

**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

COMMENTS OF THE STATE AGENCIES

On December 16, 2021, the Federal Energy Regulatory Commission (FERC or the Commission) issued a Notice of Inquiry (NOI) in Docket No. RM22-5-000, *Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses*.¹ Pursuant to the NOI, the below-defined signatory state parties (together, the State Agencies) provide the following comments.

As stated in the NOI, the Commission found it appropriate to initiate the NOI to: “(i) Examine [its] current policies and regulations governing the rate recovery, reporting, and accounting treatment of industry association dues and certain civic, political, and related expenses; and (ii) identify potential changes that may be necessary to ensure that such expenditures are appropriately accounted for under the [Uniform System of Accounts (USofA)] and that recovery of these expenditures through Commission jurisdictional rates is just and reasonable.”²

In the NOI, the Commission seeks comments on: “the delineation of recoverable and nonrecoverable industry association dues for rate purposes;” “increased transparency on industry association activities and expenses;” “utilities’ and industry associations’ expenses from civic, political, and related activities; and what, if any, steps to increase transparency would assist the

¹ *Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses*, 177 FERC ¶ 61,180 (2021) (NOI).

² *Id.* at P 10.

Commission in determining whether recovery of industry association dues in rates is just and reasonable;” and “a framework for guidance should [the Commission] determine action is necessary to further define the recoverability of industry association dues charged to utilities and/or utilities’ expenses from civic, political, and related activities.”³

The State Agencies appreciate the opportunity to submit comments as part of the Commission’s process to ensure just and reasonable rates with respect to industry association dues, and certain civic, political, and related expenses. Additionally, the State Agencies look forward to reviewing the information provided in response to the NOI by utilities,⁴ industry associations, and other stakeholders. The State Agencies anticipate that this information may assist the State Agencies in developing further comments and recommendations in response to the NOI. As discussed further below, the State Agencies support Commission action to further define the recoverability of industry association dues charged to utilities and utilities’ expenses from civic, political, and related activities and to promote increased transparency on industry association activities and expenses. In particular, the State Agencies make the following initial recommendations:

- When considering action to further define the circumstances in which utilities may recover from ratepayers industry association dues and the scope of nonrecoverable civic, political, and related expenses, the Commission should focus on: (1) the extent to which particular activities and expenses are related to providing utility service; and (2) the specific benefits particular activities and expenditures provide to ratepayers.

³ *Id.*

⁴ As in the NOI, “utilities” is used generally to refer to both public utilities as defined by section 201(e) of the Federal Power Act and natural gas companies as defined by section 2(6) of the Natural Gas Act. *See id.* at P 3 n. 3.

- At a minimum, the Commission should require utilities to substantiate their requests for recovery of industry association dues with categorical breakdowns of industry associations' activities and clear connections between the items for which utilities seek recovery and ratepayer benefits. Showing that an industry association provides some services that benefit ratepayers should not create a presumption that all dues paid to the industry association are paid for ratepayers' benefit.

THE PARTIES

The California Public Utilities Commission (CPUC) is a constitutionally-established agency charged with responsibility for regulating electric and natural gas utilities in the State of California. In addition, the CPUC has a statutory mandate to represent the interests of electric and natural gas consumers throughout California in proceedings before the Commission.⁵

The Connecticut Attorney General (CTAG) is an elected Constitutional official and the chief legal officer of the State of Connecticut. The Connecticut Attorney General's responsibilities include intervening in various judicial and administrative proceedings to protect the interests of the citizens and natural resources of the State of Connecticut and in ensuring the enforcement of a variety of laws of the State of Connecticut, including Connecticut's Unfair Trade Practices Act and Antitrust Act, so as to promote the benefits of competition and to assure the protection of Connecticut's consumers from anti-competitive abuses.

The Connecticut Department of Energy and Environmental Protection (Connecticut Department) has statutory authority over the state's energy and environmental policies and for ensuring that the state has adequate and reliable energy resources.⁶ The Connecticut

⁵ Cal. Pub. Util. Code, § 307.

⁶ Conn. Gen. Stat. §§ 22a-2d; 16a-3a.

Department is tasked with interacting with the regional transmission operator in response to state and regional energy needs and policies.

The Connecticut Office of Consumer Counsel is the statutorily designated ratepayer advocate in all utility matters concerning the provision of electric, natural gas, water, and telecommunications services. The Office of Consumer Counsel is authorized by statute to intervene and appear in any federal or state judicial and administrative proceedings where the interests of utility ratepayers are implicated.

The Delaware Attorney General is the chief law officer of the State of Delaware, empowered by state common law and statute to exercise all constitutional, statutory, and common law power and authority as the public interest may require, and charged with the duty to protect public rights and enforce public duties in legal proceedings before courts, boards, commissions, and agencies.⁷

The Delaware Division of the Public Advocate (DE DPA) is statutorily charged with, among other things, advocating for the lowest reasonable rates consistent with maintaining adequate utility service and equitably distributing rates among all customer classes. To this end, the DE DPA is authorized to appear on behalf of the interests of ratepayers in federal administrative proceedings.⁸

The Attorney General of Maryland is the state's chief legal officer with general charge, supervision, and direction of the State's legal business. Md. Const. art. V, § 3(a)(2); Md. Code Ann., State Gov't § 6-106.1. Pursuant to that authority the Attorney General of Maryland has intervened in numerous proceedings before the Commission.

⁷ Del. Code Ann. tit. 29, § 2504; *Darling Apartment Co. v. Springer*, 22 A.2d 397, 403 (Del. 1941).

