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**

CENTER FOR BIOLOGICAL DIVERSITY'S OPENING COMMENTS

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EXECUTIVE SUMMARY

In March 2021, the Center for Biological Diversity submitted a Rulemaking Petition to move "industry association dues" from Uniform System of Accounts ("USofA") Account 930.2 to Account 426. The Petition was submitted on behalf of the Center's more than 1.7 million members and online activists, who are concerned about obstacles to the nation's urgently-needed renewable energy transition, and who seek to protect human health, the natural environment, and species from the climate emergency and environmental degradation.[i]

In response to the Petition, the Commission opened a new Docket – No. RM21-15 – and invited comment. *See* 86 Fed. Reg. 17,342 (Apr. 2, 2021). In dozens of submissions representing millions of ratepayers, commenters urged the Commission to make this accounting change. Trade associations, on the other hand, argued the Commission lacks the authority to act on the Petition, and claimed that only a narrow band of lobbying could be excluded from ratepayer recovery.

Now, in a comprehensive Notice of Inquiry ("NOI"), the Commission has asked a series of questions to better understand the nature of industry association expenses included in Account 930.2, and consider other potential USofA amendments to protect consumers from paying for activities that principally serve private, rather than consumer interests. 86 Fed. Reg. 72,958 (2021).

As detailed below, and in other submissions in this docket and Docket No. RM21-15, under the current USofA, utilities routinely charge consumers for activities and advocacy that should not be funded by ratepayers. This includes through their reliance on Account 930.2, as well as other operating accounts where they record a broad array of other direct and indirect advocacy. By appropriately amending the USofA, the Commission can best protect ratepayers from inappropriately funding these activities, thereby ensuring just and reasonable rates.

In particular, the Center recommends the Commission initiate a rulemaking to remove the reference to "[i]ndustry association dues for company memberships" from Account 930.2, and add that reference to Account 426, thereby making these dues presumptively non-recoverable. Because there is so little transparency in how industry associations spend ratepayer funds, moving the dues to a below-the-line account will appropriately ensure that utilities disclose the specific trade associations expenses they maintain should be shouldered by ratepayers.

[i] Contrary to Commissioner Danly's recent dissent in RM 22-5, the Center's Petition was not a "cynical attempt to invoke the Commission's jurisdiction to silence political opponents." Comm'r Danly Dissent, ¶ 6. As Commissioner Danly notes, "scores of trade associations . . . advocate for every policy viewpoint." *Id.* ¶ 16. Any USofA amendments would apply to *all* these associations, and would permit all of them to continue to engage in any speech they choose. The question, as Commissioner Christie noted in his RM22-15 concurrence, is not who may speak, but "who pays." Comm'r Christie Concurrence, ¶ 3. All the Center's Petition seeks to do is to protect *ratepayers* from paying for advocacy that benefits private companies rather than their captive customers. Finally, it is also well-established that utility companies have no First Amendment rights to particular accounting treatment in the USofA. *See, e.g., Southwestern Elec. Power Co. v. Fed. Power Commn*, 304 F.2d 29, 38 (5th Cir. 1962).

Separately from this accounting change, and in response to other Commission questions in the NOI, the Center recommends the Commission also initiate a rulemaking to propose the following additional amendments to the USofA:

1. The Commission should amend Account 426.4 to better clarify the kinds of public opinion and influence expenditures that are presumptively non-recoverable. This should expressly include expenses designed to influence not just legislation, but also legislative rulemaking at the federal or state level. The Commission should also amend Account 426.4 in response to the D.C. Circuit's recent decision in *Newman v. FERC*, No. 20-1324, 22 F.4th 189, 2021 U.S. App. LEXIS 38373 (D.C. Cir. Dec. 28, 2021), which found that *indirect* influence expenditures – those that go to a third party before being actually used for advocacy work – also belong in this Account. The Commission should also add a Note to Account 923 in light of the *Newman* ruling, making clear that outside services related to influence expenditures belong in Account 426.4.

2. Consistent with our proposed amendment to Account 426.4, the Commission should amend Account 928, titled "Regulatory Commission Expenses," to clarify that this Account is only intended to cover expenses associated with formal, individual adjudications before state utility regulators and the Commission, and does not presumptively include legislative rulemaking or other rules of general application – expenses for which should be recorded in Account 426.4.

3. Finally, the Commission should amend Account 426.1 to clarify that it covers *indirect* expenditures that are ultimately directed to charitable and related purposes.

We conclude these comments by raising a separate matter concerning industry association dues that we also urge the Commission to consider: whether the Commission should continue to allow utilities under its jurisdiction to recover *any* portion of industry association dues. The Commission and reviewing courts have referred to the Supreme Court's ruling in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), in discussing appropriate recovery from ratepayers. However, in 2018 the Supreme Court overturned *Abood,* in *Janus v. AFSCME*, *Council 31*, 138 S. Ct. 2448 (2018). Accordingly, the Commission should address the implications of this change in law to its own approach toward the recovery of industry association dues, which, like the unions at issue in *Abood*, allows trade associations to separate their expenses into recoverable and non-recoverable portions.

I. INTRODUCTION

More than 50 years ago, the Federal Power Commission – now the Federal Energy Regulatory Commission ("FERC" or "Commission") – promulgated the Uniform System of Accounts ("USofA") to, *inter alia*, inform regulatory decision-making regarding appropriate rate recovery.[1] The Commission codified that "industry association dues for company memberships" belong in an operating, generally recoverable above-the-line account – Account 930.2.[2] Separately, the Commission identified certain political and related expenses as belonging below-the-line, in a presumptively non-recoverable account – Account 426.4.[3]

In discussing the kinds of expenses the Commission expected utilities to record below-the-line, in Account 426.4, the Commission explained that the account should include "[m]embership fees in organizations engaged in lobbying on legislative matters."[4]

More than six decades later, most industry associations engage in a broad range of advocacy activities, including lobbying, regulatory advocacy, litigation, public information campaigns, and much more. In regulatory proceedings across the nation, consumer and other advocates have sought to discover the costs ratepayers are being asked to incur for industry association-funded advocacy work. However, because utilities and their associations are not required to affirmatively provide this detailed information, and may refuse to do so when asked, these efforts have often proven difficult, yielding few details.

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1 *See, e.g.*, 28 Fed. Reg. 5,014 (1963). The USofA was originally established by the Commission in the 1930s. *See* 24 Fed. Reg. 3905 (1959) (discussing USofA history).

2 *Id.*

3 27 Fed. Reg. 12,839 (1962); 28 Fed. Reg. 14,265 (1963).

4 *Id.* at 14,267.

To address this change in industry association activities over the past six decades, the Commission should modernize the USofA by removing industry association dues from Account 930.2, and specifically referencing those dues in Account 426. The Commission should move forward with this change at this time, and should separately and additionally consider whether other USofA Amendments to guarantee fair and reasonable rates for customers are also appropriate.

In particular, like their trade associations, the behavior of private utilities has also changed markedly since the early 1960s. As a result, utilities themselves also engage in advocacy activities today that were not contemplated when these USofA Accounts were established.

Accordingly – in light of the evolution in utility companies' political advocacy; the number of new venues toward which such advocacy is directed; and the increased number of third parties undertaking these advocacy activities – the Commission should also consider additional amendments to the USofA to clarify what may be recovered from ratepayers. In short, it is time for the Commission to update this vital accounting system in recognition of the ways that utility advocacy has changed. The Center for Biological Diversity's ("Center") opening comments provide several proposed amendments to the USofA for the Commission to consider in order to achieve the vital objective of ensuring just and reasonable rates for consumers.

II. BACKGROUND

A. FERC's Uniform System Of Accounts And Advocacy Expenses

As the NOI acknowledges, the statutory framework for utility rate recovery mandates that utility companies, not ratepayers, must bear the burden of proof to demonstrate that costs should be passed on to consumers.[5] Accordingly, the basic framework of the USofA aids in identifying particular expenses that more likely should be borne by shareholders, not ratepayers.[6]

As the USofA's regulatory history demonstrates, the Commission created Account 426.4 to capture utility advocacy expenditures principally used to serve the interests of the utility itself, a private company, rather than its customers. This is consistent with the Commission's admonition, in 1960, that while it is reasonable for ratepayers to pay for expenses "properly incurred by companies in rendering public service in a business affected with a public interest," ratepayers may not be forced to pay for controversial activities, where "differences of opinion may and frequently do exist between the companies and their customers . . . .[7]

Account 426.4 provides:

426.4 Expenditures for certain civic, political and related activities.

This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials, but

5 NOI at 72,960 (citing, *e.g.,* 16 U.S.C. § 824d(e)).

6 APPA, *Public Utility Accounting: A Public Power System's Introduction to the Federal Energy Regulatory Commission Uniform System of Accounts*, American Public Power Association (2012), at 17.

7 *Alabama Power Co.*, 24 F.P.C. 278, 286 (Aug. 17, 1960). As the Commission explained:

The political expenditures of utilities fall into a peculiar category. By their nature, such expenditures obviously have a doubtful relationship to rendering utility service. *** The function of electric utilities and licensees under the Power Act is, in accordance with the requirements of the Act, to render public service in a business affected with a public interest; and it is fair and reasonable to require the customers to pay the expenses properly incurred by the companies in rendering this service. However, on matters which are politically controversial, *differences of opinion may and frequently do exist between the companies and their customers, between management and the rate payer*. The classification generally of political expenditures to operating accounts might seem to imply that such expenditures must in due course and without further question be paid by the rate payer. Such an implication would be unwarranted and possibly unfair, in view of the fact that on politically controversial matters, the opinions of management and the rate-payer may differ decidedly. Thus this accounting classification, while isolating and identifying these controversial expenditures, appropriately avoids any implication that the companies are entitled without a further showing to charge against the rate payer the cost of political programs favored by the companies but possibly opposed by those who must pay the costs of supporting these enterprises.

shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.

As noted, in creating this account, FERC explained that it should include, *inter alia*, "membership fees in organizations engaged in lobbying on legislative matters." [8] The Commission also stated that Account 426.4 should include "payments for lobbying or other fees to persons or organizations including law firms, service companies or other affiliated interests, for influencing the passage or defeat of pending legislative proposals or influencing official decisions of public officers."[9] Moreover, as the D.C. Circuit recently explained in *Newman*, and as discussed further below, the regulatory history also shows that the specific list of items identified in Account 426.4 were meant to be *illustrative* only, and include similar and related expenses.[10] Indeed, as Commissioner Black noted in concurring in the Order for this Account, the Commission's intention in referring to "political" activities belonging in this account was so that regulators should apply the term "*in its broadest meaning*."[11]

[8] 28 Fed. Reg. at 14,267.

[9] *Id.*

[10] *Newman*, 2021 U.S. App. LEXIS 38373, *8.

[11] *See* Commission Order 276 (1963), Commn'r Black, Concurring (emphasis added). As Commissioner Black explained:

> utilities and their advertising agencies have displayed great ingenuity in conveying a 'message' which is not always political in the ordinary sense of the word, but which concerns itself with problems of broad national, social or economic policy. These efforts are intended to influence fundamental attitudes or beliefs, and bear no reasonable relationship to the necessary operations of a utility company or the furnishing of utility service. The industry, of course, is free to spend its money this way, but such costs should be reported as income deductions below the line.

B. The Controversial Influence Activities Of Leading Industry Trade Associations

The Center's March 2021 Rulemaking Petition detailed some of the myriad political and related advocacy activities by several of the energy industry's leading trade associations, including the Edison Electric Institute ("EEI"), American Gas Association ("AGA"), and National Rural Electric Cooperatives Association ("NRECA").[12] These include funding outside political and charitable organizations, litigation, regulatory advocacy, efforts to shape public opinion, and numerous other activities that principally serve shareholder rather than ratepayer interests, such as:

- EEI's multi-day training session for utility executives to learn how to combat state and local clean energy policies[13];
- AGA's extensive advocacy promoting residential gas use, and co-ordinating campaigns to mislead the public regarding the climate costs of gas[14]; and
- NRECA's extensive advocacy supporting controversial efforts to weaken bedrock environmental protections.[15]

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12 *See* Center For Biological Diversity Petition For Rulemaking to Amend the Uniform System of Accounts' Treatment of Industry Association Dues (Mar. 17, 2021) (hereafter "Center Petition") at 9-14 and Exhibit B. The Center Petition and its exhibits are attached here to ensure their consideration as part of the NOI. *See* Exhibit 1. The Center urges the Commission to consider the entire docket from RM21-15 in determining how to move forward with these issues. *See also* Exhibit 2 (Center Answer in RM21-15).

13 *See* David Pomerantz, *EEI Used Anti-Clean Energy Campaigns as Role Models in Political Boot Camp for Utility Execs*, Energy and Policy Institute (Aug. 27, 2020), https://www.energyandpolicy.org/eei-campaign-institute/; Hiroko Tabuchi, *Rooftop Solar Dims Under Pressure From Utility Lobbyists*, New York Times, July 8, 2017 (discussing EEI concerns with rooftop solar expansion), https://www.nytimes.com/2017/07/08/climate/rooftop-solar-panels-tax-credits-utility-companies-lobbying.html.

14 *See, e.g.*, Hiroko Tabuchi, *A Secret Recording Reveals Oil Executives' Private Views on Climate Change: At a meeting last year, industry leaders contradicted public claims that emissions of climate-warming methane are under control*, New York Times, Sept. 20, 2020, https://www.nytimes.com/2020/09/12/climate/methane-natural-gas-flaring.html; Jeff Brady, *As Cities Grapple With Climate Change, Gas Utilities Fight To Stay In Business*, NPR (Feb. 22, 2021), https://www.npr.org/2021/02/22/967439914/as-cities-grapple-with-climate-change-gas-utilities-fight-to-stay-in-business (discussing AGA pro-gas advocacy).

