

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Center for Biological Diversity

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Docket No. RM21-_____

**PETITION FOR RULEMAKING TO AMEND
THE UNIFORM SYSTEM OF ACCOUNTS' TREATMENT OF
INDUSTRY ASSOCIATION DUES**

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**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Petition For Rulemaking To Amend)	
The Uniform System Of Accounts’)	Docket No. RM21-_____
Treatment Of Industry Association Dues)	
)	
Center for Biological Diversity)	

I. INTRODUCTION

Pursuant to 18 C.F.R. § 385.207 and the Administrative Procedure Act, 5 U.S.C. § 553, the Center for Biological Diversity, on behalf of our more than 1.7 million members and supporters, hereby petitions the Federal Energy Regulatory Commission (FERC) to amend the Uniform Systems of Accounts (USofA) requirements for payments to industry associations engaged in lobbying or other influence-related activities. Because industry associations, such as the Edison Electric Institute (EEI), engage in and support controversial political activities that ratepayers may not be required to subsidize – including, *e.g.*, lobbying, campaign-related donations, and litigation – FERC should amend the USofA to require that utilities record the millions paid in industry association dues as presumptively non-recoverable (*i.e.*, below-the-line) for rate recovery purposes.

The USofA is a critical tool relied on by FERC and other utility regulators across the country to help determine which utility expenditures are likely to be recoverable from ratepayers, and which should be shouldered by the corporations themselves, providing “consistent, transparent, and decision-useful accounting information for the Commission and other stakeholders.”¹ However, as the Commission itself noted as recently as last year, there has never been a “clearly

¹ See FERC, Accounting Matters (2021), <https://www.ferc.gov/enforcement-legal/enforcement/accounting-matters>.

delineated” line between the kinds of influence-related expenditures that may be recoverable and those that are not.²

Rather, under the USofA, millions of dollars in payments to industry associations like EEI are recorded in a presumptively recoverable USofA account – Account 930.2 – and thus routinely charged to ratepayers, despite these groups’ well-recognized political work.³ Ratepayer advocates are then forced to urge that *portions* of those payments should be re-allocated to a presumptively unrecoverable account – Account 426 – for one or more reasons.

As discussed below, in order to provide the most useful information to utility regulators, FERC should amend the USofA to require that *all* industry association dues be recorded in Account 426. This will make these payments presumptively *non-recoverable*, putting the affirmative burden where it belongs – on utilities, should they seek to assert that there could be some basis for charging ratepayers for these payments.⁴ This new approach will further FERC’s mission to ensure just and reasonable rate recovery, to limit expenses to those with a close nexus to a utility’s legitimate costs of business, and to safeguard the public interest.

Indeed, recent events have underscored the urgency of applying clear accounting treatment to political expenses, due to the problematic activities of utilities and the organizations they support. From utility involvement in the extremely corrupt Ohio Bill 6, which provided massive ratepayer subsidies to major utilities in 2019 before leading to federal racketeering charges,⁵ to

² *Potomac-Appalachian Transmission Highline, LLC*, 170 F.E.R.C. P61,050, ¶ 79, 2020 LEXIS 100 (Jan. 24, 2020).

³ See generally Anderson et al., *Paying for Utility Politics: How utility ratepayers are forced to fund the Edison Electric Institute and other political organizations*, Energy and Policy Institute (2017) at 10 (“*Paying for Utility Politics*”) (Petitioner’s Exhibit (“Pet. Exh.”) A) (<https://www.energyandpolicy.org/wp-content/uploads/2017/05/Paying-for-utility-politics-ratepayers-funding-the-Edison-Electric-Institute.pdf>). This detailed Report provides an excellent overview of EEI activities, and how they are currently funded by ratepayers.

⁴ See 16 U.S.C. § 824d(e); 15 U.S.C. § 717c(e).

⁵ See John Funk, *Ohio Attorney General Sues to Block \$1.3B Bailout of Former FirstEnergy Nuclear Plants*, Utility Dive, (Sept. 25, 2020), <https://www.utilitydive.com/news/ohio-attorney-general-sues-to-block-13b-bailout-of-former-firstenergy-nuc/585835/>.

the publicly reported connections between trade associations and the January 6th, 2021 “Stop the Steal” Rally – which, according to press accounts, was supported by at least one group affiliated with another association funded by EEI,⁶ it is evident that utility regulators must take a much closer look at whether ratepayers should be forced to pay millions of dollars to fund associations that support these activities.⁷

Amending the USofA in this manner will also protect the First Amendment rights of ratepayers. Indeed, under the Supreme Court’s 2018 ruling in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), the First Amendment arguably *forbids* regulators from allowing utilities to treat *any* portion of the dues paid to industry associations like EEI as recoverable expenses. In *Janus*, the Court emphasized that speech related to “political topics” sits at “the highest rung of the hierarchy of First Amendment values and merit special protection,” and noted that there is often a “substantial judgment call” in determining which kinds of expenses warrant protection.⁸ To adequately protect these First Amendment values, the Court in *Janus* determined that public sector employees could not be required to pay *any portion* of union dues, because doing so forces employees to financially support an organization engaged in activities they may not support.

⁶ As reported in major newspapers, the “Stop the Steal” rally was supported by, among other organizations, an affiliate of the Republican Attorneys General Association, which in turn is funded by EEI. See Meg Kinnard, *Republican AGs Group Leader Quits Over Call Pushing Protest*, US News (Jan. 11, 2021), <https://www.usnews.com/news/politics/articles/2021-01-11/republican-ags-group-leader-quits-over-call-pushing-protest>; see also Andy Kroll, *The Republicans’ Dark-Money-Moving Machine*, Mother Jones (Feb. 2012), <https://www.motherjones.com/politics/2012/01/republican-governors-association-perry-michigan/> (discussing activities of the National Republican Governors Association, also funded by EEI); EEI Form 990, 2019, at 17, available at <https://beta.documentcloud.org/documents/20413447-eei-2019-990> (showing EEI funding for National Republican Governors and Attorneys General Associations); EEI Form 990, 2018, at 17, <https://www.documentcloud.org/documents/6553997-Edison-Electric-Institute-2018.html> (same); EEI Form 990, 2017, at 17, <https://www.documentcloud.org/documents/5218920-EEI-2017-Form-990.html> (same).

⁷ In the wake of the January 6th insurrection, EEI and other trade groups and utilities announced temporary suspensions on political spending – tacitly acknowledging that their political activities are, at minimum, highly controversial. See *Utilities Halt Political Donations in Wake of Hill Chaos*, E&E News (Jan. 15, 2021), <https://www.eenews.net/stories/1063722685>; see also David Pomerantz, *Utilities Sent \$6.8 Million to Members of Congress who Sought to Overturn Election Results in Recent Election Cycles*, Energy And Policy Institute (Jan. 12, 2021), <https://www.energyandpolicy.org/utility-donations-members-congress-overturn-election/>. These voluntary measures will of course be temporary and simply emphasize the need for appropriate regulatory oversight in the future.