⁸ 29 Del. C. § 8716(e).

The Maryland Office of People’s Counsel is an independent state agency that represents the interests of Maryland’s residential utility consumers of electricity, natural gas, telecommunications, and private water services in state and federal regulatory and legislative proceedings.

The Massachusetts Attorney General is the chief legal officer of the Commonwealth of Massachusetts and is authorized by both state common law and by statute to institute proceedings before state and federal courts, tribunals, and commissions as she may deem to be in the public interest. The Massachusetts Attorney General is further authorized expressly by statute to intervene on behalf of public utility ratepayers in proceedings before the Commission and has appeared frequently before the Commission.⁹

Dana Nessel is the duly elected and qualified Attorney General of the State of Michigan and holds such office by virtue of and pursuant to the provisions of the Const 1963, art 5, § 21, and mandate of the qualified electorate of the State of Michigan, and she is head of the Department of Attorney General created by the Executive Organizations Act, 1965 PA 380, ch 3, MCL 16.150 *et seq.* The Michigan Attorney General has the right, by both statutory and common law, to intervene and appear on behalf of the People of the State of Michigan in any court or tribunal, in any cause or matter, civil or criminal, in which the People of the State of Michigan may be a party or interested.¹⁰

The Minnesota Attorney General is a public officer charged by common law and by statute with representing the State of Minnesota, the public interest, and Minnesota citizens, including

⁹ Mass. Gen. Laws ch. 12, § 11E.

¹⁰ MCL 14.28; *People v O’Hara*, 278 Mich 281; 270 NW2d 298 (1936); *Gremore v. Peoples Community Hospital Authority*, 8 Mich App 56; 153 NW2d 377 (1967); *Attorney General v. Liquor Control Comm’n*, 65 Mich App 88; 237 NW2d 196 (1975); *In re Certified Question*, 465 Mich 537, 543-545; 638 NW2d 409 (2002).

with respect to electric or gas industry matters that affect electric or gas consumers in Minnesota. The Minnesota Attorney General is specifically authorized by Minnesota Statutes section 8.33 to intervene in federal matters to further the interests of small business and residential utility consumers.

The Oregon Attorney General is the chief law officer for the state and is the head of the Oregon Department of Justice.¹¹ The Department of Justice has control of all legal proceedings in which the state may be interested.¹²

The Rhode Island Attorney General is a public officer charged by common law and by statute with representing the State of Rhode Island, the public interest, and the people of the State, including with respect to electric or gas industry matters that affect electric or gas consumers in Rhode Island. Pursuant to § 42-9-6 of the General Laws of Rhode Island of 1956, as amended, the Attorney General is the “legal advisor of all state boards, divisions, departments, and commissions and the officers thereof. . . .” Under the common law, he is the representative of the public, empowered to bring actions to redress grievances suffered by the public as a whole. Participation by the Attorney General in the instant proceeding is sanctioned by law and consistent with the public interest.

BACKGROUND

As stated in the NOI, the Uniform System of Accounts (USofA) contains accounts to record the portions of industry association dues paid by utilities as either operating or nonoperating in nature.¹³ In particular, Account 930.2 (Miscellaneous general expenses) “is considered above the

¹¹ Or. Rev. Stat. § 180.210.

¹² Or. Rev. Stat. § 180.220.

¹³ NOI at P 4 (citation omitted).

line (*i.e.* generally included in rate recovery).”¹⁴ With respect to this account, the USofA states in part:

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.

[. . .]

Expenses:

2. Industry association dues for company memberships. . . .¹⁵

In contrast, Account 426.4 (Expenditures for certain civic, political, and related activities)

“is considered below the line (*i.e.* generally excluded from rate recovery).”¹⁶ With respect to this account, the USofA states:

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.¹⁷

Relatedly, Note B to Account 930.1 (General advertising expenses) instructs reporting utilities 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

¹⁴ *Id.*

¹⁵ 18 C.F.R. pts. 101, 201, Account 930.2 (2022).

¹⁶ NOI at P 4 (citation omitted).

¹⁷ 18 C.F.R. pts. 101, 201, Account 426.4.

¹⁸ 18 C.F.R. pts. 101, 201, Account 930.1, Note B.

COMMENTS

I. The State Agencies Have a Strong Interest in Protecting Ratepayers from Utility and Industry Association Expenses That Do Not Benefit Them.

The State Agencies have an interest in this proceeding because it concerns potential regulatory changes impacting FERC jurisdictional rates paid by their states' ratepayers. Several of the State Agencies are charged with representing the interests of their states' electric and natural gas utility ratepayers, and all of the State Agencies are charged with upholding the public interest. Therefore, they have a strong interest in ensuring that the costs passed on to ratepayers are just and reasonable.¹⁹ This includes an interest in ensuring that captive ratepayers are not charged for political and public advocacy expenses that do not provide ratepayer benefits²⁰ and that may be contrary to ratepayer interests.

Additionally, the State Agencies have an interest in this proceeding because any changes to the Commission's financial reporting, accounting, or rate recovery requirements may impact the review of utility rates at the state level. The Commission's USofA sets forth a system of accounts applicable to public utilities and licensees subject to the provisions of the Federal Power Act and natural gas companies under the Natural Gas Act.²¹ Many of these jurisdictional electric and natural gas utilities are also regulated at the state level by public utility commissions (PUCs). Accordingly, many of these state PUCs have adopted FERC's USofA or have otherwise incorporated the Commission's reporting and accounting rules, or aspects of those rules, into their

¹⁹ See, e.g., 18 U.S.C. §824d(a).