15 *See* NRECA, "Electric Coops Support NEPA Reforms," https://www.electric.coop/issues-and-policy/environment; NRECA, "Co-ops Praise EPA's New Clean Energy Rule for Setting Achievable Goals," https://www.electric.coop/issues-and-policy/environment/.

In responding to the Center Petition, neither the industry associations nor their member utilities denied that they charge ratepayers for many of the activities detailed in the Petition. Rather, they argued that if an activity is not covered by the narrow definition of lobbying under the Internal Revenue Code ("IRC") or the Lobbying Disclosure Act ("LDA"), there is no reason to question whether an advocacy expense may be passed along to ratepayers.[16]

Further information made available since the Center Petition was filed only further shows how industry trade associations regularly engage in or otherwise financially support controversial advocacy activities.

For example, as reflected in its 2020 Form 990, in 2020 Edison Electric Institute ("EEI") collected more than $70 million in income, much of which will presumably be recorded in and recovered from ratepayers under USofA Account 930.2.[17] EEI also spent those funds, in part, on Democratic and Republican Governors' Associations, Attorneys' General Associations, and other political activities reported as lobbying.[18] As the NOI notes, these amounts are frequently deducted from amounts charged to ratepayers by a simple across-the-board percentage re-allocation of membership dues to Account 426.4.[19]

In 2020, EEI also made contributions to more than fifty *other* organizations – including, *e.g.*, the American Legislative Exchange Council, Americans for Tax Reform, Consumer Energy Alliance, National Association of Manufacturers, National Endangered Species Act Reform

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16 *See, e.g.,* Protest of EEI in RM21-15, at 10.

17 *See* EEI 2020 Form 990, at 14 (Exhibit 3).

18 *Id.* at 18-20.

19 NOI at 72,960.

Coalition, and the U.S. Chamber of Commerce.[20] These contributions are *not* listed as lobbying expenses.[21]

However, even a quick glance at the work of these organizations reveals that they are all engaged in a host of highly political advocacy that ratepayers should not be conscripted to fund.[22]

EEI also contributed funds in 2020 to universities, charities, and other non-profit institutions.[23] Again, since none of this is lobbying, to the extent EEI only removes from trade dues the costs that fall within the narrow definition of lobbying which EEI has decided should apply, utilities may also seek to recoup in their dues payments the costs that fund these contributions as well.

Finally, in 2020 EEI, a tax-exempt non-profit organization, paid its highest official more than $3.5 million in overall compensation, and spent more than $4 million on outside legal services for one law firm.[24] Again, to the extent these expenses do not fall within the IRS

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[20] EEI Form 990 at 33-40.

[21] *Id.*

[22] *See, e.g.*, Tina Casey, *ALEC Attacks Biden on Climate Action, But Texas Could Bite Back*, Triple Pundit, Apr. 16, 2021, https://www.triplepundit.com/story/2021/alec-climate-action-texas/721226 (reviewing ALEC's anti-climate advocacy); Eric Gunn, *Lobbyists' tax proposal helps the rich most, raises taxes for the poor*, Wisconsin Examiner, Feb. 4, 2022, https://wisconsinexaminer.com/brief/new-analysis-lobbyists-tax-proposal-helps-the-rich-most-raises-taxes-for-the-poor/ (discussing anti-tax advocacy of Americans for Tax Reform); Lisa Prevost, *New Hampshire gas law handcuffs local government on climate-friendly construction*, Energy News Network, Sept. 27, 2021, https://energynews.us/2021/09/27/new-hampshire-gas-law-handcuffs-local-government-on-climate-friendly-construction/ (discussing Consumer Energy Alliance advocacy against local gas ordinances); DeSmog, National Association of Manufacturing Page, https://www.desmog.com/national-association-manufacturers/ (discussing anti-environmental advocacy); Press Release, *Crapo, Risch, Western Caucus Members Unveil Blueprint for Conservation*, Oct. 6, 2021, https://www.crapo.senate.gov/media/newsreleases/crapo-risch-western-caucus-members-unveil-blueprint-for-conservation (discussing National Endangered Species Act Reform Coalition support for Republican endangered species reforms).

[23] EEI 2020 Form 990 at 33-40.

[24] *Id.* at 8 and 9.

lobbying definition, EEI and its members may seek to recover these costs from ratepayers, regardless of the extent to which its personnel or outside lawyers and consultants may be engaged in political advocacy-related activities.[25]

A review of the American Gas Association's 2020 Form 990 tells a similar story.[26] In 2020, AGA collected more than $30 million in income, much of which utilities will presumably record in USofA Account 930.2.[27] AGA also spent those funds on Democratic and Republican Governors' Associations, Attorneys' General Associations, and other political activities reported as lobbying.[28] As with EEI, these amounts are typically deducted from amounts charged to ratepayers by a simple across the board percentage re-allocation of membership dues to Account 426.4.

However, like EEI, AGA also made contributions to dozens of *other* organizations – including, *e.g.*, American Gas Foundation, American Petroleum Institute ("API"), Natural Gas Vehicles for America, and Partnership for Energy Progress ("PEP").[29]

Once again, since these contributions are not listed as lobbying, it would appear that they may not be treated as Account 426.4 expenses.[30] However, these organizations are also engaged in a host of highly political advocacy activities supporting gas interests that should not be

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25 Precisely because EEI, and its utility members, do not disclose how utility membership dues is spent, it is of course possible that, in fact, some of these expenses are not passed along to ratepayers. Hopefully the trade associations and utilities' responses to the Commission's NOI will describe exactly which of these millions of dollars in expenses is being funded by ratepayers through recording in Account 930.2.

26 *See* AGA 2020 Form 990 (Exhibit 4).

27 *Id.* at 1.

28 *Id.* at 16.

29 *Id*. at 30-33.

30 *See* AGA Response to Comments in RM21-15 at 10-11 (explaining ratepayers do not pay for AGA lobbying, as defined by the IRC and LDA).

ratepayer-funded.[31]

Like EEI, AGA also contributed funds in 2020 to numerous other charitable and non-profit institutions.[32] Once again, absent evidence showing otherwise, it appears that utilities may recoup in their dues payments the expenses that fund these contributions.

As reflected in the Center's 2021 Petition, these third-party contributions are only the tip of an enormous iceberg of trade group advocacy, including industry association funding for law firm operated coalitions like the Utility Advocacy Groups – UWAG, USWAG, and UARG and its successors at McGuire Woods[33] – and the Energy and Wildlife Action Coalition.[34] These third-party groups, and trade groups themselves, engage in all manner of litigation, regulatory advocacy and other work that, as discussed below, should arguably not be funded by ratepayers.[35] Once again, in the absence of any affirmative evidence showing otherwise – and in light of the positions the trade groups have taken on these issues thus far – it appears that this advocacy is funded by ratepayers through trade association dues.[36]

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31 *See, e.g.*, Press Release, *Committee Analysis of Fossil Fuel Industry's Lobbying Reveals Public Praise for Climate Policies Is Not Backed by Meaningful Action*, Oct. 28, 2021, https://oversight.house.gov/news/press-releases/committee-analysis-of-fossil-fuel-industry-s-lobbying-reveals-public-praise-for (discussing API's lobbying); Michael Laris, *Federal program to cut bus emissions gets a Senate mandate: Some buses must pollute*, Washington Post, Aug. 17, 2021, https://www.washingtonpost.com/transportation/2021/08/17/infrastructure-polluting-buses-mandate/ (discussing Natural Gas Vehicles for America's advocacy to protect fossil fuel transportation); Emily Holden, *Revealed: how the gas industry is waging war against climate action*, The Guardian, Aug. 20, 2020, https://www.theguardian.com/environment/2020/aug/20/gas-industry-waging-war-against-climate-action (discussing PEP's role "fighting state and local climate restrictions on gas").

32 AGA 2020 Form 990 at 30-33.

33 *See* Matt Kasper, *UARG, the sequel? "Clean Air Act Monitoring Service" and "Climate Legal Group" appear at McGuireWoods*, Energy & Policy Institute, Apr. 7, 2021, https://www.energyandpolicy.org/uarg-the-sequel-clean-air-act-monitoring-service-and-climate-legal-group/).

34 *See* Center Petition at 12-14.

35 *Id.*, Exhibit B.

36 *See also* Nuclear Energy Institute 2019 Form 990 (Exhibit 5); NRECA 2020 Form 990, https://www.electric.coop/wp-content/uploads/2021/12/NRECA-2020-Form-990-signed-1.pdf.

C. FERC's Notice of Inquiry

In December, FERC issued its NOI, seeking comments on rate recovery, reporting and accounting for both industry association dues and other civic, political, and related expenses, including charitable, social or community welfare expenses.[37] As the NOI notes, the Commission has not "previously adopted a bright line rule" on which of these expense should be recoverable from ratepayers, and which should be excluded from rate recovery, and as a result this line "has not been clearly delineated."[38] However, the NOI recognized that, in general, the Commission has disallowed recovery for "lobbying, civic engagement, public information campaigns and the like," unless the utility demonstrates "a benefit to ratepayers."[39]

As regards industry association dues in particular, the Commission noted the challenge for an intervenor – who bears the burden of challenging expense recovery – to assess the appropriate recovery of the dues, given that industry associations do not provide detailed information on their activities.[40] As the Commission explained, "[d]ue to the lack of transparency of industry association costs and the wide variety of activities and their specific contexts," it is difficult for regulators to determine which of these costs should be recoverable.[41]

The first questions in the NOI are principally directed at utilities and their trade associations, asking how much utilities have been paying in industry association dues in recent years; how associations spend that money; and how utilities and associations determine the

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[37] 86 Fed. Reg. 72,958 (2021).

[38] *Id.* at 72,959.

[39] *Id.* at 72,961.

[40] *Id* at 72,960.

[41] *Id.* at 72,961.

allocation of these dues between recoverable and non-recoverable costs.[42] Next, the NOI asks what mechanisms stakeholders currently have to evaluate the propriety of industry association dues rate recovery, and what FERC should do to increase transparency.[43] Finally, the NOI asks what other changes or guidance FERC should consider to better delineate between recoverable and non-recoverable expenses of industry associations and utilities themselves.[44]

D. The D.C. Circuit's Recent Decision On USofA Account 426.4

After the NOI was published, on December 28, 2021, the D.C. Circuit issued *Newman v. FERC*, which provides important new guidance on Account 426.4, and the kinds of utility expenses that should not be recoverable from ratepayers.[45] *Newman* concerned millions of dollars that utilities had spent for public relations and advocacy activities but had booked in Accounts 923 and 930.1.[46]

The advocacy activities at issue in *Newman* included promotional advertisements, public opinion polling, and coalition work intended to support the utilities' goal of obtaining a certificate from state regulators to pursue a new transmission line that had been approved by PJM.[47] The Commission had determined that these expenses could be recovered, and did not

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42 *Id.* at 72,961.

43 *Id.* at 72,962.

44 *Id.* at 72,962-63.

45 22 F.4th 189, 2021 U.S. App. LEXIS 38373.

46 Account 923 is the utility operating account for outside services, and Account 930.1 is one of the utility operating accounts for advertising. *See* 18 C.F.R. Part 101, §§ 923, 930.1. As the NOI notes, these accounts are also the same for gas utilities. All of the Center's references to the USofA in these comments are intended to apply to both sets of Accounts.

47 2021 U.S. App. LEXIS 38373, **4-7.

belong in Account 426.4, principally because they were indirect advocacy expenditures in service of a project that had already been approved by PJM.[48]

The D.C. Circuit reversed. In particular, the Court found that the plain language of Account 426.4 dictates that it covers both direct *and indirect* influence expenditures.[49] Otherwise, the Court explained, a utility could recover from ratepayers for the cost of "recruit[ing] a business leader to speak at a state utility commission hearing in support of its application for a Certificate."[50] Noting FERC's own recognition that expenses that "have little or no benefit to the ratepayers," should be in Account 426.4, the Court concluded that the utilities could not recover these indirect expenses from customers.[51]

Moreover, the Court emphasized that utilities cannot do an end-run around the proscription against charging customers for their own self-interested advocacy by farming that work out to third parties. As the Court explained, if Account 426.4 only applied to direct advocacy:

> A utility's public relations contractors could simply recruit individual(s) to influence public officials on their behalf, and because the utility's payments to such contractors would be one step removed from the influence, the disputed expenses could go to other accounts and be recovered under the formula rate. *** That would obscure the purpose of the expenditures and shift to ratepayers the costs of the utility's lobbying—costs with little or no benefit to them that exceed the ordinary operating costs of power transmission services.[52]

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48 *Id.* at **9-11.

49 *Id.* at **13-25.

50 *Id.* at *20.

51 *Id.* at *31.

52 *Id.* at *32 (citations omitted).

As discussed below, that is precisely what this proceeding is centrally about: "obscur[ing] the purpose[s]" of industry association dues passed on to ratepayers by allowing its recording in an above-the-line account, rather than placing those expenses in Account 426.4, to surface costs with "little or no benefit" to ratepayers.[53]

III. DISCUSSION

The Center's comments proceed in two parts: Sections A-C, responding to the Commission's NOI questions; and Section D, raising an additional issue we urge the Commission to consider concerning the Commission's own approach toward approving requests for recovery of trade association dues.

In Sections A-C, we have strived to direct the Commission to the specific NOI Questions that each part of the discussion answers. To help direct the reader to where each NOI question is answered, we have also provided an "NOI Questions Guide" immediately after the Table of Contents above.

A. Center Responses To NOI Questions 1-5, 16, And 20: It Is Imperative That Utilities And Industry Associations Provide Comprehensive Answers To These Commission Questions.