⁸ *Id.* at 2476.

As discussed further below, applying those principles to utility rate recovery suggests that not only should dues to groups like EEI be recorded in a presumptively non-recoverable account, but, in fact, utilities should not be able to recover *any of those dues*. Accordingly, the First Amendment provides another basis on which FERC should modify the USofA to require that these dues be properly recorded as presumptively non-recoverable.

For these reasons, as further elaborated below, we hereby Petition FERC to amend the USofA to move industry association dues from Account 930.2 to Account 426.⁹

We look forward to the Commission issuing this Petition for public comment and participating in the rulemaking process.

II. BACKGROUND

A. FERC's Treatment of Industry Association Dues

1. FERC's Long-Standing Recognition That Certain Utility Payments Are Not Generally Recoverable From Ratepayers

More than a century ago, in response to the proliferation of competing utility companies inefficiently providing multiple sources of power and transmission, the regulated utility system was created. The basic compact provides for the government to grant monopoly control over service areas, in exchange for government oversight through rate-regulation principles.¹⁰

Those principles dictate that while utilities may recover certain expenses reasonably related to the cost of providing service, as well as a reasonable rate of return, other expenses must be borne

⁹ This Petition addresses the Uniform System of Accounts for utilities, as well as for natural gas companies. 18 C.F.R. Parts 101 and 201. Both of these USofA systems contain identical accounts for the items addressed herein, and references to the USofA throughout this Petition refer to both Parts 101 and 102.

¹⁰ See generally 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).

by the utility itself. The overriding objective of the ratemaking process, therefore, is to ensure that utility rates are just and reasonable.¹¹

Accordingly, in evaluating a utility's request for rate recovery, regulators must determine which expenses are appropriately charged to ratepayers as "above-the-line" recoverable expenses, and which should be borne by the utility's shareholders as "below-the-line" expenses.

For example, FERC itself, like many other regulators, has consistently concluded that a utility's *charitable donations* are not recoverable. As FERC has explained:

The financial burden of charitable contributions should be borne by the stockholders for whom such contributions are intended to retain customer good will and employee loyalty. Charitable contributions are not operating expenses and bear no relationship to the necessary costs of providing utility service. Ratepayers have no choice as to the recipients of the contributions and there is no demonstrable connection between the charitable interests that receive the contributions and the ratepayers.¹²

Similarly, FERC, along with other utility regulators, has long recognized that ratepayers should not be forced to pay for a utility's *political* activities. This includes the political activities of utility industry associations. Thus, for example, FERC has explained that utility payments for EEI lobbying activities "may not, under any circumstances, be included in the utility's cost of service."¹³

¹¹ E.g., 16 U.S.C. § 824d(a).

¹² *Trunkline Gas Co.*, 90 F.E.R.C. P61,017, 61,064 (2000).

¹³ *Delmarva Power & Light Co.*, 58 F.E.R.C. P61,169, 61,509 (1992) (emphasis added); *Pacific Gas and Electric Company*, 165 F.E.R.C. P63,001 (Oct. 1, 2018) (discussing division between recoverable and unrecoverable EEI expenses).

2. Expense Reporting In The Uniform System of Accounts

As noted, FERC created the USofA to provide accounting information useful for regulators, including helping them to determine which utility expenses should be recoverable above-the-line from ratepayers, and which below-the-line expenses should be borne by the utility itself.¹⁴

Under the USofA, industry association dues are recorded in an above-the-line (*i.e.*, presumptively recoverable) account – Account 930.2:

930.2 Miscellaneous general expenses.

This account shall include the cost of labor and expenses incurred in connection with the general management of the utility not provided for elsewhere.

ITEMS

1. Miscellaneous labor not elsewhere provided for Expenses.
2. *Industry association dues for company memberships.*
3. Contributions for conventions and meetings of the industry.

* * *¹⁵

The USofA also contains below-the-line (*i.e.*, presumptively non-recoverable) accounts, including certain “miscellaneous expense” items recorded in Account 426:¹⁶

¹⁴ 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.

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

¹⁶ 18 C.F.R. Part 101, § 426; 18 C.F.R. Part 201, § 426.

426.1 Donations.

This account shall include all payments or donations for charitable, social or community welfare purposes.

426.2 Life insurance.

This account shall include all payments for life insurance of officers and employees where company is beneficiary (net premiums less increase in cash surrender value of policies).

426.3 Penalties.

This account shall include payments by the company for penalties or fines for violation of any regulatory statutes by the company or its officials.

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 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.

426.5 Other deductions.

This account shall include other miscellaneous expenses which are nonoperating in nature, but which are properly deductible before determining total income before interest charges.

Of particular relevance here is Account 426.4, where utilities are required to record their political and influence expenditures.

As FERC has explained, while recording in certain accounts provides useful information to regulators regarding recoverability, it is not necessarily dispositive. Rather, for example, FERC

has noted that recording expenses in Account 426 serves to “highlight them for scrutiny in rate proceedings and require the utility to justify their rate recovery.”¹⁷

With respect to industry association dues in particular, because, as noted, FERC recognizes that ratepayers may not be forced to pay for industry associations’ political activities, utilities segregate the *portion* of their association payments associated with these activities. That portion is then *re-allocated* to Account 426.4 – the account for influence and political expenses – where it becomes presumptively non-recoverable.¹⁸

Utilities under FERC jurisdiction provide this information in their Form 1 submissions.¹⁹ But the USofA’s importance extends far beyond utilities subject to FERC’s jurisdiction. *First*, federal power agencies such as the Tennessee Valley Authority (TVA) are required to follow the USofA,²⁰ 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.”²¹ *Second*, electric utility cooperatives across the country follow the USofA.²² *Finally*, and perhaps most importantly, many state agencies that oversee utilities have adopted FERC’s approach, requiring utilities under their jurisdiction to conduct their accounting in accordance with the USofA.²³ Accordingly, proper USofA treatment of industry association dues has far-reaching ramifications well beyond FERC-regulated utilities.

¹⁷ *Potomac-Appalachian Transmission Highline LLC*, 152 F.E.R.C. P63,025, 66,158 (Sept. 15, 2015); *see also, e.g., ISO New England*, 118 F.E.R.C. P61,105, 61,555 (Feb. 15, 2007) (“The designation in Account 426.4 simply means that those costs are not presumed to be recoverable, shifting the burden on the filing entity to demonstrate why such costs should be recoverable.”).