²⁰ See, e.g., *Alaskan Nw. Nat. Gas Transp. Co.*, 19 FERC ¶ 61,218 at 61,429 (1982) (disallowing recovery for certain expenditures incurred to influence public opinion where they had "little or no benefit to the ratepayers.")

²¹ NOI at P 3 (citing 16 U.S.C. 825; 15 U.S.C. 717g; 18 C.F.R. pts. 101, 201).

oversight of electric and natural gas utilities.²² While states can and do modify the USofA and impose additional requirements on utilities subject to state jurisdiction, the State Agencies have an interest in ensuring that the accounting standards set by the Commission promote transparency, are clear, are consistently applied, and support just and reasonable rates.

II. The State Agencies Support Commission Action to Further Define the Recoverability of Industry Association Dues Charged to Utilities and the Scope of Nonrecoverable Civic, Political, and Related Expenses.

As stated in the NOI,

The Commission has not previously adopted a bright line rule or specific guidelines that delineate between above the line and below the line expenses for informing and influencing the public, including industry association dues for such activities, instead allowing utilities to determine the portion of their industry association dues to include in above the line and below the line accounts, respectively, based on information provided by the industry associations about their activities and associated costs.²³

²² See, e.g., *Re Pac. Gas & Co*, No. 54279, Decision 84902, 1975 WL 23523, at *43 (Cal. Pub. Util. Comm'n Sept. 16, 1975) (noting that the CPUC has "adopted, pursuant to Sections 792 and 793 of the Public Utilities Code, the Federal Power Commission's Uniform System of Accounts Prescribed for Public Utilities and Licensees as, with minor modifications, [its] accounting system for electric utilities"); *Re Unif. Sys. of Accts. for Gas Corps.*, 1987 WL 1497504 (July 29, 1987) (adopting the USofA for natural gas utilities) (California); Ill. Admin. Code tit. 83, § 415.10 (2022) (adopting FERC's USofA for electric utilities, subject to certain exceptions) and Ill. Admin. Code tit. 83, § 505.10 (2022) (adopting FERC's USofA for gas utilities, subject to certain exceptions) (Illinois); Md. Code Regs. 20.07.04.08(B) (2022) ("Charitable contributions, penalties, and lobbying expenses recorded in Account 426.1, 426.3, and 426.4, respectively, of the Uniform System of Accounts as prescribed by the Federal Energy Regulatory Commission will not be allowed for rate making purposes in rate matters.") (Maryland); 220 Mass. Code Regs. 51.01 (2021) (adopting FERC's USofA for electric companies, with certain modifications) (Massachusetts); Mich. Admin. Code R 460.9002 (2022) (adopting FERC's USofA for electric utilities, subject to certain exceptions and conditions) and Mich. Admin. Code R 460.9022 (adopting FERC's USofA for gas utilities, subject to certain exceptions and conditions) (2022) (Michigan); Minn. R. 7825.0300(2) (2022) (requiring all public utilities to conform to the appropriate Federal Power Commission uniform system of accounts, with certain clarifications) (Minnesota); 4 N.C. Admin. Code 11.R6-70 (2021) (adopting FERC's USofA for natural gas utilities, subject to certain exceptions and conditions) and 4 N.C. Admin. Code 11.R8-27 (2021) (adopting FERC's USofA for electric utilities, subject to certain exceptions and conditions) (North Carolina); Or. Admin. R. 860-027-0045 (2022) (adopting FERC's USofA for electric companies) and Or. Admin. R. 860-027-0055 (2022) (adopting FERC's USofA for gas utilities) (Oregon); Wash. Admin. Code § 480-90-203 (2021) (requiring gas utilities to use FERC's USofA) and Wash. Admin. Code § 480-100-203 (2021) (requiring electric utilities to use FERC's USofA) (Washington).

²³ NOI at P 5.

Additionally, the “Commission relies on the principle that the ‘intended use and the reason behind the payment’ to inform and influence the public dictates its accounting assignment.”²⁴ However, “where the line between public outreach and educational expenses and lobbying expenses is drawn had not been clearly delineated.”²⁵ Moreover, as the NOI states, “The Commission’s case-by-case application of the ‘intended use’ and ‘reason behind’ tests on expenditures incurred by industry associations and borne by their utility members may have led to stakeholder confusion as to what expenses are properly recoverable in rates.”²⁶

Such “stakeholder confusion” may lead to inaccurate and inconsistent reporting, increased expenditures of administrative resources, and ultimately may impede the Commission’s ability to determine whether recovery of industry association dues in rates is just and reasonable. Therefore, the Commission should take steps to clarify any ambiguities regarding the recoverability of industry association dues charged to utilities and what utility expenses, in the form of industry association dues or otherwise, are considered nonrecoverable civic, political, and related expenses. In doing so, the Commission should consider: (1) the extent to which particular activities and expenses are related to providing utility service; and (2) the specific benefits particular activities and expenditures provide to ratepayers.

The U.S. Court of Appeals for the District of Columbia Circuit’s recent decision in *Newman v. FERC*²⁷ illustrates issues that can arise when there is ambiguity regarding the distinction between recoverable and nonrecoverable civic, political, and related expenses. It also

²⁴ *Id.* (citing *Alaskan Nw. Nat. Gas Transp. Co.*, 19 FERC ¶ 61,218 at 61,429 (1982)).

²⁵ NOI at P 5 (citing *Potomac-Appalachian Transmission Highline, LLC*, Opinion No. 554, 158 FERC ¶ 61,050 (2017), *order on compliance*, 166 FERC ¶ 61,035 (2019), *order on reh’g*, Opinion 554-A, 170 FERC ¶ 61,050, at P 79 (2020)) (internal citation omitted).