NOI Questions 1 through 5, 16, and 20 seek vital information concerning the amount of industry association dues being paid by utilities, the portion of those dues that are being allocated to recoverable accounts, and how utilities and trade associations currently make those determinations.[54] Utilities and their trade associations should have all of this data, and it is incumbent on them to provide full and transparent answers to the Commission's questions in order to inform the Commission's decision-making. The Center looks forward to examining

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53 *Id.*

54 86 Fed. Reg. at 72,961.

those submissions and providing the Commission with any further comment on these questions in Reply comments.

At this time, the Center can share the following: as reflected in the filing of E-9 Insight, in 2020 the 50 largest utility holding companies, with operations in 48 states, reported over $93 million in payments to industry trade associations.[55] Although this does not address how much of those dues will be collected from ratepayers, it reflects the vast sums these trade groups collect to engage in their many activities.[56]

As regards the Commission's important NOI Question 3 about how associations inform utilities of their programs and expenses, including those "associated with lobbying, public outreach on legislative and regulatory issues, and other categories of costs,"[57] it appears that at least EEI refuses to provide this kind of information to regulators – which led the Kentucky Public Service Commission to deny recovery of EEI dues last year.[58]

In that case, the Kentucky Attorney General had asked the utility "how EEI utilizes the Company's rate-payer funded dues," including details regarding EEI spending on regulatory advocacy and public relations.[59] In response, EEI's General Counsel refused to provide any of this information, claiming that "[b]ecause the IRC definition of lobbying *does not require us to*

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55 *See* E9 Insight Filing in RM 22-5 (Fed. 22. 2022).

56 For example, in an Arizona Rate case, Arizona Public Service disclosed that for 2018 and 2019 it had provided more than $2.5 million for EEI, USWAG and UARG alone. *See* Public Staff's Direct Test. in Arizona Corporation Commission Docket No. E-01345A-19-0236, at .pdf244, available at https://docket.images.azcc.gov/E000009361.pdf?i=1645047907671.

57 NOI at 72,961.

58 *In the Matter of Application of Louisville Gas and Elec Co. for Rate Adjustment*, 2021 KY . PUC LEXIS 814, *34-35 (Ky P.S.C. June 30, 2021).

59 *See* Feb. 5, 2021 LG&E Response to Data Requests, https://psc.ky.gov/pscecf/2020-00350/rick.lovekamp%40lge-ku.com/02192021010947/03-AG-KIUC_DR2_LGE_Responses-Vol_1_of_2%28Q42-Q82%29.*pdf*.

separately report regulatory or other activities . . . EEI is not required, nor do we, track or account for our budget in the manner requested."[60]

It is therefore vital that EEI and other trade associations provide complete and accurate answers to NOI Questions 1 to 5.

Finally, as for NOI Question 20, on information campaigns, donations to third-party organizations, and conferences and trainings, again, it is critical that the industry associations and their members disclose this information, including whether costs for the categories of activities raised in Question 20 are being recovered in rates. Just a few examples of specific activities in these categories that the Center encourages the Commission to focus on include:

- Trade group payments to third-party groups like those identified in their Form 990s, and elsewhere;[61]
- Trade group expenses on public relations firms providing informational campaign assistance;[62]
- Trade group expenses for social media information campaigns;[63] and
- Trade group work educating utility executives in effective lobbying.[64]

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60 *Id.* at 6-7 (Feb. 17, 2021 Letter from EEI to LG&E) (emphasis added).

61 See, also, e.g., Jason Garcia and Annie Martin, *Big business-linked group funded 'ghost' candidate ads, records show,* Orlando Sentinal, Jan. 18, 2022, https://www.orlandosentinel.com/news/os-ne-ghost-candidates-ryan-tyson-20220118-ortscfef7ndnxgwivl4inlbfie-story.html. (explaining how Florida Power and Light is a member of Associated Industries of Florida, which is closely linked to "Let's Preserve the American Dream," which gave $600,000 to "Grow United Inc.," used to support spoiler "ghost" candidates in key Florida state Senate races.).

62 *See, e.g.,* EEI 2020 Form 990 at 8 (disclosing $421,000 in expenses to Maslansky & Partners); https://maslansky.com/ (discussing the Firm's work); EEI 2018 Form 990 at 8 (disclosing over $500,000 in expenses to Democracy, Data and Communications; https://ddcpublicaffairs.com/ (discussing the Firm's work); AGA 2020 Form 990 at 9 (disclosing $225,000 in expenses to Adfero); (https://adfero.com/ (discussing the Firm's work).

63 For example, the EEI-sponsored group "We Stand For Energy" spent more than $60,000 on Facebook advertising. *See https://tinyurl.com/bdejfvnf*. Similarly, AGA spent more than $70,000 on Facebook for "social issues, elections or politics." *See https://tinyurl.com/2zyhed3x*.

64 *See* David Pomerantz, *EEI Used Anti-Clean Energy Campaigns as Role Models in Political Boot Camp for Utility Execs*, Energy and Policy Institute (Aug. 27, 2020), https://www.energyandpolicy.org/eei-campaign-institute/

B. Center Responses To NOI Questions 6-14 and 17-18: The Commission Should Move Industry Association Dues From Account 930.2 To Account 426 To Ensure Just And Reasonable Rates.

NOI Questions 6-14, and 17-18, concern whether, under the current USofA, the industry association expenditures funded from ratepayers through industry association dues are sufficiently transparent to ensure just and reasonable rate recovery.[65] As discussed above, a threshold concern is that, in general, industry associations do not in fact "disclose the nature of their costs and activities" to regulators.[66] Rather, as reflected in the letter from EEI noted above, trade associations may identify only the total costs associated with the narrow set of lobbying activities covered under federal lobbying laws. As regards industry associations' myriad other activities – which include many other forms of influence expenditures that do not principally benefit ratepayers – the industry associations have explained that, in their view, they are simply not required to provide these costs and activities to their members or regulators.[67]

The key question – as the Commission poses in NOI Question 9 – is what additional transparency is necessary for stakeholders to evaluate the reasonableness of ratepayer recovery for industry association dues. As we next explain, the most straightforward and effective approach to achieving the necessary transparency for these costs would be to amend the USofA by moving industry association dues from Account 930.2 to Account 426.

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65 NOI at 72,962.

66 *Id.*

67 *See generally* Trade Association comments in RM21-15.

1. The Commission's Current Treatment Of Industry Association Dues Does Not Ensure Just And Reasonable Rates.

Under the current USofA, industry association dues are recorded in Account 930.2, where it is presumptively recoverable from ratepayers. For the reasons discussed below, the Commission should move forward with a rulemaking to move industry association dues to Account 426. Importantly, recording the dues in that account would not make the entire dues non-recoverable. Instead, it would simply require that trade associations and their utility members *identify* the specific expenses they maintain should be charged to ratepayers, allowing regulators and the public to see those expenses and determine whether they are appropriate for rate recovery.[68]

As a threshold matter, amending the USofA is appropriate because the regulatory history of these accounts indicates that industry trade associations dues more properly belong in Account 426.4.

In particular, as the D.C. Circuit recently discussed in *Newman*, several of the USofA above-the-line accounts explicitly recognize that some portion of the expenses listed there may more appropriately belong in Account 426.4, and instruct that such expenses be re-allocated there.[69] For example, Accounts 909 and 930.1 both have a note specifically explaining that political expenses covered by Account 426.4 belong in that account, rather than an above-the-

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68 *See* Account 426 Note ("The classification of expenses as nonoperating and their inclusion in these accounts is for accounting purposes. It does not preclude Commission consideration of proof to the contrary for ratemaking or other purposes").

69 *Newman*, 2021 U.S. App. LEXIS 38373, **33-34.

line account.[70] Similarly, as the Court noted in *Newman*, Account 923 has specific language requiring utilities to re-allocate expenses that are "eligible for Account 426.4 in the first place."[71]

Account 930.2 – where industry association dues are currently recorded – has no similar note. Thus, while it includes several forms of "miscellaneous general expenses," it does not indicate that *any* portion of those expenses might actually concern political or other activities that belong in Account 426.4.

As noted, the regulatory history of Account 426.4 similarly reflects that the Commission expected that this Account should include all utility expenses for "membership fees in organizations engaged in lobbying on legislative matters."[72] And, as Commissioner Black emphasized in concurrence, the Commission had in mind the "broadest meaning" of the kind of political activities that would be covered by this Account.[73]

Even apart from this USofA history, many things have changed since these accounts were created over a half-century ago, including the kind of advocacy activities in which industry associations engage in order to influence both public opinion and the regulators and legislators who determine the legal environment in which they must operate. It is therefore appropriate that the Commission is considering whether to modify the USofA to better reflect what utilities and their trade associations are doing, and how they are spending ratepayer funds.

As the Commission well knows, for-profit utilities face challenges that simply did not exist when the USofA was created. These challenges include competition – be it from distributed

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70 *See* USofA Accounts 909 Note A and 930.1 Note B.

71 *Newman*, 2021 U.S. App. LEXIS 38373, at *34.

72 28 Fed. Reg. at 14,267.

73 Order 276, Comm'r Black, Concurring.

energy companies and customers, other utility providers, or even other technologies such as storage or demand response.[74] These challenges also include regulations and other initiatives from federal and state agencies with environmental protection and clean energy mandates.[75]

These marked changes in the market and regulatory environments in which utilities operate have naturally led associations to engage in advocacy that was not contemplated decades ago, including new forms of public and regulatory advocacy, as well as litigation.[76]

As it became evident that trade associations were engaged in activities that would otherwise be covered by Account 426.4, regulators began to treat this issue the same way it was treated in other accounts – explaining that utilities should identify what portion of trade association dues reflects these political activities, and record them in Account 426.4.[77] As a practical matter, this generally means that a utility points to a trade association invoice in which the trade association itself identifies what portion of dues are associated with lobbing activities, and the utility re-allocates that percentage to Account 426.4 – and the only circumstance in which further information is shared, or the allocation is questioned, is if an intervenor successfully raises and pursues the issue in a regulatory proceeding.[78]

This approach has proven inadequate, yielding inconsistent results, and unfairly placing the burden on consumer and non-utility advocates. It also fails to take into account the utilities

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74 *See, e.g.,* Ari Peskoe, *Unjust, Unreasonable, and Unduly Discriminatory, Electric Utility Rates and the Campaign Against Rooftop Solar*, 11 Tex. J. Oil Gas & Energy 211, 221-28 (2016).

75 The Nation's major environmental statutes, with which utilities across the country must comply, were largely put in place in the 1970s and later. *See, e.g.,* Clean Air Act 42 U.S.C. § 7401, *et seq.* (1970); Clean Water Act, Pub. Law 92-500 (1972).

76 *See* Center Petition at 10-14 and Exhibit B (detailing advocacy of industry associations and their affiliates concerning implementation of federal environmental laws).

77 *See, e.g., Delmarva Power & Light Co*., 58 F.E.R.C. P61,169, 61.509 (1992).

78 *See, e.g.,* Center Petition, Exhibits F and G (sample invoices).

and their trade associations' incentives to maximize the scope of activities funded by ratepayers. In short, particularly given how the activities of trade associations have changed, it is appropriate for the Commission to consider moving trade association dues to a below-the-line account, for several related reasons.

(1) Trade association dues are not the same as other utility expenses. Nonetheless, the existing approach ignores how industry association dues are unique among expenses that FERC identifies in an above-the-line account. Under the USofA, utilities identify expenses for particular above-the-line expenses, allowing regulators to evaluate whether those expenses are suitable for recovery.

Industry association dues do not work this way. Rather, under the USofA, utilities generally just list the *amount* of dues paid to industry associations, without any details regarding how those funds are actually being spent, with the exception of the portion the associations themselves self-identify as lobbying. Indeed, association fees are not even an expense for a service to a specific utility, but rather a proxy for *all* the services the trade association provides all utilities across the board. This alone counsels in favor of treating these dues differently than other utility expenses.[79]

(2) In response to NOI Question 20(c), utility trade associations frequently use ratepayer funds to support outside entities whose activities are even harder to track. In particular, utility trade associations often deliver rate-payer funds to *other* third-party groups who engage in their own advocacy activities.

[79] Membership dues in trade associations is generally not tailored to the specific utility, but rather is set at a base rate for utilities, regardless of the specific services provided. While some association activities may benefit all members, this approach also means that ratepayers in one state are paying for EEI advocacy, for example, directed at benefiting utility companies in another state. *See, e.g.*, EEI Comments on Utah Regional Haze Rule (Mar. 14, 2016), https://www.regulations.gov/comment/EPA-R08-OAR-2015-0463-0155; EEI Comments on Arkansas air quality plan (July 15, 2015), https://www.regulations.gov/comment/EPA-R06-OAR-2015-0189-0174.

For example, the AGA has a close affiliate, the Energy Solutions Center ("ESC"), which engages in campaigns to support AGA members' interests.[80] Among other activities, ESC publishes *Natural Living*, a promotional magazine distributed by gas companies, which has sought to influence public opinion with respect to local electrification ordinances, raising up hyperbolic claims that ordinances addressing new building construction are "a steppingstone" to limiting gas use in existing homes.[81] ESC has also promoted AGA Foundation studies that "highlight ways emissions reductions can be achieved through natural gas solutions at lower consumer cost than electrification."[82] This kind of advocacy to influence public opinion regarding ordinances and related matters belongs below-the-line, but by passing expenses first from the utility to AGA, and then from AGA to another group, utilities have the opportunity to bury these advocacy expenses, and pass them on to ratepayers.

The examples of this kind of pass-through to other advocacy groups are legion. This is evident from industry association Form 990s[83] and other information already before the Commission.[84] As yet one more example, Eversource funded a number of outside organizations that then supported legislation consistent with Eversource's interests.[85]

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80 *See* Benjamin Storrow, *Leaked docs: Gas Industry Secretly Fights Electrification*, E&E, May 3, 2021, https://www.eenews.net/climatewire/2021/05/03/stories/1063731537?utm_campaign=edition&utm_medium=email&utm_source=eenews%3Aclimatewire.