¹⁸ *See, e.g., Delmarva Power & Light Co.*, 58 F.E.R.C. P61,169, 61,509 (1992) (emphasis added); *Pac. Gas and Elec. Co.*, 165 F.E.R.C. P63,001 (Oct. 1, 2018).

¹⁹ 18 U.S.C. § 141.1; *see also, e.g.*, Mar. 2, 2020 Form 1 Filing Instructions, available at <https://www.ferc.gov/sites/default/files/2020-04/transmittal-letter.pdf>.

²⁰ *See* 16 U.S.C. § 831m (requiring TVA to follow the USofA).

²¹ Order 141, 12 Fed. Reg. 8503 (Dec. 19, 1947).

²² 7 C.F.R. Subpart B (applying USofA to cooperatives).

²³ *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 §§

B. The Controversial Political Activities Of Leading Industry Associations Funded By Utilities

Utilities across the country pay millions of dollars to support numerous trade associations that engage in controversial political advocacy, as detailed in Petitioner's Exhibit B.²⁴ Here we address one particular association where these concerns are particularly salient: the Edison Electric Institute (EEI).

EEI is the leading industry association for electric utilities.²⁵ The association has an annual budget of more than \$90 million,²⁶ much of which is derived from utility payments passed on to ratepayers. Florida Power and Light customers were charged more than \$9 million in EEI dues from 2015-2018,²⁷ and as detailed in the attached *Paying for Utility Politics* Report, charging ratepayers for hundreds of thousands, and even millions, of dollars of EEI dues is common among utilities.²⁸ In 2019, the Public Service Commission of Wisconsin authorized charging

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); N.Y. Comp. Codes R. & Regs. tit. 16, § 167 (2021) (New York).

²⁴ Petitioner's Exhibit B contains details on the political and other influence-related activities of the American Gas Association, the Nuclear Energy Institute, the American Public Power Association, and the National Rural Electric Cooperative Association.

²⁵ See *About Edison Electric Institute*, <https://www.eei.org/about/Pages/about.aspx>; see also *EEI Members List*, https://www.eei.org/about/Documents/memberlist_print.pdf. (Pet. Exh. C).

²⁶ See EEI Form 990, 2019, <https://beta.documentcloud.org/documents/20413447-eei-2019-990>; EEI Form 990, 2018, <https://www.documentcloud.org/documents/6553997-Edison-Electric-Institute-2018.html>; EEI Form 990, 2017, <https://www.documentcloud.org/documents/5218920-EEI-2017-Form-990.html>; EEI Form 990, 2016, <https://projects.propublica.org/nonprofits/organizations/130659550>; EEI Form 990, 2015 <http://www.documentcloud.org/documents/3221593-Edison-Electric-Institute-EEI-2015-990.html>.

²⁷ See *Paying for Utility Politics*, *supra* note 3, at 5.

²⁸ *Id.* at 43 (listing 18 utilities passing EEI dues along to ratepayers).

ratepayers almost \$500,000 in EEI dues.²⁹ And last year, the California Public Utilities Commission approved charging ratepayers \$300,000 for EEI dues.³⁰

EEI wields tremendous power influencing regulatory and policy decisions at both federal and state levels. EEI has long engaged in highly political advocacy on the kinds of issues that the Supreme Court has characterized as “sensitive political topics,” advancing objectives that many people would “find objectionable.”³¹ EEI itself acknowledges spending almost \$9 million dollars on lobbying in 2019, and more than \$8 million in 2018.³² Among other activities, for example, EEI has emphasized its own efforts to:

- Advocate for the U.S. Environmental Protection Agency (EPA) to permit the maximum levels of polluting ozone in the environment, rather than a more environmentally-protective ozone standard;³³
- Prevent improved standards in the Toxic Substances Control Act;³⁴ and
- Delay implementation of the Clean Power Plan, which was designed to protect human health and the environment from air and climate pollution, and succeeding in implementing “less stringent” requirements for coal plants.³⁵

EEI leadership has also publicly denied human-caused climate change, and EEI funded a nationwide campaign to sow public doubt about climate science.³⁶

²⁹ *Application of Wis. Elec. Power Co.*, 2019 Wis. PUC LEXIS 704 (PSC Wis. Dec. 19, 2019).

³⁰ *Application of San Diego Gas & Elec.*, No. 17-10-007 (CPUC July 16, 2020).

³¹ *Janus*, 138 S. Ct. at 2464.

³² See *Client Profile: Edison Electric Institute*, Center for Responsive Politics (2019), <https://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2019&id=D000000297>; *Client Profile: Edison Electric Institute*, Center for Responsive Politics (2018), <https://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2018&id=D000000297>.

³³ See Edison Electric Institute, *2015 Results in Review*, Huffington Post (Jan. 2016) (Pet. Exh. D), <http://big.assets.huffingtonpost.com/eeibooklet.pdf>.

³⁴ See Edison Electric Institute, *Results in Review 2016* (Pet. Exh. E).

³⁵ See Edison Electric Institute, *2015 Results in Review*, Huffington Post (Jan. 2016) (Pet. Exh. D),

³⁶ In 2017, EEI Chairman Tom Fanning, in response to a CNBC anchor’s question regarding whether it had been proven that carbon dioxide was the main driver of climate change replied, “No, certainly not. Is climate change

EEl also engages in activities that it may not even treat as lobbying, despite their highly political nature, including media and training efforts. For example, as documented by the Energy and Policy Institute, in December 2019, EEl held a multi-day training session for utility executives to learn how to combat state and local clean energy policies – the kind of initiative that surely should not be paid for with ratepayer funds.³⁷

EEl also provides direct funding to political organizations, such as funding Governors and Attorney Generals’ associations – including, as noted above, an organization affiliated with a group that supported the January 6, 2021 “Stop the Steal” Rally in Washington, D.C.³⁸

Regulators have long recognized that EEl engages in political activities. Indeed, when the National Association of Regulated Utility Commissioners (NARUC) last audited EEl activities, the association found that EEl was spending up to 50% of its income on advocacy and lobbying efforts.³⁹ Similarly, as noted, FERC itself has long recognized that EEl engages in non-recoverable political activities, and on that basis requires that utilities separately account for their funding of EEl lobbying activities in Account 426.4.⁴⁰

happening? Certainly. It has been happening for millennia.” See Matthew J. Belvedere, *Like the New EPA Chief, Southern Company’s CEO Doesn’t See CO2 as Main Reason for Climate Change*, CNBC (Mar. 28, 2017), <https://archive.is/E8CMO>. And EEl was long part of the Global Climate Coalition, which for years worked to downplay and deny human-caused climate change. See Kathy Mulvey & Seth Shulman, *The Climate Deception Dossiers: Internal Fossil Fuel Industry Memos Reveal Decades of Corporate Disinformation*, Union of Concerned Scientists, at 11 (2015), <https://www.ucsusa.org/sites/default/files/attach/2015/07/The-Climate-Deception-Dossiers.pdf>

³⁷ See David Pomerantz, *EEl 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/>; see also Hiroko Tabuchi, *Rooftop Solar Dims Under Pressure From Utility Lobbyists*, New York Times, July 8, 2017 (discussing EEl concerns with rooftop solar expansion), <https://www.nytimes.com/2017/07/08/climate/rooftop-solar-panels-tax-credits-utility-companies-lobbying.html>.