²⁶ NOI at P 5 (citations omitted).

²⁷ 22 F.4th 189 (D.C. Cir. 2021).

illustrates how “public relations” and “advocacy” expenses can be utilized to influence the decisions of public officials.²⁸ At issue in that case was more than \$6 million that Potomac-Appalachian Transmission Highline, LLC (PATH) spent for public relations and advocacy activities that had been booked to USofA Account 923 (Outside services employed) and Account 930.1 (General advertising expenses).²⁹ The disputed funds³⁰ were paid to public relations contractors who hired “reliable power coalitions” that would recruit individuals to testify before the state PUCs in support of PATH’s applications for necessary certificates; polled public opinion of the project; ran promotional advertisements; and sent lobbyists to persuade state officials that the certificates should be granted.³¹

In 2015, an ALJ “reasoned that the ‘intended use’ and ‘reason behind’ the expenditures dictates their appropriate account, and that the *ultimate aim* of PATH’s public relations and advocacy expenditures was to influence the decisions of public officials in an effort to obtain Certificates and other licensing approvals,” thus determining that “activities of this nature must be recorded in Account 426.4, not 923 or 930.1.”³² In 2017, the Commission affirmed the ALJ’s decision on the accounting determinations and ordered PATH to refund those expenditures to ratepayers.³³ However, in 2020, following a request for rehearing, the Commission reversed the

²⁸ *See id.* at 191-194.

²⁹ *Id.* at 191, 192.

³⁰ While *Newman v. FERC* did not concern industry association dues, any issues that arise from a lack of clarity in applying Account 426.4 are only compounded when payments are made to a third party who utilizes those funds and accounts for the resulting activities.

³¹ *Id.* at 192-193.

³² *Id.* at 193-94 (citing *Potomac-Appalachian Transmission Highline, LLC*, 152 FERC ¶ 63,025, at 8-9 (2015)) (emphasis added) (internal quotation marks and citation omitted).

³³ *Newman v. FERC*, 22 F.4th at 194 (citing *Potomac-Appalachian Transmission Highline, LLC*, Opinion No. 554, 158 FERC ¶ 61,050 (2017)).

treatment of these expenditures.³⁴ While continuing to affirm that “the ‘intended use’ and the ‘reason behind’ [a] payment dictates its accounting assignment,”³⁵ the Commission held that the disputed expenses belonged in accounts other than Account 426.4, noting, among other things, that PATH incurred costs to *indirectly* influence public officials.³⁶ Following a request for rehearing, the Commission reaffirmed that decision.³⁷

The Court of Appeals granted review of the Commission’s opinions and vacated them, holding that Account 426.4 expenditures for certain civic, political and related activities “include expenditures made for the purpose of indirect as well as direct influence.”³⁸ Interpreting the Official Decisions Clause³⁹ of Account 426.4, the Court rejected the Commission’s argument that it only prohibits *direct* forms of influence over the decisions of public officials.⁴⁰ Rather, “Virtually all the traditional tools of construction bear out the conclusion that purpose, not directness, is the touchstone of that Clause.”⁴¹

In reaching this decision, the Court reviewed, among other things, the text, regulatory history, and regulatory purpose of Account 426.4.⁴² This analysis provides useful guidance for

³⁴ *Newman v. FERC*, 22 F.4th at 194 (citing *Potomac-Appalachian Transmission Highline, LLC*, Opinion 554-A, 170 FERC ¶ 61,050 (2020)).

³⁵ *Potomac-Appalachian Transmission Highline, LLC*, Opinion 554-A, 170 FERC ¶ 61,050, at P 79 (2020).

³⁶ *Newman v. FERC*, 22 F.4th at 194 (citation omitted); *Potomac-Appalachian Transmission Highline, LLC*, Opinion 554-A, 170 FERC ¶ 61,050, at P 79-85 (2020).

³⁷ *Newman v. FERC*, 22 F.4th at 195 (citing *Potomac-Appalachian Transmission Highline, LLC*, Opinion 554-B, 172 FERC ¶ 61,048 (2020)).

³⁸ *Newman v. FERC*, 22 F.4th at 192.

³⁹ The Official Decisions Clause of Account 426.4 states, “for the purpose of influencing the decisions of public officials.” *See id.* at 196 (citing 18 C.F.R. pt. 101, Account 426.4).

⁴⁰ *Newman v. FERC*, 22 F.4th at 196-198.

⁴¹ *Id.* at 196 (internal quotation marks and citation omitted).

⁴² *See id.* at 197-202.

drawing principled distinctions between recoverable and nonrecoverable expenses. For example, in examining the regulatory history of Account 426.4, the Court reviewed FERC’s Order 276, “which created Account 426.4 in 1963 and describes the Account’s purpose, drafting, and scope.”⁴³ The Court found that Order 276’s non-exhaustive list of examples to illustrate the type of expenditures that do or do not belong in Account 426.4 substantiated its conclusion that the Official Decisions Clause includes indirect as well as direct forms of influence.⁴⁴ In particular, the Court cited the below example as supporting its conclusion that Account 426.4 includes expenditures made for the purpose of indirect influence, noting that the clause identified lobbyists separately from “agents of less direct influence.”⁴⁵

- 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.⁴⁶

Additional relevant examples of items that should be placed in Account 426.4, as identified in Order 276, include:

- Advertising in mass communication media to influence the general public or public officials on the private v. public power question. (Such advertising even where it has no specific or express objective is calculated to affect public or official attitudes toward future legislative or administrative action.)
- Payments for the preparation or distribution of editorial or cartoon material intended to influence the public on political matters.
- Membership fees in organizations engaged in lobbying [sic] on legislative matters.⁴⁷

⁴³ *Id.* at 199 (citing *Expenditures for Political Purposes-Amendment of Account 426, Other Income Deductions, Uniform System of Accounts, and Report Forms Prescribed for Electric Utilities and Licensees and Natural Gas Companies-FPC Forms Nos. 1 and 2*, Order No. 276, 30 F.P.C. 1539 (1963) (Order 276)).