81 *See* Natural Living at 3 and 4 (2020), https://www.atmosenergy.com/sites/default/files/fall_2020_natural_living.pdf.; *see also, e.g.,* Southwest Gas Natural Living Magazine Page, https://www.swgas.com/en/natural-living-magazine (linking to multiple issues of Natural Living).

82 *Id.*

83 *See supra* at 6-9.

84 *See, e.g.,* Center Petition at 12-14; Public Interest Organizations Comments in RM21-15.

85 *See* Bruce Mohl, *Eversource puts tab for memberships on ratepayers: Utility seeks reimbursement for fees paid to business groups*, Commonwealth, Oct. 26, 2017, https://commonwealthmagazine.org/energy/31427/.

By putting industry association dues below-the-line, the Commission can most efficiently ensure that to the extent a utility seeks to recover for expenses associated with any of these groups funded by the industry associations, those specific expenses are identified and therefore subject to appropriate regulatory oversight.[86]

(3) The difficulty in drawing a bright line between recoverable and non-recoverable expenses counsels in favor of making industry association dues presumptively non-recoverable. Because, as the Commission has long recognized, "the line between public outreach and educational expenses and lobbying expenses is drawn has not been clearly delineated,"[87] there may be questions regulators need to resolve regarding precisely which of these trade association expenses should be treated as non-recoverable. The relevant question then becomes who is in the best position to identify, categorize, and put dollar amounts on the various activities of trade associations and their affiliates, to allow regulators to engage in reasoned decision-making. And the answer is: the utility, not the consumer or consumer advocates.

Under the current USofA, however, that burden lies with intervenors in regulatory proceedings, who must serve discovery and pursue these expenses. On the other hand, if the Commission were to move trade association dues to Account 426, it will be incumbent on *utilities* to identify the specific trade association expenses they assert are suitable for ratepayer recovery. In short, since it is the trade associations – and at most perhaps in some instances the

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86 *See also, e.g.* Senator Sheldon Whitehouse, *Dark Money and The U.S. Courts: Problems and Solutions, 57* Harv. J. on Legis. 273, 273 (Summer 2020) (discussing how, through their "network of trade associations, think tanks, front groups, and political organizations," corporations – including regulated utilities – are permitted to "dodge accountability for harms to the public; to subvert the free market to their advantage; and to protect their own political power by undermining democratic institutions").

87 *Potomac-Appalachian Transmission Highline*, *LLC*, 170 F.E.R.C. P61,050, ¶ 79, 2020 LEXIS 100 (Jan. 24, 2020). On rehearing, the Commission discussed the scope of Account 426.4, and noted that the company whose accounting had been challenged had re-allocated some of the challenged lobbying expenses to that Account. *Potomac-Appalachian Transmission Highline*, *LLC*, 172 F.E.R.C. P61,048, ¶ 26, 2020 LEXIS 1195 (July 16, 2020).

regulated utilities – who possess the actual *data* regarding how ratepayer funds are being spent, it is entirely reasonable that the USofA should require utilities to identify specific trade association expenses, rather than leaving the task of seeking these details to intervenors.

The marked resource imbalance and incentives between utilities on the one hand, and intervenors on the other, also demonstrates that it would be much more reasonable to put the burden on utilities and trade associations to demonstrate the appropriateness of trade association dues recovery than the other way around. As private companies, utilities of course have a self-interest in maximizing the amount of their expenses that are passed on to ratepayers.

At the same time, intervenors possess neither the data nor the resources to be responsible for the threshold burden of challenging the appropriate treatment of industry association dues. Indeed, the manner in which the current approach, which puts the burden on intervenors, plays out in proceedings bears out this concern. For example, in *Pacific Gas and Electric*, intervenors sought to challenge the utility's bid to charge ratepayers for its EEI dues, where it was undisputed that "PG&E does not know how EEI spends PG&E's contributions."[88]

However, reflecting the USofA's existing presumption that these dues are recoverable, the presiding Judge's principal concern was that "*PG&E was not put on notice* that the EEI expenditures to which [Intervenor] refers were an issue in the case."[89] In short, with industry association dues in an above-the-line account, *in every case* the burden is squarely on *intervenors* to both serve discovery on the utility and challenge whether recovery of the dues is appropriate. And, in the absence of discovering details showing how industry associations may be engaged in activities that should not be recoverable, regulators have overwhelmingly tended to simply

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[88] 165 FERC P63,001, ¶ 770 (2018).

[89] *Id.* at ¶ 772 (emphasis added).

assume they may be recovered.[90] This is how the issue is treated before FERC and state regulators.[91]

In sum, putting these expenses in a presumptively non-recoverable account will best serve ratepayers by not only putting the burdens where they properly belong, and best insuring that regulators have the most complete and accurate information in making their regulatory decisions, but also by conserving precious resources currently expended trying to litigate over these expenses.

(4) FERC's effort to ensure that more marginalized voices have a fair opportunity to be heard in regulatory proceedings also counsels in favor of this straightforward accounting change. In 2021, the Commission established the Office of Public Participation ("OPP").[92] The Commission has emphasized that the OPP's objective is to increase transparency of the Commission's work to marginalized communities in order to facilitate their participation in Commission proceedings that impact them, with the ultimate goal of improving decision-making about the energy system overall because the views of those most impacted will

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[90] Although the presiding Judge in the PG&E case also summarized testimony generally outlining EEI services that could be a legitimate expense for ratepayers, those general activities were in no manner tied to the dues PG&E was paying. *Id.*; *see also Pacific Gas and Electric*, 173 FERC P61,045 (2020) (affirming initial decision).

[91] *See also, e.g., In the Matter of the Application of DTE Elec. Co.*, No. U-20162, 95 (MPSC May 2, 2019) (rejecting Administrative Law Judge determination that utility had not sufficiently justified recovery of EEI dues based solely on EEI's self-reporting, concluding that this approach is sufficient "in the absence of any evidence to the contrary" showing that the self-reporting is inaccurate).

Intervenors also often lack the resources to challenge the appropriate treatment of industry association dues. With some minor exceptions, state regulators – and FERC – do not provide for intervenors to be compensated for the time and expense associated with reviewing utility submissions and challenging expenses. And while these issues are sometimes pursued by state funded Attorney's General or other consumer advocates, they – unlike the trade associations and their members – lack the actual data, and must try to pursue it, costing parties and regulators time and expense that, in turn, only adds to the costs to ratepayers.

[92] The office was created pursuant to a long-standing Congressional mandate for the Commission to create such an office in order to "coordinate assistance to the public with respect to authorities exercised by the Commission," by both providing assistance to those intervening or seeking intervention in Commission proceedings, and considering a program to provide funding for greater intervenor participation. 16 U.S.C. § 825q-1.

be considered.[93] Further, the OPP is committed to making Commission processes "responsive to public input, with the goal of ensuring processes are inclusive, fair, and easy to navigate."[94]

Underlying the OPP's objective is the Commission's recognition that marginalized communities have been historically left out of the decision-making process of energy decisions that disproportionately impact them. In multiple-week listening sessions for the OPP, commenters from environmental justice communities conveyed that they lack resources, accessibility, and knowledge "that the Commission's actions will affect them until it is too late to meaningfully participate."[95] Advocates particularly emphasized the importance of targeting "environmental justice, [I]ndigenous, frontline, and fenceline communities that have historically been disproportionately burdened by energy infrastructure" to participate in decision-making on energy projects, energy market and rate matters.[96]

The Commission's efforts to make energy decisions more transparent, inclusive and fair for communities disproportionately impacted by those decisions also counsels in favor of this straightforward accounting change. As a threshold matter, because, as noted, trade association dues are currently recorded in the recoverable account, the public bears the initial burden to challenge how these dues are being spent – adding yet another burden that should especially not be borne by these very communities.

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93 The OPP's mission statement provides that the Office has a duty to "ensure that the concerns of Tribal members, environmental justice communities, and other historically marginalized communities are fully and fairly considered in Commission proceedings." *See* FERC, Office of Public Participation, https://www.ferc.gov/OPP.

94 *Id.*

95 *See* FERC, The Office of Public Participation, 16, June 24, 2021, https://www.ferc.gov/media/ferc-report-office-public-participation.

96 *Id.* at 18.

Moreover, this accounting change would further the Commission's stated goals of increasing transparency and accessibility of energy decision-making to communities most harmed. Because historically marginalized communities bear higher energy burdens than their white counterparts,[97] the portion of their energy bills that has been presumptively routed to trade association dues under current accounting practices consists of a higher percentage of their income. The fact that trade association dues are often directed to highly political activities that harm the environment, block clean energy progress, and increase fossil fuel infrastructure also means that the resulting impacts of trade association dues disproportionately harm marginalized communities, who bear greater health and economic consequences of the polluting energy system.[98]

For these reasons, the proposal to make trade association dues presumptively unrecoverable by ratepayers has garnered significant support from environmental justice leaders and communities as a way to better protect the interests of Black, Brown, Indigenous, Asian, and other communities of color. Dr. Robert Bullard, a founder of the environmental justice movement who coined the term "environmental racism," called on FERC to address this precise issue in a June 2021 New York Times editorial. There, Dr. Bullard urged FERC to "bar utilities from forcing their customers to pay the membership fees to trade associations whose anti-climate

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[97] Fisher, Sheehan, & Colton, Home Energy Affordability Gap (2013), http://www.homeenergyaffordabilitygap.com/. *See also* American Council for an Energy-Efficient Economy, Understanding Energy Affordability 1 (2018), https://www.aceee.org/sites/default/files/energy-affordability.pdf.

[98] *See* Tim Donaghy & Charlie Jiang, Greenpeace, Fossil Fuel Racism (2021), https://www.greenpeace.org/usa/wp-content/uploads/2021/04/Fossil-Fuel-Racism.pdf; *Energy Justice toward Racial Justice*, 5 Nature Energy 551 (2020), https://www.nature.com/articles/s41560-020-00681-w; Eva Lyubich, *The Race Gap in Residential Energy Expenditures* (Energy Inst. at Haas, Working Paper No. 306, 2020), https://haas.berkeley.edu/wp-content/uploads/WP306.pdf.

efforts promote policies that harm the communities they serve."[99] Similarly, more than 90 environmental justice and energy justice organizations have endorsed this accounting change, arguing that it "would help address utilities' unconscionable practice of charging electricity customers for payments to groups engaged in political activities that promote fossil fuels, worsen air pollution, and obstruct the urgently-needed clean and just energy transition to combat the climate emergency."[100]

In short, the accounting change would serve the Commission's greater interest in protecting marginalized communities and their articulated interest in not being forced to pay for association practices that disproportionately harm them.

(5) Trade associations' erroneously narrow definition of lobbying does not account for all the political advocacy expenses that may belong below-the-line. NOI Question 17 therefore identifies another reason to move trade association dues to Account 426:[101] because the scope of industry association activities that should be considered non-operating is considerably *broader* than the narrow definition under the federal lobbying laws the trade associations rely on.

As noted, in responding to the Center Petition in RM21-15, the trade associations argued that no action is needed because they already identify certain expenses covered as lobbying under both the Internal Revenue Code and the Lobbying Disclosure Act.[102] However, the trade

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99 Robert Bullard, I Wrote About This Environmental Injustice Decades Ago. It Hasn't Changed, June 29, 2021, https://www.nytimes.com/2021/06/29/opinion/biden-environmental-justice-pipelines.html.

100 Nathan Phelps, Clean Energy, Justice Groups Oppose Flow of Ratepayer Money to Utility Trade Groups, Votesolar News, May 11, 2021, https://votesolar.org/clean-energy-justice-groups-oppose-flow-of-ratepayer-money-to-utility-trade-groups/.

101 NOI at 72,962.

102 *See* AGA Protest in RM 21-15 at 10-11 (Apr. 26, 2021); EEI Motion to Intervene and Protest at 10 (Apr. 26, 2021).

associations' premise is that any expenses that fall outside the narrow definition of lobbying in these statutes is *ipso facto* appropriate for recovery from ratepayers. There is simply no basis for that presumption.

For example, by following federal lobbying laws trade associations can charge ratepayers for expenses related to influencing the public with respect to local legislation, as the federal lobbying laws do not specifically cover this kind of advocacy. Several years ago AGA prepared a detailed Report criticizing local efforts to promote electrification.[103] Although this Report was plainly intended to influence public opinion on local legislation, AGA presumably considers its cost to be included above-the-line, because it does not fall within the scope of activities covered by federal lobbying laws. Similarly, when EEI spent funds in order "to rebalance the public conversation" on net metering, an issue often addressed by state and local legislators, EEI was engaged in influencing public opinion with respect to state and local legislative questions, yet EEI's reliance on federal lobbying laws would not necessarily lead the association to report those expenses as lobbying.[104]

However, the first clause of Account 426.4 specifically includes "expenditures for the purpose of influencing public opinion with respect to . . . referenda, legislation, *or ordinances*."[105] This would thus include influencing public opinion with regard to city or state laws, and thus these expenses should be excluded from trade association dues.

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[103] *See* AGA, Implications of Policy Driven Residential Electrification (July 2018), https://www.aga.org/globalassets/research--insights/reports/AGA_Study_On_Residential_Electrification

[104] *See* Center Petition, Exh. E at 4.

[105] 18 C.F.R. Part 101, § 426.4 (emphasis added).