³⁸ See *supra* note 6.

³⁹ See *Paying for Utility Politics*, *supra* note 3, at 10 (explaining that “[o]ne of the final audits from NARUC revealed that 50% of EEl’s expenditures went to” political activities).

⁴⁰ See *supra* note 18.

Furthermore, in addition to its own political advocacy work, EEI funds *other* groups engaged in expressly political activities. This includes other anti-regulatory advocacy groups, like the Utility Regulatory Groups and the Energy and Wildlife Action Coalition, which themselves engage in highly controversial advocacy and litigation.⁴¹

The Utility Regulatory Groups – Utility Air Regulatory Group (UARG), Utility Water Act Group (UWAG), and Utility Solid Waste Activities Group (USWAG) – are well-recognized anti-regulatory advocacy groups.⁴² The list of these groups’ controversial political advocacy is long, and includes, for example:

- UARG’s participation in more than 200 regulatory matters opposing clean air and public health standards,⁴³ and UWAG and USWAG objecting to numerous regulations designed to protect human health and the environment;⁴⁴
- Specific efforts to delay and prevent critically important air and climate initiatives, such as:

⁴¹ See EEI Invoices to Showing Payments to the Utility Regulatory Groups (Pet. Exh. F). The Utility Regulatory Groups are run by the Hunton law firm, to which, in 2019 alone, EEI paid more than \$5 million dollars – further demonstrating the incredibly close ties between EEI and the Utility Regulatory Groups highly controversial advocacy efforts. See, e.g., EEI Form 990, 2019 at 8, <https://beta.documentcloud.org/documents/20413447-eei-2019-990>; see also EEI Invoice for EWAC Dues (Pet. Exh. G).

UARG itself suddenly disbanded in 2019 after its controversial activities and close ties to EPA Deputy Administrator Bill Wehrum became the focus of Congressional inquiry. See Darrell Proctor, *Utility Group Under Congressional Investigation Will Disband*, Power Magazine, May 13, 2019.

⁴² See *Paying for Utility Politics*, supra note 3; see also Zack Coleman & Alex Guillen, *Documents Detail Multimillion-Dollar Ties Involving EPA Official, Secretive Industry Group*, Politico (Feb. 20, 2019) <https://www.politico.com/story/2019/02/20/epa-air-pollution-regulations-wehrum-1191258>; see also *Utility Air Regulatory Group*, Energy and Policy Institute, <https://www.energyandpolicy.org/utility-air-regulatory-group/> (summarizing UARG’s work).

⁴³ See Sean Reilly, *TVA defends its role in trade group*, E&E News (May 7, 2019) <https://www.eenews.net/stories/1060291357> (noting that “UARG, which mainly represents utilities reliant on coal-fired generation, has been a party in some 200 lawsuits since 2001 [challenging] such landmark regulations as EPA’s limits on power plant emissions of mercury and other toxins”); see also Zack Colman, *Documents Detail Multi-million Dollar Ties Involving EPA Official*, Politico (Feb. 20, 2019), <https://www.politico.com/story/2019/02/20/epa-air-pollution-regulations-wehrum-1191258> (linking to UARG Policy Workshop Materials (Pet. Exh. H) at 16-25 (providing a long list of political advocacy projects and lawsuits of UARG), <https://static.politico.com/59/f4/19e386684cde98d283683e8bbb54/utility-air-regulatory-group.pdf>

⁴⁴ See Matt Kasper, *UWAG and USWAG the Secretive Utility Groups that Also Target EPA Safeguards Remain After Utility Air Regulatory Group Disbands*, Energy and Policy Institute (2019), <https://www.energyandpolicy.org/uwag-and-uswag-the-secretive-utility-groups-that-target-epa-rules/>.

- the federal government's efforts to regulate greenhouse gas emissions under the Clean Air Act;⁴⁵
- EPA's regulation of greenhouse gas emissions from stationary sources;⁴⁶
- EPA's regulation of greenhouse gas emissions from power plants through the Clean Power Plan;⁴⁷
- EPA's rule to limit toxic wastewater discharge into waterways from power plants;⁴⁸
- EPA's regulations establishing requirements for safe disposal of coal ash from power plants.⁴⁹

Notably, the Utility Regulatory Groups do not take the position that EPA regulations needed to be *strengthened*. Rather, consistent with these groups' political position to protect fossil fuel interests and their existing fossil fuel power infrastructure, they consistently argue *against* additional protections designed to protect public health and the environment.

The Energy and Wildlife Action Coalition (EWAC), also funded by EEI,⁵⁰ is another industry-funded and controversial group advocating against environmental protections. In particular, EWAC focuses on undermining federal wildlife protection efforts.

Some of EWAC's controversial political advocacy efforts include:

⁴⁵ See, e.g., Utility Air Regulatory Group, Comment on Proposed Endangerment Finding (June 2009), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2009-0171-3394>.

⁴⁶ See *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014).

⁴⁷ See Brief for Petitioners, *West Virginia v. EPA*, 136 S. Ct. 1000 (Feb. 19, 2016) (No. 15-1363); see also Utility Air Regulatory Group, Comments on the EPA Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program; Proposed Rule, 83 Fed. Reg. 44,746 (Aug. 31, 2018), <https://assets.documentcloud.org/documents/5027539/Final-UARGcommentsOnACERule103118-C.pdf>.

⁴⁸ See Utility Water Act Group's Petition for Reconsideration of EPA's Final Rule Titled "Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category," 80 Fed. Reg. 67,838 (Nov. 3, 2015), https://www.epa.gov/sites/production/files/2017-03/documents/letter_to_epa_submitting_petition_for_reconsideration_w_exhibits-c_508.pdf

⁴⁹ See Utility Solid Waste Activities Group Petition for Rulemaking to Reconsider Provisions of the Coal Combustion Residuals Rule, 80 Fed. Reg. 21,302 (Apr. 17, 2015), https://www.epa.gov/sites/production/files/2017-06/documents/final_uswag_petition_for_reconsideration_5.12.2017.pdf.

⁵⁰ See Pet. Exh. G.