⁴⁴ *Newman v. FERC*, 22 F.4th at 199.

⁴⁵ *Id.*

⁴⁶ Order 276 at *1542; *see Newman v. FERC*, 22 F.4th at 199.

⁴⁷ Order 276 at *1542.

In addition to its analysis of the regulatory history of Account 426.4, the Court’s discussion of the account’s regulatory purpose is worth highlighting. As the Court explained, “Order 276 distinguished between [a] expenditures appropriate for that Account and [b] expenditures for ‘above-the-line operating expenses’ that are part of the *ordinary costs of maintaining service* for current ratepayers.”⁴⁸ The Court warned that “[i]njecting a non-textual directness requirement into the Official Decisions Clause would hamper those objectives.”⁴⁹ For example, a utility’s public relations contractors could recruit individuals 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 be recorded in accounts other than Account 426.4.⁵⁰ Such interpretations would risk “end-runs around the core function of Account 426.4” and should be avoided.⁵¹

III. The State Agencies Support Commission Action to Promote Increased Transparency on Industry Association Activities and Expenses.

As discussed above, *Newman v. FERC* highlights issues that may arise in light of the Commission’s case-by-case application of the “intended use” and “reason behind” tests, regardless of whether they are applied to utility expenditures on industry association dues or other expenses.⁵² Additionally, reviewing the activities and expenses of industry associations, which are “one step

⁴⁸ *Newman v. FERC*, 22 F.4th at 202 (citing Order 276 at *1540) (emphasis added).

⁴⁹ *Newman v. FERC*, 22 F.4th at 202.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Other FERC cases have considered similar issues. *See, e.g., ISO New England Inc.*, 117 FERC ¶ 61,070, 61,304 (2006) (“Most would agree that activities such as participation in Political Action Committees, candidate fundraising, entertainment expenses (e.g., meals, sporting events, junkets) are clearly not recoverable lobbying activities. However, informational and educational activities as well as monitoring and communicating on issues of direct operating concern to the RTO, such as those described by ISO-NE in the present proceeding, are much harder cases.”).

removed,” from utilities’ expenditures, presents an additional challenge. As the Commission observed in the NOI, “A challenge with reviewing the accounting of industry association dues . . . is that utilities typically have not required their industry association[s] to provide more than simple invoices and thus lack detailed information on the nature of the association’s activities for purposes of determining the appropriate classification of costs into above the line and below the line accounts.”⁵³ This is the case, despite the fact that, “under section 205 of the Federal Power Act,⁵⁴ the ultimate burden has always been on the regulated utility to demonstrate the justness and reasonableness of its proposed rate.”⁵⁵ As illustrated in the examples discussed below, the lack of detailed information regarding industry association’s activities also has impacted the review of utility rates at the state level.⁵⁶ State PUCs have not responded uniformly—the examples below include cases where recovery has been allowed, disallowed, and partially allowed—but in each instance the review of utility expenditures on industry association dues would have benefited from additional information regarding industry association activities and costs.

⁵³ NOI at P 8. *See, e.g., Ameren Illinois Company*, Docket No. ER-18-1122-001, Motion for Leave to Answer and Answer of Ameren Services Company, Attachment, Edison Electric Institute Invoice (Feb. 11, 2020) (stating that the portion of the invoiced dues “relating to influencing legislation” is estimated to be 7% and providing a total invoice amount).

⁵⁴ Typically, in rate case proceedings at the state level, utilities likewise have the burden of demonstrating that their proposed rates are just and reasonable.

⁵⁵ NOI, Christie, Comm’r, concurring at P 7; *see* 16 U.S.C. § 824d(e).

⁵⁶ In addition to state PUC rate cases, issues concerning the recoverability of industry association dues and civic, political, and related expenses have arisen in other state contexts as well. For example, New York recently amended its public service law to prohibit the inclusion of “the costs of membership dues for any organization, association, institution, corporation or any other entity *that engages in legislative lobbying* as part of any such utility’s operational costs.” N.Y. Pub. Serv. Law § 114-a (2021) (emphasis added). In addition, the North Carolina Utilities Commission recently adopted relevant amendments to its rules in a rulemaking proceeding. *See In the Matter of Petition for Rulemaking Proceeding to Consider Proposed Rule to Establish Procedures for Disclosure and Prohibition of Public Utility Lobbying, Advertising and Other Expenditures*, Docket No. M-100, Sub 150, Order Adopting Amendments to Commission Rules R12-12 and R12-13 (N.C. Util. Comm’n Aug. 10, 2021).