The lobbying definitions that the trade associations have referenced also exclude extensive expenses "for the purpose of influencing the decisions of public officials," including participation and litigation related to agency rulemaking.[106] According to the trade associations, excluding these activities from Account 426.4 is therefore appropriate because the list of covered activities under the Lobbying Disclosure Act exempts certain agency rulemaking advocacy.[107]

However, these laws do encompass efforts to influence senior executive branch officials, including as to the "formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government."[108] The question for the Commission, then, is why there should be a distinction – from the standpoint of just and reasonable rates – between a utility or its trade association's efforts to influence senior executive branch officials as distinguished from other agency officials in the policy-making process.

We respectfully submit that it would be more consistent with the Commission's long-standing views of recoverable activities to, at the very least, require rulemaking activities to be recorded in Account 426.4, where they would be at least presumptively non-recoverable. As the Commission noted decades ago:

> on matters which are politically controversial, differences of opinion may and frequently do exist between the companies and their customers, [and therefore] isolating and identifying these controversial expenditures, appropriately avoids any implication that the companies are entitled without a further showing to charge against the rate payer the cost of political programs favored by the companies but possibly opposed by those who must pay the costs of supporting these enterprises.[109]

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106 18 C.F.R. Part 101, § 426.4 (emphasis added).

107 *See, e.g.,* AGA Protest in RM21-15 at 11.

108 2 U.S.C. § 1602(8)(A)(ii).

109 *Alabama Power Co*., 24 F.P.C. 278, 286 (Aug. 17, 1960).

In short, in today's regulatory environment, decisions about appropriate regulatory initiatives are often controversial, and there is no reason that utilities – through their trade associations – should automatically be permitted to rely on ratepayers to fund their regulatory advocacy, when their customers may have a different view.

(6) The D.C. Circuit's recent ruling supports treating trade association dues as presumptively non-recoverable. Rejecting the Commission's suggestion that utilities could pay third parties to "influence public officials on their behalf," the Court explained that allowing this kind of end run around ratepayer accountability "would obscure the purpose of the expenditures" in a manner that would undermine the purposes of Account 426.4.[110] Similarly, here, simply allowing utilities to pay lump sums to industry associations, who then seek to "influence public officials" on behalf of their utility members, obscures the purpose of these expenditures in contravention of Account 426.4.[111]

(7) Moving industry association dues below-the-line would be more consistent with the Federal Power Act's mandate that utilities bear the burden of proof in seeking rate recovery. As noted, under the current USofA, intervenors bear the burden of challenging whether utilities are appropriately seeking recovery of trade association dues. This is contrary to

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110 *Newman*, 2021 U.S. App. LEXIS 38373.

111 The Minnesota PUC's recent resolution of a request to recover expenses for McGuire Woods – the law groups that is the successor to the Utility Air Regulatory Group (*see* Matt Kasper, *UARG, the sequel? "Clean Air Act Monitoring Service" and "Climate Legal Group" appear at McGuireWoods*, Energy & Policy Institute, Apr. 7, 2021, https://www.energyandpolicy.org/uarg-the-sequel-clean-air-act-monitoring-service-and-climate-legal-group/) – also reflects this concern, as the Commission found that the expenses could only be recoverable based on details regarding how the money is being spent. *In The Matter of The Application of Otter Tail*, Docket No. 20-719, Order on Findings of Fact, at 24-25 (Feb. 1, 2022) ("Although the company argues that these organizations provide valuable services and information, it is unclear how the membership dues connect to the provision or improvement of utility services. The Commission is not convinced that without these membership dues, Otter Tail's utility service would be diminished or its quality reduced. The Commission does not make this decision on the basis of the policy or legislative activities of the organizations in question, but on the overall lack of information on the specific value of the services.).

the mandate that utilities, not consumers, must bear the burden of proof.[112] Accordingly, the Commission also should move industry association dues below the line to make this aspect of rate recovery more consistent with the statutory mandates the USofA implements.

2. Center Response To NOI Question 13: Requiring More Detailed Disclosures Of Trade Association Spending Would Not Be Nearly As Effective In Ensuring Just And Reasonable Rates As Simply Moving Industry Association Dues To A Presumptively Non-Recoverable Account.

NOI Question 13 asks whether the Commission can ensure just and reasonable rates associated with utility trade associations by either requiring utilities to "possess detailed data" subject to Commission audits (Q13(a)); requiring industry associations to "publicly disclose detailed cost data" (Q13(b)); and/or requiring utilities to include in their filings certain categories of industry association dues activities (Q13(c)).[113] As we discuss next, none of these alternative approaches would be nearly as effective at ensuring just and reasonable rates as simply moving industry association dues to a non-recoverable account. Rather, moving trade association dues to being presumptively non-recoverable offers an elegant and simple solution that avoids pitfalls presented by these other alternatives.

(1) FERC's proposal in NOI Question 13(a), mandating that utilities obtain detailed data on trade association dues spending, would fail to address the resource imbalance and burden issues on consumers, would create new burdens for the Commission and other regulators, and would not provide regular and consistent monitoring. In particular, rather than affirmatively require the disclosure of this information to satisfy their

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[112] *E.g.,* 16 U.S.C. § 824d(e)); *see also* 15 U.S.C. § 717c(e).

[113] NOI at 72,962.

burden for rate recovery, this approach would leave the information hidden, allowing for disclosure only as the result of some affirmative investigation.

As to potential Commission audits – also suggested in NOI Question 13(a) – a major deficiency in relying on this tool is the limited nature of these audits, which are done only for a small fraction of utility filings.[114] Indeed, the fact that, despite their infrequency, these audits routinely discover misallocated association and related costs simply serves to reinforce that relying on FERC's auditing authority alone would be insufficient to ensure these expenditures are treated properly for rate recovery purposes.[115]

Nor would it be sufficient to rely on intervenors to discover and scrutinize this data. Indeed, under this approach, while utilities would have additional data, they would be under no obligation to affirmatively share that data with regulators or the public. Rather, it would be incumbent on intervenors to seek this data in discovery. Again, given the serious resource imbalance inherent in these proceedings, it is simply not sufficient to anticipate that ratepayer interests will be sufficiently protected by relying on resource-constrained intervenors to pursue these matters.[116]

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114 *See* https://www.ferc.gov/audits.

115 *See, e.g.*, July 30, 2020 FERC Letter to San Diego Gas & Elec. Co., No. FA19-3-000, at 49 (finding "charitable donations through payments to an industry association as a portion of its membership dues paid"), https://www.ferc.gov/media/fa19-3-000-san-diego-gas-electric; Nov. 15, 2019 FERC Letter to National Grid USA, No. FA16-2-000, at 27-28 (same), https://www.ferc.gov/media/fa16-2-000-national-grid.; Sept. 27, 2019 FERC Letter to Cleco Power LLC, No. FA18-3-000, at 58 (finding company "recorded lobbying costs reported on industry and trade association dues invoices in" Account 930.2), https://elibrary.ferc.gov/eLibrary/idmws/common/OpenNat.asp?fileID=15363949; *see also* Exhibit 6 (chart summarizing other FERC audits).

116 As the NOI notes, the National Association of Regulatory Utility Commissioners ("NARUC") used to conduct independent audits of certain trade association expenses. NOI at 72,961. At bare minimum, independent auditing of trade association expenses would provide a level of objectivity lacking if utilities and their trade associations are left to track these expenses on their own.

(2) FERC's proposal in NOI Question 13(b), requiring industry associations themselves to publicly disclose detailed cost data for a utility to seek dues recovery, would not ensure just and reasonable rates. As a threshold matter, since the Commission – and state regulators – have no jurisdiction over the associations themselves, they would have no authority to police either the adequacy or the accuracy of these association disclosures. Thus, regulators and the public would be left to simply trust how the associations characterize their spending to evaluate whether expenses are suitable for recovery.

Again, this stands in stark contrast to simply moving industry association dues below-the-line, which would force utilities to affirmatively disclose the specific expenses for which recovery is sought, and would allow regulators and intervenors to appropriately probe those expenses within the context of regulatory proceedings. In short, farming rate recovery oversight out to the associations of for-profit companies – who, again, have a vested interest in maximizing the amount of these expenses that can be passed onto ratepayers – would not serve the Commission's goal of achieving just and reasonable rates.

(3) FERC's proposal in NOI Question 13(c), requiring utilities to affirmatively disclose information on the categories of industry association dues in Commission rate filings, would also not fulfill the USofA's greater transparency objectives and consistency in utility accounting. As a threshold matter, this approach would continue to rely on utilities, and their associations, to detail their spending, which would be markedly less dependable than independent auditing along the lines of the earlier NARUC audits. It would also require Commission oversight to monitor the accuracy of this reporting.

Moreover, as the Commission has explained, the USofA is a critical tool for "consistent, transparent, and decision-useful accounting information" not just for the Commission, but, *for* *other regulators as well*.[117] For example, federal power agencies such as the Tennessee Valley Authority (TVA) are required to follow the USofA,[118] and it applies to all other "agencies of the United States engaged in the generation and sale of electric energy for ultimate distribution to the public, so far as may be practicable, in accordance with applicable statutes."[119] Electric utility cooperatives also follow the USofA.[120] And finally, state agencies that oversee utilities in more than half the states across the country have adopted FERC's approach, requiring utilities under their jurisdiction to conduct their accounting in accordance with the USofA.[121]

Accordingly, while requiring certain affirmative disclosures before the Commission itself might improve the transparency of industry association dues in Commission proceedings, it would risk leaving this inherent problem intact in myriad other proceedings around the country where utilities routinely seek ratepayer recovery for industry association dues. And while

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117 *See* FERC, Accounting Matters (2021), https://www.ferc.gov/enforcement-legal/enforcement/accounting-matters.

118 *See* 16 U.S.C. § 831m (requiring TVA to follow the USofA).

119 Order 141, 12 Fed. Reg. 8503 (Dec. 19, 1947).

120 7 C.F.R. Part 1767 (applying USofA to cooperatives).

121 *See, e.g.*, Ala. Code § 37-1-54 (2020) and Ala. Admin. Code § 770-X-2-.03(a) (2020) (Alabama); Alaska Stat. § 42.05.451 (2020) and Alaska Admin. Code tit. 3, § 48.277(a)(9)–(13) (2021) (Alaska); Ariz. Admin. Code §§ 14-2-212, 14-2-312 (2021) (Arizona); Ark. Code Ann. § 23-4-422 (2020) and 126-00 Ark. Code R. § 001(1.01)(tt) (Arkansas); Colo. Rev. Stat. § 40-4-111 (2020) and 4 Colo. Code Regs. § 723-3 (2021) (Colorado); Fla. Admin. Code Ann. r. 25-6.014 (2021) (Florida); Ga. Code Ann. § 46-2-20(f) (2020) and Ga. Comp. R. & Regs. 515-3-1-.10(a) (Georgia); Idaho Admin. Code. r. 31.12.01.101 (2020) (Idaho); 220 Ill. Comp. Stat. Ann. 5/5-101 (LexisNexis 2020) and Ill. Admin Code tit. 83, § 415.10 (2021) (Illinois); Iowa Admin. Code r. 199-16.2(5) (Iowa); Ky. Rev. Stat. Ann. § 278.220 (2021) (Kentucky); 65-407-310 Me. Code R. § A (2021) (Maine); 220 Mass. Code Regs. 51.01–02 (2021) (Massachusetts); Minn. R. 7825.0200(3) (2021) (Minnesota); 39-16 Miss. Code R. § 16(100)(2) (2021) (Mississippi); Mo. Code Regs. Ann. tit. 20 § 4240-20.030 (2021) (Missouri); Mont. Admin. R. 38-5-110 (2021) (Montana); Nev. Rev. Stat. Ann. § 703.191 (LexisNexis 2020) (Nevada); N.M. Code R. § 17.3.510.10 (2021) (New Mexico); Form E-1 Rate Case Information Report, Docket E-100 NCUC (1985) (North Carolina); Ohio Admin. Code 4901:1-9-05 (2021) (Ohio); Or. Rev. Stat. § 757.120 (2020) and Or. Admin. R. 860-027-0045 (Oregon); 52 Pa. Code § 57.42 (2021) (Pennsylvania); S.D. Admin R. 20:10:13:48 (2021) (South Dakota); 16 Tex. Admin. Code § 25.72(c) (Texas); Utah Admin. Code r. 746-310-7 (2021) (Utah); 20 Va. Admin Code § 5-201-90 (2021) (Virginia); Wash. Admin. Code §480-100-203 (2021) (Washington); Wis. Stat. Ann. § 196.06 (West 2021) (Wisconsin); 023.0002.3 Wyo. Code R. § 12 (2021) (Wyoming).

regulators and intervenors might be able to rely on the Commission filings to aid in that process, the basic problem would remain: any additional data that might be relevant to these determinations would remain in the possession of the trade associations, free from regulator and intervenor scrutiny.

Moving industry association dues to a below-the-line account would address all these concerns. If a utility maintains that an industry association expense is suitable for recovery, it would simply identify that expense, just as it does for any other expense in Account 426 that a utility seeks recovery for. Thus, as noted, Account 426 itself explains that "[t]he classification of expenses as nonoperating and their inclusion in these [Account 426] accounts is for accounting purposes [and] does not preclude Commission consideration of *proof* to the contrary for ratemaking or other purposes."[122]

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In sum, rather than simply requiring trade associations to disclose their expenses more fully to utilities or regulators as a general matter, the Commission should adopt the simple approach most consistent with the Commission's intention in crafting 426.4 in the first place – requiring "membership fees in organizations engaged in lobbying on legislative matters" to be recorded in Account 426.4.[123]

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122 18 C.F.R. Part 101, § 426 (emphasis added).

123 28 Fed. Reg. at 14,267 (emphasis added); *see also id.* (also referring to "payments for lobbying or other fees to persons or organizations including law firms, service companies or other affiliated interests, for influencing the passage or defeat of pending legislative proposals or influencing official decisions of public officers.")