- Seeking to undermine and weaken protections for migratory birds;⁵¹
- Seeking to weaken critical habitat protections for species under the Endangered Species Act (ESA);⁵²
- Litigation challenging wildlife protections afforded under the Bald and Golden Eagle Protection Act;⁵³
- A Supreme Court amicus brief supporting the denial of ESA protection for an imperiled species;⁵⁴ and
- Comments supporting efforts to substantially weaken protections species are afforded under the ESA.⁵⁵

* * *

In sum, it is evident that EEI both engages in, and finances other groups engaged in, many activities that ratepayers should not be forced to subsidize through the rate-making process.⁵⁶

⁵¹ See EWAC, Migratory Birds, <https://www.energyandwildlife.com/initiatives/migratory-birds/>.

⁵² See Energy and Wildlife Action Coalition, Comments on the May 12, 2014 Notices of Proposed Rules and Policy on Critical Habitat Under the U.S. Endangered Species Act (Oct. 9, 2014), http://energyandwildlife.com/public_docs/Endangered%20Species/2014-10-09%20EWAC%20comments%20re%20adverse%20mod%20w-conf.pdf.

⁵³ See *Energy and Wildlife Action Coal. v. DOI*, No. 15-1486 (D.D.C. Sept. 10, 2015); see also Settlement Agreement of Sept. 16, 2019 in No. 15-1486 (resolving the suit).

⁵⁴ See Brief of Energy and Wildlife Action Coalition for Petitioner, *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 139 S. Ct. 361 (2018) (No. 17-71).

⁵⁵ See Energy and Wildlife Coalition, Comments Regarding the Revision of Regulations for Prohibitions to Threatened Wildlife and Plants (Sept. 24, 2018), <https://www.cooperative.com/programs-services/government-relations/regulatory-issues/documents/2018-09-24%20final%20ewac%20public%20comments%20re%20revision%20of%20esa%20regs%20for%20prohibitions%20to%20threatened%20wildlife%20and%20plants.pdf>.

⁵⁶ Petitioner's Exhibit B provides similar details for other trade associations, such as the American Gas Association (AGA), which engage in similarly problematic lobbying activities ratepayers should not be forced to support. See, e.g., 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); Sammy Roth, *SoCalGas Shouldn't Be Using Customer Money to Undermine State Climate Goals, Critics Say*, L.A. Times (Nov. 22, 2019), <https://www.latimes.com/environment/story/2019-11-22/socalgas-climate-change-customer-funds> (discussing gas association activities); 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>.

III. DISCUSSION

FERC has often amended the USofA when appropriate to better inform utility regulator decision-making. Only a few years ago FERC created new USofA accounts to address expenses associated with energy storage,⁵⁷ and FERC recently issued a Notice of Inquiry related to the accounting treatment for renewable energy credits.⁵⁸ As noted, the Commission amends the USofA where necessary to “promote consistent, transparent, and decision-useful accounting information for the Commission and other stakeholders.”⁵⁹

Here, in order to provide the most useful information to utility regulators charged with determining whether utilities’ expenses are chargeable to ratepayers, FERC should amend the USofA to require that all industry association dues be recorded in Account 426. This change will serve two salutary purposes. *First*, it will make these millions in payments presumptively non-recoverable, putting the affirmative burden on utilities should they seek to assert that there could be some basis for charging ratepayers for these payments. *Second*, it will protect the First Amendment rights of ratepayers by allowing regulators to segregate utility payments made to groups engaging in political activities – payments which, under the Supreme Court’s reasoning in *Janus*, should not be recovered from ratepayers.

A. Industry Association Dues Should Be Placed In Account 426 To Be Flagged As Presumptively Non-Recoverable In Order To Ensure That Utilities Satisfy Their Burden Should They Claim Entitlement To Ratepayer Recovery

As discussed above, industry associations like EEI regularly engage in political activity, “endors[ing] ideas [many ratepayers] find objectionable.”⁶⁰ At the same time, millions of dollars

⁵⁷ See 78 Fed. Reg. 46,178 (July 30, 2013) (adding, *inter alia*, Account 351).

⁵⁸ 86 Fed. Reg. 7,086 (Jan. 26, 2021).

⁵⁹ See *supra* note 1.

⁶⁰ *Janus*, 138 S. Ct. at 2464.

in dues and memberships to these associations are often included in utilities' cost recovery and related requests.

As noted, under the current USofA system, these dues are designated for accounting in Account 930.2, where they become presumptively recoverable expenses. Utilities then determine whether, and, if so, how much of those dues should be *re-allocated* to Account 426.4 because they represent non-recoverable political expenditures.

Even apart from the First Amendment concerns discussed below, granting this Petition, and thereby requiring utilities to record industry association dues in Account 426, is an appropriate modification to the USofA for several reasons.

First, this new approach would be more consistent with the legal framework that the USofA implements. The Federal Power Act and the Natural Gas Act provide that in rate proceedings the *utility*, not the consumer, must bear “the burden of proof” to demonstrate an entitlement to recover expenses from ratepayers.⁶¹ Under the current USofA, however, industry association dues are recorded in a presumptively recoverable account, and thus only if regulators and/or intervenor advocates raise questions are utilities required to justify that recovery, or re-allocate additional portions of those dues to Account 426.4.

By placing industry association dues in Account 426, flipping the existing burdens and making them presumptively non-recoverable, utilities will be required to meet their burden, should they claim that there is a basis to re-allocate some portion of those dues to a presumptively recoverable account.⁶²

⁶¹ 16 U.S.C. § 824d(e) (“At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility.”); 15 U.S. Code § 717c(e) (same). Utilities are similarly required to bear the burden of proof in state proceedings. *See, e.g.*, 66 Pa. Cons. Stat. § 315(a) (2020) (“In any proceeding upon the motion of the commission, involving any proposed or existing rate of any public utility, or in any proceedings upon complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility.”).

⁶² Presumably, where a utility makes that claim those discrete expenses would be re-allocated to Account 930.2.

Second, putting these dues in Account 426 would be more consistent with FERC’s original intent in creating Account 426.4 in 1963. At that time, the Commission explained that this Account should include, *inter alia*, “membership fees in organizations engaged in lobbying on legislative matters,” as well as “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.”⁶³ Accordingly, and as detailed above and in Petitioners’ Exhibit B (discussing other trade associations), given the activities of industry associations like EEI, and the affiliated groups EEI and other industry associations support, it is apparent that utilities’ payments to these groups belong in this Account to adhere to the Commission’s original intent, rather than Account 930.2.

Third, as the Commission itself recently noted, even after many decades, determining precisely where “the line between public outreach and educational expenses and lobbying expenses is drawn has not been clearly delineated.”⁶⁴ Because industry association dues are currently recorded in a presumptively recoverable account, this means that where these expenses are embedded in those dues, this uncertainty risks forcing ratepayers to subsidize activities they should not be forced to support. Recording industry dues in Account 426 will ensure that ratepayers are not the victims of this difficulty, providing that close calls tend toward non-recoverability, rather than allowing these expenses to be recorded as presumptively recoverable.