For example, in 2021, the Kentucky Public Service Commission (KYPSC) denied requests by Kentucky Utilities Company (KU) and Louisville Gas and Electric Company (LG&E) to recover anticipated Edison Electric Institute (EEI)⁵⁷ dues, finding that the utilities did not meet their “burden of proof as to the reasonableness of recovery of any of the proposed EEI dues.”⁵⁸ Notably, KU and LG&E had excluded from their requests for ratepayer recovery the portion of EEI dues reflective of “lobbying and political activities,” as reported to the utilities on invoices from EEI.⁵⁹ Additionally, the KYPSC considered a letter from EEI provided by KU and LG&E in response to requests for information, which “explained that the amount identified by EEI for ‘lobbying and political activities’ is calculated pursuant to Section 162(e)⁶⁰ of the [Internal

⁵⁷ Edison Electric Institute is the trade association that represents all shareholder-owned electric utilities in the United States. *Petition for Rulemaking to Amend the Uniform System of Accounts’ Treatment of Industry Association Dues*, Docket No. RM21-15-000, Motion to Intervene and Protest of the Edison Electric Institute, at 3 (Apr. 26, 2021). It is funded through membership dues. *Id.* at 5.

⁵⁸ *Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates*, Case No. 2020-00349, Order at 28 (Ky. Pub. Serv. Comm’n June 30, 2021) (KYPSC KU Order); *Application of Louisville Gas and Electric Company for an Adjustment of its Electric and Gas Rates*, Case No. 2020-00350, Order at 30 (Ky. Pub. Serv. Comm’n June 30, 2021) (KYPSC LG&E Order).

⁵⁹ KYPSC KU Order at 25; KYPSC LG&E Order at 27-28.

⁶⁰ Section 162(e) of the Internal Revenue Code states:

(e) Denial of deduction for certain lobbying and political expenditures.—

(1) In general.—No deduction shall be allowed under subsection (a) for any amount paid or incurred in connection with—

- (A) influencing legislation,
- (B) participation in, or intervention in, any political campaign on behalf of (or in opposition to) any candidate for public office,
- (C) any attempt to influence the general public, or segments thereof, with respect to elections, legislative matters, or referendums, or
- (D) any direct communication with a covered executive branch official in an attempt to influence the official actions or positions of such official. 26 U.S.C. § 162(e).

Revenue Code].”^{61,62} The KYPSC further explained that “the letter noted that EEI does not separately account for activities that could be described as ‘regulatory advocacy, and public relations.’”⁶³ Reiterating that each utility had “the affirmative burden of proof . . . as to whether its proposed rates are fair, just and reasonable,”⁶⁴ the KYPSC denied recovery of all proposed dues. As the KYPSC explained, “A focus only on the amount of EEI dues *not* recoverable in rates misses the point. [Each utility’s] affirmative burden is what level of EEI dues *is* recoverable from customers.”⁶⁵

⁶¹ KYPSC KU Order at 25; *see* February 17, 2021 Letter from EEI, KY’s Response to Joint Supplemental Request for Information (filed Feb. 19, 2021), Item 42, Attachment 2; KYPSC LG&E Order at 28; *see* February 17, 2021 Letter from EEI, LG&E’s Response to Joint Supplemental Request for Information (filed Feb. 19, 2021), Item 42, Attachment 2; *see also* NOI at P 19, Q16; *Petition for Rulemaking to Amend the Uniform System of Accounts’ Treatment of Industry Association Dues*, Docket No. RM21-15-000, Motion to Intervene and Protest of the Edison Electric Institute, at 10 (Apr. 26, 2021); *Petition for Rulemaking to Amend the Uniform System of Accounts’ Treatment of Industry Association Dues*, Docket No. RM21-15-000, Protest of the American Gas Association, at 16-17 (Apr. 26, 2021); *The Narragansett Electric Co. d/b/a National Grid – Application for Approval of a Change in Electric and Gas Base Distribution Rates*, Docket No. 4770, National Grid’s Copy of Letters from the American Gas Association (AGA) and Edison Electric Institute (EEI) (R.I. Publ. Util. Comm’n Aug. 8, 2019), [http://www.ripuc.ri.gov/eventsactions/docket/4770-NGrid-Compliance%20\(AGA%20&%20EEI%20Responses\)\(8-8-19\).pdf](http://www.ripuc.ri.gov/eventsactions/docket/4770-NGrid-Compliance%20(AGA%20&%20EEI%20Responses)(8-8-19).pdf).

⁶² The State Agencies note that Account 426.4 is not coterminous with Section 162(e) of the Internal Revenue Code and that Account 426.4 does not incorporate Section 162(e). *Compare* Account 426.4, *supra* p. 7; Section 162(e), *supra*, p.16 n 60. The text, regulatory history, and purpose of Account 426.4, as well as FERC precedent interpreting the USofA text, are distinct. *See Newman v. FERC*, 22 F.4th at 197-202. Moreover, the holding in *Newman v. FERC*, that Account 426.4 includes expenditures for the purpose of *indirectly* as well as directly influencing the decisions of public officials, 22 F.4th at 196, highlights a distinction between Account 426.4 and Section 162(e). *See* 26 U.S.C. § 162(e)(D) (prohibiting “direct communication” with a covered executive branch official in an attempt to influence the official actions or positions of such official).

⁶³ KYPSC KU Order at 26 (citation omitted); KYPSC LG&E Order at 28 (citation omitted). In denying recovery for any of the proposed EEI dues, the KYPSC relied on its own prior order, which had denied recovery for “[r]egulatory advocacy and public relations, in addition to legislative advocacy.” KYPSC KU Order at 26 (citation omitted); KYPSC LG&E Order at 28 (citation omitted).

⁶⁴ KYPSC KU Order at 26; KYPSC LG&E Order at 28.

⁶⁵ KYPSC KU Order at 27; KYPSC LG&E Order at 29.