3. Center Responses To NOI Questions 10, 11 and 14: The Commission's Changes To The USofA Should Apply To All Rates, And To All Entities.

NOI Questions 10, 11, and 14 generally ask whether the Commission should make certain exceptions to amending the way in which industry association dues is treated – to certain proceedings (Q10); certain regulatory structures (Q11); or certain minimum cost thresholds (Q14). Because this information should not be unduly burdensome to provide across all proceedings, and would provide "decision-useful information," the Commission should apply them across-the-board.[124]

(1) As regards NOI Question 10 – asking whether any new requirements should have exemptions for certain types of rates – there is no reason the Commission should assume that amending the USofA would be unduly burdensome for any regulated entities. Indeed, since regulated companies will necessarily rely on their trade associations to provide the requisite information regarding how ratepayer funds are spent, this should not be a resource-intensive exercise for any companies.

Moreover, moving industry associations dues to Account 426 may well be the least burdensome approach for all entities, as compared to alternatives the Commission summarizes in NOI Question 13. In particular, rather than adding any affirmative disclosure obligations that would apply across-the-board, putting industry association dues into Account 426 would only require companies to disclose industry association expenses for which they are seeking ratepayer recovery. To the extent smaller entities might choose to simply absorb those costs rather than disclose those details, they can make the relative cost-determination themselves.

[124] *See* FERC, Accounting Matters (2021), https://www.ferc.gov/enforcement-legal/enforcement/accounting-matters.

Accordingly, all companies subject to the USofA should be subject to any amended version.

(2) As to NOI Question 11 – asking about potential exemptions for municipal utilities and rural electric cooperatives where under FERC jurisdiction – for several reasons the Commission's new accounting treatment for industry association dues should also apply to these public power providers.

First, the trade associations for public power providers and electric cooperatives also engage in a host of political and related advocacy activities. For example, as detailed in the Center Petition, the trade association for rural cooperatives—the National Rural Electric Cooperative Association ("NRECA") – spends millions of dollars annually on lobbying, and engages in myriad other forms of advocacy.[125] The Center Petition similarly detailed the political and related advocacy work of the American Public Power Association ("APPA").[126]

Second, as noted, public power providers generally follow the USofA. It would thus be anomalous for public power providers to have a USofA exemption when they are under the Commission's jurisdiction, but to follow other requirements before their principal regulators.

Finally, unlike private utilities, public power providers do not have shareholder funds they can choose to rely on for their political and related advocacy activities. Rather, as publicly funded entities, *these funds all come from ratepayers*.

This of course raises serious questions concerning whether these expenses are appropriately included as part of just and reasonable rates. However, at bare minimum this

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[125] *See* Center Petition, Exhibit B at 7. NRECA was also a top contributor to the 147 members of Congress who voted to overturn the 2020 election results. *See* Mat Kasper, *Some utility companies "pause" or "evaluate" PAC giving; others remain silen*t, Energy and Policy Institute (Jan. 15, 2021), https://www.energyandpolicy.org/utility-companies-pause-evaluate-pac-givingafter-capitol-hill-attack/.

[126] Center Petition, Exhibit B, at 5-6.

critical difference for public power providers counsels in favor of maximizing the degree of transparency required for these kinds of expenses. In short, if ratepayers are going to be forced to pay for these costs, they should certainly at least be publicly disclosed.

Accordingly, there are no grounds for considering excepting public power providers or cooperatives from any amendments the Commission might make to the USofA. Rather, these new requirements should apply across-the-board.

(3) Finally, as to NOI Question 14 – suggesting the potential for an exemption where associations dues might be small – there is also no reason for the Commission to entertain such an exemption. Once again, with association dues recorded in Account 426, companies paying small amounts of dues may elect to simply absorb those costs. If, instead, they maintain that the dues are suitable for rate recovery, there is simply no reason they could not identify those specific costs – which will presumably be less burdensome the smaller the dues amount, as there will be fewer costs to report.

C. Center Response To NOI Questions 15, 19, and 21-22: FERC Should Consider Amending Other USofA Accounts To Ensure Just And Reasonable Rates

The foregoing discussion demonstrates why the Commission should move forward with amending the USofA to move industry association dues to a presumptively non-recoverable account. However, included in NOI Questions 15-22 are several separate inquiries concerning whether the Commission should consider *other* USofA amendments to address advocacy activities by utilities or their associations, particularly considering the "grey areas" between appropriate and inappropriate recovery – including regulatory advocacy and litigation.[127] As we

[127] NOI at 72,962-63.

discuss next, in light of the kinds of advocacy which utilities fund and engage in today, the Commission should additionally consider amending several other USofA Accounts.

1. Center Response To NOI Question 19: The Commission Should Amend Account 426.4 To Ensure Just And Reasonable Rates.

As NOI Question 19 notes, Account 426.4 contains a carve out for "expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations."[128] Recognizing the potential ambiguity concerning "the appropriate scope of this exemption" for both utilities and their trade associations, the NOI asks if there are types of expenses or appearances before regulatory or other governmental bodies that should be excluded from rates.[129]

The answer is yes, and they fall into two categories. First, as discussed below, the Commission should amend Account 426.4 to remove any doubt as to whether activities beyond a utility's participation in a formal case concerning its own activities is recoverable, and to make absolutely clear that utility participation in general legislative rulemaking is presumptively a non-operating expense. Second, the Commission should amend Account 426.4 pursuant to the *Newman* ruling, to also make it absolutely clear the Account includes *indirect* utility expenses. In sum, for the reason we next outline, we respectfully urge the Commission to consider amending Account 426.4 so that would read as follows (proposed changes shown in redline/strikeout):

[128] NOI at 72,963 (quoting Account 426.4).

[129] *Id.*

426.4 Expenditures for certain civic, political and related activities.

This account shall include expenditures for the purpose of **directly or indirectly** influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, **regulation**, or ordinances (either with respect to the possible adoption of new referenda, legislation, **regulation** or ordinances or repeal or modification of existing referenda, legislation, **regulation** or ordinances) or approval, modification, or revocation of franchises; or for the purpose of **directly or indirectly** influencing the decisions of public officials, but shall not include such expenditures which are directly related to appearances before regulatory ~~**or other governmental**~~ bodies in connection with **formal cases before those bodies.**~~**the reporting utility's existing or proposed operations**~~

a. Legislative Rulemaking Should Be Treated The Same As Legislative Lobbying For The Purposes Of Ratepayer Recovery.

As the Commission has noted, the line between recoverable and non-recoverable advocacy expenses "has not been clearly delineated."[130] As a result, the Commission has attempted to address these issues on a case-by-case basis, with mixed results.[131]

As regards the agency rulemaking process, which is typically called "legislative rulemaking,"[132] in dissenting from proceeding with this NOI, Commissioner Danly asserted that because legislative rulemaking advocacy can impact regulated entities' operations – and therefore ultimately ratepayer costs – it might be recoverable.[133]

However, we respectfully urge that allowing utilities to presumptively charge ratepayers for their legislative rulemaking advocacy would be both inconsistent with the Commission's intentions in crafting Account 426.4, and with an appropriate consideration of the kinds of activities that should fall on either side of the recovery line.

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130 *Id.* at 72,959.

131 *See, e.g.*, *Newman*, 22 F.4th 189, 2021 U.S. App. LEXIS 38373.

132 *E.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001).

133 *See* Commissioner Danly Dissent in RM22-15 at 5.

As to the regulatory history, as discussed, in considering the appropriate allocation of expenses when initially crafting the USofA, the Federal Power Commission was acting against a backdrop of little need for utilities to engage in regulatory advocacy or related litigation. The nation's major environmental laws had not yet been enacted, and legislative rulemaking as a tool for making important generic legislative judgments before administrative agencies did not flourish until the 1960s.[134]

Nonetheless, in crafting Account 426.4, the Commission noted that there were issues pending before the public, legislators, and regulators concerning "the private v. public power question."[135] As to those matters, the Commission explained that it intended Account 426.4 to include expenses associated not just with supporting legislation but also with "*administrative action*" – *i.e.*, generic action before agencies.[136]

Similarly, the Commission explained that it expected Account 426.4 to include expenses for "law firms, service companies or other affiliated interests" working to influence *either* "pending legislative proposals" *or* "official decisions of public officials."[137]

Thus, while the Commission anticipated that expenses associated with a company's appearance before regulators in its own regulatory proceedings would be an operating

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[134] *See, e.g.*, Thomas W. Merrill and Kathryn Tongue Watts, *Agency Rules With The Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 549-571 (Dec. 2002).

[135] 28 Fed. Reg. at 14,266.

[136] *Id.* (emphasis added).

[137] *Id.* (emphasis added).

expense[138], the Commission appears to have intended for legislative rulemaking to be treated like lobbying legislators: a below-the-line expense.

In fact, given the nature of the legislative rulemaking process, the Commission should consider clarifying that, in general, legislative rulemaking expenses should be presumptively recorded in Account 426.4.

The Commission has long held – and the Courts have long endorsed the principle – that legislative advocacy is not recoverable because it serves shareholder rather than ratepayer interests.[139] But why is that so?

After all, if a utility is successful in passing legislation repealing environmental mandates, or protecting themselves from certain market competition, that also would impact a regulated entities' operations, and thus would presumably bear on ratepayer costs.

Thus, the rationale for disallowing recovery for political expenses is not simply because it will have no impact on ratepayers. Rather, it reflects a judgment that a company's involvement in the legislative process might advance interests with which the ratepayers might not agree. Thus, again, as the Commission explained in *Alabama Power*, advocacy on legislation is not recoverable because "differences of opinion may and frequently do exist between the companies and their customers, between management and the rate payer."[140] For that reason, the Commission explained, "isolating and identifying these controversial expenditures appropriately avoids any implication that the companies are entitled without a further showing to charge

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[138] *Id.* (Identifying as appropriate operating expenses the "[c]osts of *appearances* before the Federal Power Commission or other Federal and state regulatory agencies in various regulatory proceedings") (emphasis added). A party does not "appear" in a generic rulemaking proceeding.

[139] *See Alabama Power Co.*, 24 F.P.C. 278, 286 (Aug. 17, 1960*); Southwestern Elec. Power Co. v. Fed. Power Commn*, 304 F.2d 29, 38 (5th Cir. 1962).

[140] *Alabama Power Co.*, 24 F.P.C. 278, 286 (Aug. 17, 1960) (emphasis added).

against the rate payer the cost of political programs favored by the companies but possibly opposed by those who must pay the costs of supporting these enterprises."[141]

These considerations apply with equal force to legislative rulemaking. After all, legislative rulemaking generally has the force of law, and in today's administrative state exponentially more generic law is made every day by administrative agencies engaged in the rulemaking process than by Congress or state legislators.[142]

Accordingly, since legislative lobbying is not recoverable from ratepayers, there should be no ambiguity that legislative rulemaking is not recoverable either. In sum, allowing utilities to conscript ratepayers to pursue their efforts to influence the general regulatory environment in which they must operate is as objectionable as allowing them to force ratepayers to fund their efforts to influence the legislative regime governing their operations.

This principle should apply not just to the the legislative rulemaking process, but also to litigation over legislative rules. To be sure, litigation concerning individual adjudicatory matters has been deemed suitable for ratepayer recovery.[143] However, where a utility – or its trade association – or an outside law group funded by the utility or trade association – decides to sue an agency over a legislative rule, that should be treated no differently than engagement in the rulemaking process itself, for again, the positions they advance may be contrary to those of their ratepayers.

Adding the term "regulations" into Account 426.4, as proposed above, will remove any existing ambiguity on this point, clarifying that expenses for the purpose of influencing decisions

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141 *Id.*

142 *See supra* n.134.

143 *E.g., Mountain States Telephone and Telegraph Co. v. FCC*, 939 F.2d 1035 (D.C. Cir. 1991); *Iroquois Gas Transm. Sys., Inc. v. FERC*, 145 F.3d 398 (D.C. Cir. 1998).

on regulations, and public opinion concerning regulations, belong in this account, along with expenses associated with influencing decision-makers and public opinion with respect to legislation.

However, to fully clarify that these expenses belong in Account 426.4, we also respectfully urge the Commission to consider amending the exclusion clause at the end of the Account 426.4 description, which provides a carve-out that allows utilities to recoup expenses that would otherwise be excluded by Account 426.4's operative clauses.

As it stands, the exclusion clause at the end of Account 426.4 includes a vague reference to "appearances before regulatory *or other governmental bodies*."[144] This could be read to suggest that a utility may exclude from Account 426.4 certain expenses incurred in appearances before bodies other than their own regulators. We recommend deleting the clause "or other governmental bodies" to clarify that such expenses should be included in this Account.

The exclusion clause also refers to expenditures "in connection with the reporting utility's existing or proposed operations."[145] As reflected by Commissioner Danly's dissent, this could be read to suggest an open-ended allowance for recovering any expenses even tangentially tied to a utility's operations. However, as noted, the Commission already does not allow recovery for lobbying, even though that of course may also impact a utility's operations.

Accordingly, we recommend removing this clause, which will further clarify what expenses belong in Account 426.4. In its place, we recommend that the Commission amend the end of Account 426.4 to provide that the exclusion only covers expenses "directly related to appearances before regulatory bodies in connection with *formal cases before those bodies*."

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[144] 18 C.F.R. Part 101, § 426.4.

[145] *Id.*

Limiting the clause to "formal cases before those bodies" would leave no room for doubt that the exclusion only applies to individual adjudications, not the general rulemaking context. This is the precise language the Commission uses in Account 928, which also refers to "formal cases."[146]

With these clarifying amendments to Account 426.4, the Commission could best ensure that utilities do not charge ratepayers for advocacy expenses that should be shouldered by shareholders, rather than consumers.

b. The Commission Should Make Explicit That *Indirect* Expenses For The Activities Covered By Account 426.4 Are Also Properly Recorded In This Account.