Two examples of how these issues play out in rate cases demonstrate the need for this new approach. In one recent case before the Commission, an intervenor objected to a company’s reporting of industry association expenses in Account 930.2, on the grounds that the expenses included recovery for political activities.⁶⁵ Following existing practice, the Commission found it appropriate to generally record industry association dues in Account 930.2, but was forced to re-

⁶³ 28 Fed. Reg. 14,265, 14,267 (1963) (emphasis added).

⁶⁴ *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).

⁶⁵ *Ameren Ill. Co.*, 169 F.E.R.C. P61147, ¶ 105, 2019 FERC LEXIS 1719 (Nov. 22, 2019).

iterate that the portion of the dues associated with industry association political activities must be re-allocated to Account 426.4.⁶⁶ That led the company to identify thousands of dollars of political expenditures that had been improperly placed in Account 930.2 and had to be re-allocated.⁶⁷ Had these expenditures been placed in Account 426.4 from the outset, there would have been no need for the intervenor arguments, and Commission oversight, necessary to insure their re-allocation.

While at least the funds were re-allocated in that case, another case in recent years demonstrates that the current system does not necessarily even lead to that result. In *Pacific Gas and Elec.*, the Commission refused even to *consider* re-allocating influence expenditures on the grounds that the intervenor had not affirmatively raised the issue in testimony, and as a result the Commission found the utility was “not put on notice that the EEI expenditures” would be at issue.⁶⁸

Once again, by placing industry association dues in Account 426, where they would be presumptively non-recoverable, FERC can ensure that utilities *affirmatively demonstrate* whether a portion of the dues is arguably recoverable, rather than placing an inappropriate burden on intervenors to initially raise the issue.⁶⁹

Fourth, fundamental changes in energy markets since the creation of these accounts warrant a new approach. As the association for vertically integrated IOUs, for example, EEI once represented the vast portion of electricity providers, and there was more reason to assume that EEI’s activities in support of those IOUs arguably also served the public interest.

⁶⁶ *Id.* ¶ 105.

⁶⁷ *See Ameren Ill. Co.*, 171 F.E.R.C. P61,101, ¶ 6, 2020 FERC LEXIS 710 (May 7, 2020).

⁶⁸ 165 F.E.R.C. P63001, ¶¶ 771-73 (Oct. 1, 2018).

⁶⁹ Indeed, the Commission has long recognized that allowing political expenses to be included in “a hotchpotch of operating expenses would tend to obscure their essential character, and make more difficult their informed analysis and proper ultimate disposition.” *Alabama Power Co.*, 24 F.P.C. 278, 286 (Aug. 17, 1960). That logic applies equally to the risks that arise from allowing trade association dues to be considered operating expenses when those associations engage in political activities.

Today there are many other market participants, and as discussed above, there is now much less reason to assume that EEI's activities in support of its members actually benefit ratepayers. To the contrary, when EEI fights against federal pollution limits, obstructs state clean energy development, and sows doubt about climate science, the association furthers the interests of its members in competing against renewable energy providers. There are accordingly good grounds for much greater skepticism as to whether association dues should be presumptively recoverable from ratepayers.

Fifth, the urgency for a new approach has been highlighted by recent events calling into question the propriety of both industry association and utilities' expenditures related to political activities. For example, there has been considerable attention called to the fact that an affiliate of the Republican Attorneys General Association (RAGA) reportedly spent funds to promote former President Donald Trump's January 6, 2021 "Stop the Steal" Rally, which led to the insurrection at the U.S. Capitol.⁷⁰ RAGA is one of the many politically-oriented organizations that have been financially supported by EEI.⁷¹ Indeed, as noted, in tacit recognition that the close ties between utilities, their industry associations like EEI, and political groups are at the least unseemly, both

⁷⁰ See Meg Kinnard, *Republican AGs group leader quits over call pushing protest*, Washington Post (Jan. 11, 2021), https://www.washingtonpost.com/politics/republican-ags-group-leader-quits-over-call-pushing-protest/2021/01/11/d8e0943a-547c-11eb-acc5-92d2819a1ccb_story.html; Joan McCarter, *Insurrections have consequences, as Republican attorneys general are finding out*, Daily Kos (Jan. 13, 2021), <https://www.dailykos.com/stories/2021/1/13/2008870/-Top-official-for-Republican-AGs-resigns-corporate-funding-dries-up-after-group-backs-Trump-mob>; Andrea Salcedo, *Republican AGs group sent robocalls urging protesters to the Capitol. GOP officials now insist they didn't know about it*, Washington Post (Jan. 11, 2021), <https://www.washingtonpost.com/nation/2021/01/11/gop-robocalls-trump-rally-capitol/>.

⁷¹ EEI Form 990, 2019, at 17, <https://beta.documentcloud.org/documents/20413447-eei-2019-990>; EEI Form 990, 2018, at 17, <https://www.documentcloud.org/documents/6553997-Edison-Electric-Institute-2018.html>; EEI Form 990, 2017, at 17, <https://www.documentcloud.org/documents/5218920-EEI-2017-Form-990.html> (showing EEI funding for National Republican Governors and Attorneys General Associations).

Another utility-payments scandal in Ohio recently led that state Commission to open a new proceeding to explore the extent to which utility funds for charitable or political activities may have been part of a massively corrupt bribery scheme. See *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, No. 20-1502-EL-UNC (Ohio PUC Sept. 15, 2020); see also John Funk, *Ohio Attorney General Sues to Block \$1.3B Bailout of Former FirstEnergy Nuclear Plants*, Utility Dive (Sept. 25, 2020), <https://www.utilitydive.com/news/ohio-attorney-general-sues-to-block-13b-bailout-of-former-firstenergy-nuc/585835/>; Dave Anderson, *13 FirstEnergy utilities paid \$144 million for external affairs to service company involved in Ohio bribery scandal*, Energy & Policy Institute (Feb. 10, 2021), <https://www.energyandpolicy.org/firstenergy-service-company/>.

EEI and certain utilities have recently announced temporary suspensions of particular political contributions.⁷² Given these serious concerns, simply requiring utilities to record their industry association dues in a presumptively non-recoverable account is at most a modest reform to maintain confidence in the propriety of the rate recovery regime.

In this regard, it also bears emphasizing that utilities, and the industry associations they support, have an inappropriate *self-interest* in minimizing the amount of utility dues payments that are removed from Account 930.2 and re-allocated to Account 426. Nonetheless, utility regulators typically permit industry associations to *self-report* how much of their expenditures are associated with non-recoverable political activities, and tend to resolve the division between recoverable and non-recoverable expenses without serious inquiry into the accuracy of the associations' submissions.

