when utility staff members appear before their own boards of trustees, that activity on the surface can be construed as a communication to a government official – which looks like “political activity.” Moreover, since utility staff are compensated for such communications, there is an argument to be made that such costs could not be recovered in rates if Chapter 83 were not drafted carefully. The net effect of such an outcome would be that consumer-owned utilities would be constrained in their ability to pay for the basic operations of their governing bodies – which would make it difficult or impossible for such utilities to function.

Another concern relates to political activities associated with running elections to elect trustees, which activity is “political” in nature. Maine law in most instances requires consumer-owned utilities to pay for the cost of holding public elections to allow eligible voters to elect trustees.

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Holding an election also requires some level of communication to voters about the election, including where it is to be held, and when. If Chapter 83 is not drafted carefully, there is a risk that such necessary expenditures could not be made, which would effectively make it impossible for consumer-owned utilities to conduct elections needed for governance.

**Recommendation to address the Association's concerns.** To address the Association's significant concerns regarding restriction of protected speech and the necessary operation of consumer-owned utilities, we believe the simple solution is for any revision to Chapter 83 to maintain the existing language allowing the recovery of costs associated with "political activities" to come from "other owners," which language has historically preserved the ability of consumer-owned utilities to obtain rate recovery of costs associated with activities such as lobbying or local campaigns.

**Conclusion.** We appreciate the opportunity to provide comments on this NOI related to Chapter 83 of the Commission's rules, and we hope the initial rulemaking proposal regarding Chapter 83 is able to address our significant concerns. If you have any questions or need further information, please do not hesitate to let us know.

Yours for safe drinking water,



Roger Crouse  
Chair, MWUA Legislative & Regulatory Committee

cc: Service to Parties via MPUC e-notification