As noted, in *Newman*, the D.C. Circuit recently explained that the operative clauses in Account 426.4 apply to both direct and indirect expenditures.[147] The Commission should codify this ruling by also amending Account 426.4 to add the term "directly or indirectly" before "influencing" in the two operative clauses, thereby making clear this account covers both direct and indirect expenditures to influence public opinion or public officials. Indeed, doing so would be consistent with language Congress itself has used elsewhere.[148]

The recent "ghost candidate" scandal in Florida highlights the importance of making

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[146] 18 C.F.R. Part 101, § 928. The Center Petition refers to a NARUC audit that found EEI was spending up to 50% of its income on "advocacy and lobbying efforts." Center Petition at 11. This assertion comes from a 2009 rate case filing from the Arkansas Attorney General's Office, which included a chart listing the "Schedule of Expenses by NARUC Category For Core Dues Activities For the Year Ended December 31, 2005." *See* Direct Testimony of William B. Marcus, *In the Matter of the Appl. Of Oklahoma Gas And Elec.*, No. 08-103-U (Ark. PSC, Jan. 13, 2009). The chart's listing of NARUC categories for legislative advocacy, legislative policy research, regulatory advocacy, and regulatory policy research totaled more than 50%. *Id.*

Commissioner Danly calls this reference "misleading" because, in his view, regulatory advocacy and related costs naturally belong above-the-line. Comm'r Danly Dissent, ¶¶ 9-11. However, as we have explained, legislative advocacy is not recoverable, and there is no reason to treat legislative rulemaking advocacy differently – at least as regards whether these expenses should be at the very least presumptively non-recoverable by being recorded in Account 426.4.

[147] *Newman,* 22 F.4th 189, 2021 U.S. App. LEXIS 38373.

[148] *See, e.g.,* 15 U.S.C. § 3203(b)(2) (prohibiting recovery for both "direct and indirect" advertising expenditures by gas companies); 16 U.S.C. § 2623(b)(5) (same restriction for electric companies).

absolutely clear that utilities may not engage in indirect influence expenditures, either themselves, or through their industry associations. In that case, it appears that Florida Power and Light ("FPL") is a member of an industry association that contributed to a non-profit organization, which in turn used funds for electoral activities.[149] By making explicit that any indirect expenditures ultimately used for political activities belongs in Account 426.4, the Commission can best ensure that these kinds of expenses do not get recorded above-the-line.

2. Center Response To NOI Question 22: FERC Should Consider Amending Accounts 923 And 928 To Ensure Just And Reasonable Rates

NOI Question 22 asks whether there are other accounts in which utilities record the kind of activities addressed in the NOI, and if so what issues the Commission should consider as to those accounts.[150] As we discuss next, to ensure just and reasonable rates the Commission should consider also consider amending Accounts 923 and 928.

(1) As regards Account 923, which concerns outside services, the Commission should add a Note to this account to clarify that advocacy expenses do not belong there, as discussed by the D.C. Circuit in *Newman*. In *Newman*, the Court explained that while this account is "broad in scope," it does not include expenses that properly belong in Account 426.4.[151] To avoid any confusion about this account, the Commission should therefore add a Note similar to the Note the Commission already includes in Account 909 and 930.1, making

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149 *See, e.g.,* Jason Garcia and Annie Martin, *Big business-linked group funded 'ghost' candidate ads, records show,* Orlando Sentinal, Jan. 18, 2022, https://www.orlandosentinel.com/news/os-ne-ghost-candidates-ryan-tyson-20220118-ortscfef7ndnxgwivl4inlbfie-story.html. (explaining how FPL is a member of Associated Industries of Florida, which is closely linked to Let's Preserve the American Dream, which gave $600,000 to Grow United Inc., used to support spoiler "ghost" candidates in key state Senate races.").

150 NOI at 72,963.

151 *Newman*, 22 F.4th 189, 2021 U.S. App. LEXIS 38373, *33.

clear that political expenses may not be included.[152]

In particular, we propose the Commission add the following Note at the end of Account 923:

> NOTE: Exclude from this account and include in account 426.4, Expenditures for Certain Civic, Political and Related Activities, expenses for outside services, which are designed to solicit public support or the support of public officials in matters of a political nature.

The Commission's recent Audit Report for FirstEnergy Corporation demonstrates the value of this USofA clarification.[153] In that case, the Commission found that FirstEnergy had misallocated more than $10 million in lobbying expenses to Account 923.[154] By making it absolutely clear that this account is not available for any expenses that properly belong in Account 426.4, the Commission can help to avoid this kind of problem in the future.

(2) As regards Account 928, the Commission should consider amending the language of this Account to comport with the proper approach toward includable expenses for legislative rulemaking.[155] The amended version would read as follows (proposed changes shown in redline/strikeout):

[152] For example, Note B to Account 930.1 directs reporting companies to "[e]xclude from this account and include in account 426.4, Expenditures for Certain Civic, Political and Related Activities, expenses for advertising activities, which are designed to solicit public support or the support of public officials in matters of a political nature." 18 C.F.R. Part 101, § 930.1.

[153] See Feb. 4, 2022 Audit Letter to FirstEnergy Corp. in Docket No. FA19-1-000, https://www.gongwer-oh.com/public/FERCFEAudit2422.pdf.

[154] *Id.* at 49.

[155] *See supra* at 39-45.

Account 928

This account shall include all expenses (except pay of regular employees only incidentally engaged in such work) properly includible in utility operating expenses, incurred by the utility in connection with formal cases before regulatory commissions~~, or other regulatory bodies, or cases in which such a body is a party~~, including payments made to a regulatory commission for fees assessed against the utility for pay and expenses of such commission, its officers, agents, and employees, and also including payments made to the United States for the administration of the Federal Power Act.

The Commission should remove the reference to "other regulatory bodies, or cases in which such a body is a party," in order to leave no doubt that while expenses for adjudications or other "formal cases before regulatory commissions" are recoverable expenses, as a general rule a utility's expenses to participate in the legislative rulemaking process, including before other agencies, should not be passed on to ratepayers.

This amendment would appear to be consistent with the Commission's intention in creating this account, which is titled "Regulatory Commission Expenses."[156] Thus, the Commission did not appear to anticipate that utilities would treat their advocacy on legislative rulemaking before agencies like the U.S. Environmental Protection Agency as a recoverable expense. These expenses belong in Account 426.4.

3. Center Response To NOI Question 15: FERC Should Clarify Account 426.1 To Ensure Just And Reasonable Rates.

NOI Question 15 asks whether the Commission should consider additional transparency associated with donations for charitable, social, or community welfare purposes, recorded in Account 426.1.[157] The Commission and many state regulators have long considered these kinds

156 18 C.F.R. Part 101, § 928.

157 NOI at 72,962.

of expenses to be non-recoverable, and it is therefore important that this account capture all of these expenses.[158]

As with other accounts discussed above – and consistent with the D.C. Circuit's *Newman* ruling – the Commission should improve the transparency associated with this account by clarifying that it covers any *indirect* utility expenses that may be directed toward these kind of purposes.

Indeed, as reflected in industry trade association Form 990s, these associations often provide funds to these organizations.[159] Moreover, as the Commission has discovered in various utility audits, on multiple occasions utilities have sought to pass on to ratepayers expenses for these purposes that were funded directly by their trade groups.[160]

Accordingly, the Commission should amend Account 426.1 so that it reads as follows:

426.1 Donations.
This account shall include all **direct and indirect** payments or donations for charitable, social or community welfare purposes.

158 *See, e.g., Trunkline Gas Co.*, 90 F.E.R.C. P61,017, 61,064 (2000). There are serious questions whether utilities use their support for charitable causes to purchase customer loyalty, and at the very least goodwill, as part of an overall tactic to maintain customer acquiescence. *See* NAACP Climate and Env. Justice Program, *Fossil Fueled Foolery: An Illustrated Primer On The Fossil Fuel Industry's Deceptive Tactics* (2021), https://naacp.org/resources/fossil-fueled-foolery-20*;* Anderson, *et al., Strings Attached: How Utilities Use Charitable Giving To Influence Politics and Increase Investor Profits* ("Strings Attached") (Energy and Policy Institute, Dec. 2019), https://www.energyandpolicy.org/wp-content/uploads/2019/12/Strings-Attached-how-utilities-use-charitable-givingto-influence-politics-and-increase-investor-profits.pdf; Ivan Penn, *N.A.A.C.P. Tells Local Chapters: Don't Let Energy Industry Manipulate You*, New York Times, Jan. 5, 2019, https://www.nytimes.com/2020/01/05/business/energy-environment/naacp-utilitydonations.html); Anne Marshall-Chalmeers and Dan Gearino, *Is the California Coalition Fighting Subsidies For Rooftop Solar A Fake Grassroots Group?*, Inside Climate News, Feb. 8, 2022, https://insideclimatenews.org/news/08022022/is-the-california-coalition-fighting-subsidies-for-rooftop-solar-a-fake-grassroots-group/.

159 *See supra* at 7-9.

160 *See* Exhibit 6 (chart summarizing other FERC audits).

Consistent with the *Newman* ruling, this amendment would clarify that utilities may not place spending for these purposes in operating accounts, by first passing these expenses through other organizations – including their trade associations. Rather, even these indirect expenses must be recorded in Account 426.

In addition, as raised in other comments, the Commission should require affirmative disclosures of these expenses, consistent with the kinds of disclosures that were previously required of utilities when the Securities and Exchange Commission ("SEC") played a critical oversight role regarding utility accountability. Only by disclosing these expenses can regulators and the public ensure this spending has been properly tracked and accounted for.[161]

D. The Commission Should Also Consider Whether It Will Continue To Approve The Recovery Of Any Portion Of Industry Association Dues.

As noted, the Commission has long recognized that a utility's political activities should not be funded by ratepayers, because doing so allows a utility to conscript ratepayers into financially supporting viewpoints that they may in fact oppose. As the Commission explained decades ago, requiring private utilities to spend *their own* funds on their political advocacy is appropriate because, "on matters which are politically controversial, differences of opinion may and frequently do exist between the companies and their customers, between management and the rate payer."[162] The Commission has also explained that the legislative history of the Federal Power Act evinces Congress's intention to reign in utility reliance on ratepayer funding for political spending, which had become a highly controversial issue at that time.[163]

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161 *See* SEC Form U-13-60 (2006), at 24, https://www.sec.gov/about/forms/formu-13-60.pdf*; see also* SEC Form U5S (2007), at 5, https://www.sec.gov/about/forms/formu-5s.pdf.

162 *Alabama Power Co.*, 24 F.P.C. 278, 286 (Aug. 17, 1960) (emphasis added).

163 *See Southwestern Elec. Power Co. v. Fed. Power Commn*, 304 F.2d 29, 38 (5th Cir. 1962). Rejecting the

As regards industry trade association dues, as the NOI notes, the Commission has allowed utilities and their associations to identify these political expenses and record only that portion of the dues in Account 426.4.[164] As the Center has explained, to ensure just and reasonable rates across all utilities whose regulators rely on the USofA, FERC should move industry association dues entirely to Account 426.4, which would put the onus on utilities to identify specific expenses that might be appropriate for recovery.[165]

However, in addition to this discrete amendment to the USofA, the Commission should separately consider a different question: whether it will continue to allow utilities under its jurisdiction to charge ratepayers for *any* of the expenses that go to industry trade associations, in light of the Supreme Court's 2018 ruling in in *Janus v. AFSCME*, *Council 31*[166] – which overturned decades of precedent originally established by the Supreme Court in *Abood v. Detroit Board of Education.*[167]

To be sure, the Court's rulings in *Abood* and *Janus* concerned employee rights under the First Amendment. To date, the Commission has taken the position that, because they are private companies, utilities are not required to comply with the First Amendment.[168]

utilities' claim that restricting their ability to charge customers for political activities somehow infringed their *own rights*, the Fifth Circuit in *Southwestern Power* noted that Senator Black had specifically explained how "a part of the expenses of the campaign against this bill has most likely been charged to the operating expenses of the company supplying the electricity for the light in your room at this very moment. In other words, *you will pay the bill*." *Id.* at 45, n.32 (emphasis added) (other citations omitted).

164 NOI at 72,959.

165 *See supra* Part III.B.

166 138 S. Ct. 2448 (2018).

167 431 U.S. 209 (1977).

168 *E.g.., Williston Basin Interstate Pipeline Company*, 72 F.E.R.C. P61,074 (July 25, 1995). In reaching this conclusion the Commission has rejected the New York Court of Appeals' contrary view, as set forth in detail in *Cahill v. N.Y. Pub. Svc. Commn*, 556 N.E.2d 133, 134-35 (N.Y. 1990), *cert. denied New York Tel. Co. v. Cahill*, 498 U.S. 939 (1990). *See Williston*, 72 FERC at P61,074 (rejecting *Cahill*'s reasoning). We respectfully disagree with

However, as discussed further below, both the Commission and reviewing courts have recognized the close connection between the manner in which the Supreme Court, in *Abood*, addressed compelled funding for third-party speech on the one hand, and the dividing line between appropriate and inappropriate ratepayer expenses on the other.[169] Thus, regardless of whether utilities under FERC's jurisdiction are subject to the First Amendment, the Supreme Court's critical change in First Amendment jurisprudence in *Janus* is highly relevant to the Commission's consideration of just and reasonable rates.

Accordingly, because the Court's ruling in *Janus* overturned decades of understanding regarding compelled funding for third-party speech, the Commission should consider the implications of this ruling on its approach to allowing utilities to recover industry association membership dues from ratepayers. In short, as discussed below, the Commission should – separately from amending Account 426.4 – determine that it will no longer approve utility requests to recover industry association dues *at all*.