For example, in a recent case before the California Public Utilities Commission, a utility sought to recover EEI dues based solely on EEI invoices in which EEI had self-reported its lobbying activities.⁷³ Because an intervenor had objected to this recovery, the Commission examined whether the utility had adequately justified its request, and found that it was insufficient to simply rely on EEI's self-reporting. As a result, the Commission approved the challenger's alternative proposal to allow recovery of approximately only 50% of the dues.⁷⁴

On the other hand, in a 2019 proceeding, after an Administrative Law Judge had concluded that that a utility was *not* entitled to recover EEI dues where it sought to rely solely on EEI's self-reporting to establish what percentage of dues to allocate to lobbying, the Michigan Public

⁷² See Kristi E. Swartz & Edward Klump, *Utilities Halt Political Donations in Wake of Hill Chaos*, E&E News (Jan. 15, 2021), <https://www.eenews.net/stories/1063722685>; David Pomerantz, *Utilities Sent \$6.8 Million to Members of Congress Who Sought to Overturn Election Results in Recent Election Cycles*, Energy and Policy Institute (Jan. 12, 2021), <https://www.energyandpolicy.org/utility-donations-members-congress-overtun-election/>.

⁷³ *Application of San Diego Gas & Elec.*, No. 17-10-007 (CPUC July 16, 2020).

⁷⁴ *Id.*; see also, e.g., *Application of Wis. Elec. Power Co.*, 2019 Wis. PUC LEXIS 704 (PSC Wis. Dec. 19, 2019) (similarly applying a 50% discount for EEI dues).

Service Commission reversed, concluding that “in the absence of any evidence to the contrary,” it would *assume* that EEI had properly allocated these amounts.⁷⁵

In these and many other rate cases, state utility commissions would be able to make substantially better informed decisions on cost allocation with additional details concerning the *actual* expenditures EEI was making for its political activities – which would have been necessary had industry association dues been recorded in Account 426, and therefore presumptively unrecoverable. In short, by moving industry association dues to Account 426, FERC will be properly forcing utilities to bear their burden of demonstrating why some portion of those dues should be recovered from ratepayers, rather than putting the burden on regulators and intervenors.

Finally, the fact that, as noted, EEI itself funds *other* outside groups – like EWAC and the Utility Regulatory Groups – which, in turn, engage in activities ratepayers should not be forced to subsidize, also demonstrates the need for this new approach. As Senator Sheldon Whitehouse has recently detailed, 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.”⁷⁶ Again, the modest reform sought here will help to ensure that, at the very least, regulated utilities are less likely to engage in these anti-democratic activities with ratepayers’ *own funds*. Rather, requiring utilities to record EEI, and other association, payments in Account 426, where they will be presumptively non-recoverable, will force utilities to obtain and disclose the information necessary to actually demonstrate whether, in fact, it is appropriate to force ratepayers to fund part of the dues paid to these associations.⁷⁷

⁷⁵ *In the Matter of the Application of DTE Elec. Co.*, No. U-20162, 95 (MPSC May 2, 2019).

⁷⁶ Senator Sheldon Whitehouse, *Dark Money and The U.S. Courts: Problems and Solutions*, 57 Harv. J. on Legis. 273, 273 (Summer 2020).

⁷⁷ This new approach might also reveal whether ratepayers are currently footing the bill for lobbying activities by industry association executives, such as the millions of dollars paid to top officials at EEI. *See, e.g.*, EEI Form 990, 2019, at 43, <https://beta.documentcloud.org/documents/20413447-eei-2019-990>.

For all these reasons, FERC should move industry association dues to Account 426.

B. Industry Association Dues Should Be Recorded In Account 426 To Safeguard Ratepayers' First Amendment Rights

In addition to addressing these risks of misallocation, and the lack of transparency inherent in the USofA's current approach to recording industry association dues, moving these dues payments to Account 426 will also serve another critical purpose: safeguarding the First Amendment rights of ratepayers, who should not be forced to subsidize organizations engaged in political activities that they may not support. As explained below, while separating industry dues into recoverable and non-recoverable accounts was at least arguably consistent with First Amendment principles prior to the Supreme Court's ruling in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), that decision – which found that because public sector unions spend *some* of their resources on political activities, employees may not even be forced to contribute to a union's *non-political* work – strongly counsels in favor of the Commission requiring that *all* industry association dues be recorded in Account 426, where regulators may determine they are entirely non-recoverable.

1. The Pre-*Janus* Standard For Union Dues And Its Application To Utilities

The Supreme Court set forth its original test for union dues in *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977), which concerned the First Amendment objections of employees required by state law to pay union dues, regardless of union membership or agreement with the union's political activities. Concluding that the First Amendment prohibits “compulsory subsidization of ideological activity,” the Court found 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.”⁷⁸ To resolve that concern, the Court concluded that unions could only charge objecting members a lower amount – called an “agency fee” – to pay for the union's work on

⁷⁸ *Id.* at 234-37.

behalf of the employees unrelated to the union’s political activities.⁷⁹ Thus, the dues were divided into two buckets: one part (the agency fee) that was chargeable to union members, and another part (for political activities) that union members could not be compelled to pay.

A few years later, in *Consolidated Edison Co. v. Public Svc. Commn*, 447 U.S. 530, 543 (1980), the Supreme Court considered whether the New York Public Service Commission had the authority to prohibit a regulated utility from sending customers separate paper inserts included with their electric bills discussing “controversial issues of public policy.” While the Court found that the Commission had not demonstrated that the prohibition safeguarded the *utility’s* First Amendment rights to spend its *shareholder* funds as it chooses, the Court specifically noted that, under *Abood*, it may be appropriate to “exclude the cost of these bill inserts [discussing controversial public policy issues] *from the utility’s rate base.*”⁸⁰

More recently, in *Braintree Elec. Light Dep’t v. FERC*, 550 F.3d 6, 18-20 (D.C. Cir. 2008), the D.C. Circuit also recognized the critical connection between compelled utility payments and the union dues at issue in *Abood*. There, the Court found that the expenditures at issue did not violate the First Amendment because, rather than disallowed political expenditures, the court determined they were germane to the services being provided to customers. *Id.* at 20-22.