The Minnesota Public Utilities Commission (MNPUC) reached a similar conclusion in a 2022 decision concerning a rate increase request by Otter Tail Power Company (Otter Tail).⁶⁶ In that case, Otter Tail had requested recovery for organizational dues for Lignite Energy Council, Utility Air Regulatory Group, McGuireWoods Clean Air Act Monitoring Service, and McGuireWoods Climate Legal Group.⁶⁷ Otter Tail “stated that its membership in these organizations served to educate and inform its employees about providing improved utility service, provide essential information, or provide training to employees to become better qualified in providing improved utility service.”⁶⁸ Moreover, Otter Tail stated that the requested amount excluded the portion of dues charged for lobbying expenses.⁶⁹ The MNPUC, however, disallowed the proposed organizational dues expenses, finding that:

Although the [Otter Tail] 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.⁷⁰

With respect to additional information that Otter Tail should provide, the MNPUC instructed that, if the company wished to seek recovery for certain of the services in future cases, it “must provide an accounting of the legal activities that are provided . . . the amount of subscription cost allocated to each of these activities, and . . . billing-hour details for the legal services under the

⁶⁶ *In the Matter of the Application of Otter Tail Power Company for Authority to Increase Rates for Electric Service in the State of Minnesota*, Docket No. E-017/GR-20-719, Findings of Fact, Conclusions, and Order (Minn. Pub. Util. Comm’n Feb. 1, 2022).

⁶⁷ *Id.* at 24.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 24-25.

subscriptions,” noting that such information would help it evaluate the services’ value to ratepayers.⁷¹

The California Public Utilities Commission (CPUC) addressed similar issues in a 2021 Southern California Edison Company (SCE) general rate case.⁷² In that case, SCE requested recovery for membership dues, including EEI membership dues, and stated that its request excluded the portions of membership dues attributable to lobbying and non-allowable expenses.⁷³ While the CPUC found that SCE had “presented sufficient evidence demonstrating that ratepayers receive some benefits from the EEI membership,” it also found that SCE did “not provide a breakdown of EEI’s membership activities or dues that would enable the Commission to determine how much of the dues are attributable to activities the Commission has previously deemed improper for ratepayer recovery.”⁷⁴ SCE relied on information presented in the EEI invoice to exclude costs related to “influencing legislation,” but the invoice did “not present an itemized breakdown of other activities that the Commission has excluded from ratepayer funding.”⁷⁵ Ultimately, the CPUC approved ratepayer recovery for EEI dues designated for a “Restoration, Operations, and Crisis Management Program” and for 50 percent of the remainder of the requested amount.⁷⁶

⁷¹ *Id.* at 25.

⁷² *Application of Southern California Edison Company (U338E) for Authority to Increase its Authorized Revenues for Electric Service in 2021, among other things, and to Reflect that Increase in Rates*, Application 19-08-013, Decision on Test Year 2021 General Rate Case for Southern California Edison Company, Decision 21-08-036 (Cal. Pub. Util. Comm’n Aug. 20, 2021).

⁷³ *Id.* at 460.

⁷⁴ *Id.* at 462.

⁷⁵ *Id.*

⁷⁶ *Id.* at 462-463.

The Michigan Public Service Commission (MIPUC) likewise addressed similar issues in a 2020 decision concerning a DTE Electric Company (DTE) rate case.⁷⁷ In a Proposal for Decision, an ALJ found that, although the record did “not provide a basis for evaluating the activities” of the associations for whom DTE had requested recovery of membership dues, the record also did not “support excluding the membership fees for all associations,” as recommended by an intervenor.⁷⁸ The ALJ ultimately recommended recovery, relying on knowledge of certain organizations’ activities and the prior practice of the MIPUC.⁷⁹ The MIPUC adopted the findings and recommendations of the ALJ, allowing recovery of the disputed fees, but it also reminded DTE of “the need to continually justify that [membership] fees are truly required and/or are in the interests of ratepayers,” and “of its continuing obligation to identify, describe, and explain projected costs associated with membership fees in future rate cases.”⁸⁰

These examples from state PUC proceedings underscore the point that measures to enhance the transparency of industry association dues are necessary to evaluate the reasonableness of those expenditures. At a minimum, the Commission should require utilities to substantiate their requests for recovery of industry association dues with categorical breakdowns of industry associations’ activities and clear connections between the items for which the utilities seek recovery and ratepayer benefits. It is broadly recognized that industry associations may provide certain informational, training, and other services that benefit ratepayers. However, the fact that *some* of

⁷⁷ *In the Matter of the Application of DTE Electric Company for Authority to Increase Its Rates, Amend Its Rate Schedules and Rules Governing the Distribution and Supply of Electric Energy, and for Miscellaneous Accounting Authority*, Case No. U-20561, Order (Mich. Pub. Util. Comm’n May 8, 2020) (DTE Order).

⁷⁸ *In the Matter of the Application of DTE Electric Company for Authority to Increase Its Rates, Amend Its Rate Schedules and Rules Governing the Distribution and Supply of Electric Energy, and for Miscellaneous Accounting Authority*, Case No. U-20561, Notice of Proposal for Decision, at 341 (Mich. Pub. Serv. Comm’n Mar. 5, 2020).

⁷⁹ *Id.* at 342.

⁸⁰ DTE Order, at 200.

the services provided by a particular industry association are beneficial should not create a presumption that industry association dues, in general, are paid for the benefit of ratepayers.⁸¹ A more detailed review of the categories of activities that industry association dues fund is required to ensure rates that are just and reasonable.