To reiterate, we offer this proposal for the Commission's consideration separate from our proposed amendments to the USofA, and the Commission's resolution of this issue should have no bearing on whether the USofA itself should be amended for all the reasons discussed above.

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the Commission's view on this question, and suggest that the Commission also consider whether to adopt the *Cahill* interpretation.

169 *See, e.g., Consolidated Edison Co. v. Public Svc. Commn,* 447 U.S. 530, 543 (1980)*; Braintree Elec. Light Dep't v. FERC* 550 F.3d 6, 18-22 (D.C. Cir. 2008); *Trunkline Gas Company*, 90 FERC P61,017, 61,064, n.68 (2000).

1. The *Abood* Standard Governing Compelled Funding For Third-Party Speech, And The Application Of This Approach To Just And Reasonable Rates Prior To *Janus*.

The Supreme Court set forth the test for whether an individual may be compelled to fund the speech of a third party – in particular, a union – in *Abood*.[170] In that case, employees objected to a state law requiring them to pay union dues, regardless of union membership or agreement with the union's political activities.[171] Concluding that the First Amendment prohibits "compulsory subsidization of ideological activity," the Court explained that public employees may not be forced to pay dues used by unions "to express political views unrelated to its duties as exclusive bargaining representative."[172]

To protect employees from this kind of forced subsidization, the Supreme Court approved an approach whereby objecting employees were only required to pay an "agency fee" for the union's work on behalf of the employees deemed unrelated to the union's political activities.[173] Thus, the dues were divided into two buckets: one part chargeable to all employees (the agency fee), and another part that employees could choose not to pay (for political activities).

Numerous courts subsequently relied on the *Abood* decision in considering the kinds of utility expenses that may be recovered from ratepayers. For example, in *Consolidated Edison Co. v. Public Svc. Comm'n*, the Supreme Court itself cited *Abood* in discussing whether it

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170 431 U.S. 209 (1977).

171 *Id.*

172 *Id.* at 234-37.

173 *Id.*

may be appropriate for a utility to absorb the cost of certain bill insert pamphlets discussing controversial public policy issues, rather than passing those costs on to ratepayers.[174]

A decade later, in *Cahill v. NY Public Svc. Comm'n*, the highest court in New York concluded that *Abood* dictates that ratepayers may not be forced to subsidize a utility's political speech, finding that utilities may not charge customers for expenditures on "politically and religiously active organizations . . . engaged in activities and causes contrary to [ratepayers'] political or personal beliefs."[175] As the court there explained, utilities may not "exert monolithic or majoritarian power through a mini-taxing authorization certainly against the interests and beliefs of some ratepayers," which would "convert the free marketplace of ideas to the consumer-subsidized preserve of corporate utility ideas."[176]

More recently, in *Braintree Elec. Light Dep't v. FERC*, the D.C. Circuit also recognized the critical connection between compelled utility payments and the union dues at issue in *Abood*.[177] The Commission itself also specifically referred to *Abood* in its landmark ruling in *Trunkline Gas Company*, where the agency determined that utilities under its jurisdiction may no longer recover from ratepayers for their charitable contributions.[178]

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174 447 U.S. at 543 and n.13. Subsequently, the New York Public Service determined that, in fact, the utility *could not* pass all of these costs on to ratepayers, and the New York Court of Appeals affirmed. *Consolidated Edison Co. v. Public Service Com.*, 66 N.Y.2d 369 (1985).

175 556 N.E.2d 133, 134-35 (N.Y. 1990), *cert. denied New York Tel. Co. v. Cahill*, 498 U.S. 939 (1990).

176 *Id.* at 138. In concurring in *Cahill*, one of the judges also noted the inherent problem in allowing a non-elected body – the utility – to levy a tax that it may choose to spend on charitable or political activities, without the electoral accountability inherent in a governmental tax, which opponents have an opportunity to oppose at the ballot box. 556 N.E.2d at 140; *see also* R. Paul Gee, *Who Pays for Charitable Contributions Made By Utility Companies?*, 12 Energy L. J. 363 (1991); Richard P. Johnson, *Power to the People: The First Amendment and Utility Operating Expenses*, 69 Wash. U.L.Q. 945 (Fall 1991).

177 550 F.3d 6, 18-22 (D.C. Cir. 2008).

178 *Trunkline Gas Company*, 90 FERC P61,017, 61,064 n.68 (2000); *see also, MIGC, Inc.*, 70 FERC P63,022, P65,124-128 (1995) (explaining that *Abood* and other "overwhelming Constitutional precedent" demonstrate that "forcing ratepayers to subsidize the favorite charities of public utilities, with the consent and endorsement of a federal agency," is inappropriate because it "constitutes forced speech and association"); *Williston Basin Interstate*

2. The New *Janus* Standard Governing Compelled Funding For Third-Party Speech

Like *Abood*, *Janus* concerned a challenge to union dues requirements. Explaining that through compelled speech, "individuals are coerced into betraying their convictions," and emphasizing that "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning," the Court explained that compelled speech is of even more concern than speech prohibitions.[179]

The specific question in *Janus* was whether the *Abood* approach of dividing union dues into two buckets sufficiently safeguarded objecting employees' rights against being forced to subsidize the union's speech. For several reasons that are also relevant here, the Supreme Court determined that, in fact, employees may not be compelled to pay union fees *at all*.[180]

First, the Court determined that there was no reason to assume that the unions could not carry on their activities without the financial support of objecting employees.[181] As a result, the Court concluded, it is appropriate to err on the side of protecting the employees from being forced to pay funds toward unions engaged in activities that they do not support.[182]

Second, the Court emphasized the difficulty in precisely determining which fees should be disallowed from the agency fee, noting it often concerns a "substantial judgment

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Pipeline Company, 68 FERC. P63,007, P65045 (1994) (relying on *Cahill* to deny recovery of charitable contributions), *rev'd* 72 FERC P61,074, P63,007 (1995) (adhering to the Commission's pre-*Trunkline* view that charitable contributions are properly recoverable).

179 138 S. Ct. at 2,464.

180 *Id.* at 2,486.

181 *Id.* at 2,467-69.

182 *Id.*

call."[183] The Court thus determined that states may not compel an employee to pay a union at all, to protect against the risk that they may in fact be supporting political work.

Finally, the Court majority rejected the dissent's suggestion that the appropriate way to resolve these concerns would be to simply better police the line between chargeable and non-chargeable expenses. In particular, Justice Kagan argued in dissent that, while "there may be some gray areas (there always are)" as to which expenses fall on which side of the line, "in the mine run of cases, everyone knows the difference between politicking and collective bargaining."[184] Justice Kagan further noted that there were no Circuit splits or other indications that it was inherently impossible to distinguish between chargeable and non-chargeable expenses.[185]

Nonetheless, the Court majority rejected the argument that the line between the two kinds of expenses could be meaningfully ascertained, given that all of the activities of a union concern competing views on the expenditure of public resources, and thus at the very least have public policy implications.[186]

3. In Light Of *Janus*, The Commission Should Consider Whether It Will Continue To Authorize Utilities To Recover From Ratepayers For *Any* Portion Of Their Industry Association Dues.

Under *Abood*, unions could compel employees to pay for the union's activities by segregating out politically-related advocacy expenses. Similarly, under the Commission's long-standing approach to industry association dues rate recovery, utilities may recover those

183 *Id.* at 2,481 (citations omitted).

184 *Id.* at 2,498 (Kagan, J. dissenting).

185 *Id.*

186 *Id.* at 2,476-77.

dues by segregating out these kinds of costs. For several reasons, the Supreme Court's determination in *Janus* that the *Abood* approach is both unworkable and unnecessary should lead the Commission – separately from amending Account 426.4 – to consider whether it will continue to allow utilities under the Commission's jurisdiction to recover industry association dues at all.

(a) Like unions, all of the activities of industry trade associations arguably concern some public policy implications. Indeed, in *Janus* the United States argued that since everything that state employee unions do impacts how public resources are expended, *all* their activities are inherently political.[187] Following that same reasoning in this context, since groups like EEI, AGA and all the other industry associations discussed in the Center Petition advocate for how public resources should be allocated in the utility context, *all* their activities should be funded by utility shareholders.[188]

(b) Even if the Commission were to conclude that utility trade associations provide some services that are non-political in nature, the fact remains that it is exceedingly difficult to tie those services to those ratepayers who may benefit. In short, since trade associations do not charge utilities for discrete services, there is simply no way to determine how much a service benefits the ratepayers from one utility as compared to another. Indeed, as noted earlier, trade associations often engage in regional or local advocacy that could only even arguably benefit ratepayers in that area, and yet industry association dues are not allocated in that manner.[189]

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187 *See* Amicus Brief of the United States in *Janus v. AFSCME*, No. 16-1466 (U.S. Dec. 6, 2017), at 15-17.

188 *See* Center Petition at 9-14 and Exhibit B.

189 *See supra* 20 n.79.

This same kind of difficulty was an important consideration in the Court's ruling in *Janus*.[190] For example, the Court noted that, in a prior case, the Court had recognized the problems inherent in trying to tie the purposes for which funds are used to who they benefit – as well as the inappropriate burden it puts on those forced to try and challenge whether they are in fact obtaining the benefit they are paying for.[191] Similarly, the *Janus* Court noted that in another prior case, the Court had been unable to even agree on which expenses belong on which side of the line.[192]

Accordingly, because there is similarly no particular metric by which to distinguish which association expenses should be recoverable from which ratepayers, a bright line rule disallowing the recovery of any industry association dues would best insure just and reasonable rates, consistent with the Court's reasoning in *Janus*.

(c) Like the unions in *Janus*, it is also apparent that industry trade associations can continue to provide services to their members without relying on ratepayer funding. The Commission therefore should not credit conclusory claims that withdrawing utilities' decades-long authority to conscript ratepayers into funding industry association dues would somehow undermine their ability to serve customers.

In *Janus* the Court similarly rejected the argument that mandated employee funding for unions was essential to a union's role in the bargaining process.[193] There, the Court noted that

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190 138 S. Ct. at 2,481.

191 138 S. Ct. at 2,481 (citing *Knox v. SEIU, Local 1000*, 567 U.S. 298, 318-19 (2012) (discussing the "significant burden [on] employees to bear simply to avoid having their money taken to subsidize speech with which they disagree")).

192 138 S. Ct. at 2,481 (citing *Lehnert v. Ferris Faculty Assn*, 500 U.S. 507 (1991); *see also id.* 551 (Kennedy J., concurring in part and dissenting in part) (noting that distinguishing among which expenses are chargeable and which are not is "so malleable" that even the Justices cannot agree on a "principled basis" for the distinction).

193 138 S. Ct. at 2,465-66.

federal unions did not rely on mandatory agency fees, and yet continued to provide effective service to employees.[194] Indeed, although the number of state unions and employees who would be impacted by the Court's ruling was exponentially larger than the relatively small number of employees covered by a handful of federal unions, even this small sample size was sufficient for the Court to conclude that there was no reason to expect that unions could not continue to thrive without mandated payments from employees.[195]

Similarly, here, industry trade associations are already not guaranteed to recover industry association dues from all of their utility members' ratepayers. For example, New York law expressly forbids utilities regulated by the New York Public Service Commission from recovering *any* dues for industry trade associations engaged in lobbying, stating as follows:

> In determining rates to be charged customers, the commission shall not include the cost of legislative lobbying on behalf of any public utility as part of any such utility's operational costs and the Commission *shall not include the cost of membership dues for any organization, association, institution, or corporation or any other entity that engaged in legislative lobbying as part of any such utility's operational costs*.[196]

Moreover, regulators in some states have already refused to allow utilities to recover *any* trade association dues where utilities are unable to demonstrate how those funds are being used.[197]

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194 *Id.*

195 *Compare id.* (discussing numbers of federal employees) with *id.* at 2,499 (Kagan, J., dissenting) (noting the many millions of state union employees who would be impacted by the Court's ruling).

196 Rates Not to Include Cost of Legislative Lobbying, N.Y. CLS Pub. Serv. L. § 114-a (2021) (emphasis added); *see also* N.Y. State Senate, *Senate To Pass Legislation To Improve Utility Services Across New York State*, Feb. 23, 2021, https://www.nysenate.gov/newsroom/press-releases/senate-pass-legislation-improve-utility-services-across-new-york-state.

197 *See, e.g., supra* at 14-15.

Accordingly, just as with unions in *Janus*, the available evidence suggests that industry trade associations would not continue to function without mandated payments from ratepayers.

In this regard, it also bears emphasizing that, in rejecting these concerns in *Janus*, the Court noted that, as a consequence of authorizing compelled union fees for decades, the Court had allowed the unions to collect "many billions" that actually belonged to the employees.[198] The long history of this funding, the Court concluded, appropriately mitigated any short-term funding losses the unions might experience as a result of a change in approach.[199]

Again, so too here. For decades utilities and their trade associations have been permitted to rely on captive customers to fund most of their activities, to the tune of billions of dollars. If the Commission agrees that this funding is not an appropriate cost of service, simply permitting the utilities and associations to retain the billions they have already received should amply cushion any transition costs they might incur as they no longer rely on this coerced income stream.

In short, in light of the Supreme Court's ruling in *Janus*, the Commission should also consider whether it will continue to approve the recovery of *any* industry association dues from ratepayers.[200]

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198 138 S. Ct. at 2,485-86.

199 *Id.*

200 *See also Consolidated Edison Co. v. Public Service Com.*, 66 N.Y.2d 369, 372 (1985) ("nothing in the Constitution requires that the shareholders get a free ride on the backs of the ratepayers").

IV. CONCLUSION

For the foregoing reasons, the Commission should amend the USofA, and take other appropriate actions, to ensure that ratepayers are not forced to pay for utility company advocacy expenses that are not an appropriate cost of service.

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