2. The New *Janus* Standard For Union Dues

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

⁷⁹ *Id.*

⁸⁰ 447 U.S. at 543 and note 13. Importantly, the First Amendment rights of utilities themselves are not implicated by any amendments FERC may make to the USofA. *See Southwestern Elec. Power Co. v. Fed. Power Commn*, 304 F.2d 29, 38 (5th Cir. 1962) (rejecting the argument that utilities have any basis in the First Amendment to object to “being required to keep their books in such manner as to indicate that presumptively those activities are to be paid for out of their own pockets [and] should not be subsidized by the consumers who purchase the power”).

speech prohibitions, and that “[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns.”⁸¹

The specific question in *Janus* was whether a public-sector employee could be compelled to pay even the “agency fee” to a union – *i.e.*, the amount that, under *Abood*, represents the permissible charge for the union’s work on behalf of its employees that is *unrelated* to political activities. Rejecting *Abood*, the Supreme Court found that where employees oppose the union’s public policy positions, they may not be compelled to pay union dues *at all*.⁸²

In particular, the Court concluded that an individual may only be compelled to fund a group engaged in objectionable political activities where necessary to serve an interest that cannot be achieved without infringing First Amendment rights. Applying that principle, the Court concluded the unions had failed to demonstrate that their ability to carry out their functions would be impaired from no longer collecting agency fees.⁸³ The Supreme Court has reached similar results in other cases.⁸⁴

In *Janus*, the Supreme Court also emphasized the “substantial judgement call” involved in determining precisely which fees should be disallowed from the agency fee, noting that unions are often permitted to charge for items that are arguably political in nature,⁸⁵ and the numerous

⁸¹ *Id.* at 2464 (emphasis in original).

⁸² *Id.* at 2486.

⁸³ *Id.* at 2467-2469.

⁸⁴ *See Harris v. Quinn*, 134 S. Ct. 2618 (2014) (state may not compel any “agency fee” to support a union, where the employees are not full-fledged public employees); *United States v. United Foods*, 533 U.S. 405, 410 (2001) (rejecting a government program compelling mushroom producers to pay for advertising they do not support, finding that, “[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views”); *see also, e.g., Ranchers-Cattlemen Action Legal Fund v. Perdue*, No. 16-41-GF, 2017 WL 2671072, (D. Mont. Jun. 21, 2017), *aff’d* 718 Fed. Appx. 541 (2018) (enjoining USDA “from continuing to allow the Montana Beef Council to use the assessments that it collects under the Beef Checkoff Program to fund its advertising campaigns, absent prior affirmative consent from the payer”).

⁸⁵ *Id.* at 2481-82.

“controversial subjects” on which unions are active, “such as climate change”⁸⁶ Noting that speech and other activities on such “sensitive political topics,” of “profound value and concern to the public,” sit at “the highest rung of the hierarchy of First Amendment values and merit special protection,” the Court emphasized that there must be a particularly compelling reason to force objecting employees to fund organizations engaged in such activities.

3. In Light Of *Janus*, Industry Association Dues Should Be Recorded in Account 426, Because Recovery Of Any Of These Expenses Implicates Ratepayers’ First Amendment Rights.

Following the Supreme Court’s recommendation in *Consolidated Edison*, *see supra* at p. 23, the highest state court in New York expressly recognized that the First Amendment protects ratepayers from forced subsidization of 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.” *Cahill v. NY Public Svc. Comm’n*, in *Cahill v. NY Public Svc. Comm’n*, 556 N.E.2d 133, 134-35 (N.Y. 1990), *cert. denied New York Tel. Co. v. Cahill*, 498 U.S. 939 (1990). As the Court explained, the First Amendment does not permit utilities to “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.”⁸⁷

The New York Public Service Commission, like similar commissions across the country, requires utilities to comply with the USofA.⁸⁸ Accordingly, and particularly given that both the

⁸⁶ *Id.* at 2476.

⁸⁷ *Id.* at 138. In concurring in *Cahill*, one of the Judges also noted the constitutional problem inherent 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).

⁸⁸ *See supra* at note 23.

Supreme Court and the D.C. Circuit have recognized the connection between compelled union dues and utility expenditures,⁸⁹ it is evident that the Supreme Court’s reversal of the long-standing *Abood* standard for union dues in *Janus* has important implications for the proper treatment of utility expenditures, including association dues.

More specifically, because industry associations – like unions – often engage in political activities, it is no longer appropriate for these dues to be treated as a presumptively recoverable expense in Account 930.2, and then to consider re-allocating portions of those dues related to lobbying and political activities to Account 426.⁹⁰ This existing approach treats part of the dues like the “agency fee” that had been permitted under *Abood*, an approach that has now been deemed unconstitutional under *Janus*. In short, since industry associations engage in political activities that ratepayers may not be forced to support, *all* of the dues should be recorded in Account 426.

Indeed, one of the concerns that animated the *Janus* decision has also been recognized by the Commission itself in the utility context: the difficulty in separating the political and non-political expenses into two separate and distinct groups. In *Janus*, the Court noted the “substantial judgment call” inherent in determining whether proposed expenses are sufficiently “germane” to non-political – and thus recoverable – activities.⁹¹ The Court also emphasized the “daunting and expensive task” facing any party who seeks to challenge a union’s self-designation of recoverable expenses.⁹² This concern – which, the Court concluded, risked allowing the unions

⁸⁹ *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 543 (1980); *Braintree Elec. Light Dep’t v. FERC*, 550 F.3d 6, 18-20 (D.C. Cir. 2008). The *Abood* standard was also central to the Court’s decision in *Cahill*, 556 N.E.2d 133, and to the extent *Braintree* could be read to be an application of *Abood*, that ruling has also been superseded by *Janus*.

⁹⁰ *See Ameren Ill. Co.*, 171 F.E.R.C. P61,101, 61671 (May 7, 2020).

⁹¹ *Janus*, 138 S. Ct. at 2481-82.

⁹² *Id.*; *see also, e.g., 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”).

to force employees to subsidize political activity – was an important consideration in the Court’s ruling.⁹³

As noted, the Commission has recognized this same concern with utility rate recovery, recognizing the frequent difficulty in precisely distinguishing between recoverable and non-recoverable expenses.⁹⁴ Thus, just as the Supreme Court established a bright-line rule to protect objecting employees from these risks, moving industry association dues to Account 426, where regulators might similarly determine that they should remain – and be unrecoverable – to protect ratepayers from the risk of subsidizing political activities would appropriately protect ratepayers’ First Amendment rights.

Accordingly, industry association dues should also be moved from Account 930.2 to Account 426 in order to protect ratepayers’ First Amendment rights.

⁹³ *Janus*, 138 S. Ct. at 2481-82.

⁹⁴ *Potomac-Appalachian Transmission Highline, LLC*, 170 F.E.R.C. P61,050, ¶ 79, 2020 LEXIS 100 (Jan. 24, 2020) (noting that “the line between public outreach and educational expenses and lobbying expenses is drawn has not been clearly delineated”).

IV. CONCLUSION

For the foregoing reasons, the Center for Biological Diversity respectfully urges that the Commission amend the USofA to move trade association dues from Account 930.2 to Account 426.



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