CONCLUSION

The State Agencies appreciate the Commission's solicitation of public input on the rate recovery, reporting, and accounting treatment and recovery of industry association dues and certain civic, political, and related expenses. We respectfully urge the Commission to consider the above comments as it considers potential reforms.

MAURA HEALEY
MASSACHUSETTS ATTORNEY GENERAL

By: /s/ Kelly Caiazzo
Rebecca Tepper
Chief, Energy and Environment Bureau
Kelly Caiazzo
Special Assistant Attorney General
Massachusetts Office of
the Attorney General
One Ashburton Place
Boston, MA 02108-1598
(617) 727-2200
kelly.caiazzo@mass.gov

⁸¹ This is the case even when limited categories of costs are excluded from requests for ratepayer recovery. As noted above, identifying costs that are nonrecoverable does not, without more, satisfy the burden to demonstrate that a proposed rate is just and reasonable.

CALIFORNIA PUBLIC UTILITIES
COMMISSION
CHRISTINE J. HAMMOND
General Counsel
CHRISTOPHER CLAY
Assistant General Counsel

By: /s/ JONATHAN PAIS KNAPP
JONATHAN PAIS KNAPP
505 Van Ness Ave.
San Francisco, CA 94102
Telephone: (415) 703-1626

*Attorneys for the California Public Utilities
Commission and the People of
the State of California*

WILLIAM TONG
ATTORNEY GENERAL
STATE OF CONNECTICUT

By: /s/ John S. Wright
John S. Wright
Assistant Attorney General
Attorney General's Office
10 Franklin Square
New Britain, CT 06051
Tel: (860) 827-2620
Fax: (860) 827-2893

KATHERINE S. DYKES
COMMISSIONER
CONNECTICUT DEPARTMENT OF ENERGY
AND ENVIRONMENTAL PROTECTION

By: /s/ Kirsten S. P. Rigney
Kirsten S. P. Rigney
Director Legal Office
Connecticut Department of Energy and
Environmental Protection
Robert Snook
Assistant Attorney General
10 Franklin Square
New Britain, CT 06051
Tel: (860) 827-2620
Kirsten.Rigney@ct.gov

CONNECTICUT OFFICE OF
CONSUMER COUNSEL

By: /s/ Andrew W. Minikowski
Andrew W. Minikowski
Julie Datres
Staff Attorneys
State of Connecticut
Office of Consumer Counsel
10 Franklin Square
New Britain, CT 06051
Tel: (860)827-2922
Andrew.Minikowski@ct.gov
Julie.Datres@ct.gov
www.ct.gov/occ/

KATHLEEN JENNINGS
DELAWARE ATTORNEY GENERAL

By: /s/ Christian Douglas Wright
Christian Douglas Wright
Director of Impact Litigation
Jameson A. L. Tweedie
Deputy Attorney General
Delaware Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 683-8899

DELAWARE DIVISION OF
THE PUBLIC ADVOCATE

By: /s/ Regina A. Iorii
Regina A. Iorii (De. Bar No. 2600)
Deputy Attorney General
Delaware Department of Justice
820 N. French Street, 4th Floor
Wilmington, DE 19801
(302) 577-8159 (office)
(302) 893-0279 (cell)
regina.iorii@delaware.gov

*In the Capacity of Counsel for the
Delaware Division of the Public Advocate Only*

BRIAN E. FROSH
MARYLAND ATTORNEY GENERAL

By: /s/ John B. Howard, Jr.
John B. Howard, Jr.
Special Assistant Attorney General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6300
jbhoward@oag.state.md.us

DAVID S. LAPP
MARYLAND PEOPLE'S COUNSEL

By: /s/ Irene N. Wiggins
Irene N. Wiggins
Assistant People's Counsel
6 Saint Paul Street, Suite 2102
Baltimore, MD 21202
(410) 767-8152
irene.wiggins@maryland.gov

DANA NESSEL
ATTORNEY GENERAL OF MICHIGAN

By: /s/ Michael Moody
Michael Moody
Division Chief
Special Litigation Division
Michigan Department of Attorney General
525 West Ottawa Street
Lansing, Michigan 48909
(517) 335-7627
Moodym2@michigan.gov

KEITH ELLISON
MINNESOTA ATTORNEY GENERAL

By: Joseph C. Meyer
JOSEPH C. MEYER
Assistant Attorney General
Manager, Residential Utilities Division
joseph.meyer@ag.state.mn.us
(651) 757-1433 (Voice)
445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 296-9663 (Fax)

ELLEN F. ROSENBLUM
ATTORNEY GENERAL OF OREGON

By: /s/ Paul Garrahan
Paul Garrahan
Attorney-in-Charge
Steve Novick
Special Assistant Attorney General
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593
Paul.Garrahan@doj.state.or.us
Steve.Novick@doj.state.or.us

FOR THE STATE OF RHODE ISLAND

PETER F. NERONHA
ATTORNEY GENERAL

By: /s/ Nicholas M. Vaz
Nicholas M. Vaz
Special Assistant Attorney General
Office of the Attorney General
Environmental and Energy Unit
150 South Main Street
Providence, Rhode Island 02903
Telephone: (401) 274-4400 ext. 2297
nvaz@riag.ri.gov

CERTIFICATE OF SERVICE

In accordance with 18 C.F.R. § 385.2010, I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Boston, Massachusetts this 22nd day of February, 2022.

By: /s/ Kelly Caiazzo
Kelly Caiazzo
Special Assistant Attorney General
Massachusetts Office of
the Attorney General
One Ashburton Place
Boston, MA 02108-1598
(617) 727-2200
kelly.caiazzo@mass.gov