Document Accession #: 20220222-5327 Filed Date: 02/22/2022

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

INITIAL COMMENT OF THE VIRGINIA OFFICE OF THE ATTORNEY GENERAL, DIVISION OF CONSUMER COUNSEL

COMMUNICATIONS

The Virginia Office of Attorney General, Division of Consumer Counsel designates the following persons to be placed on the official service list and receive all communications in this docket:

C. Meade Browder Jr.
Senior Assistant Attorney General
Office of the Attorney General
Commonwealth of Virginia
202 North Ninth Street
Richmond, Virginia 23219
Telephone: (804) 786-2071
Facsimile: (804) 371-2086
mbrowder@oag.state.va.us

John E. Farmer Jr.
Assistant Attorney General
Office of the Attorney General
Commonwealth of Virginia
202 North Ninth Street
Richmond, Virginia 23219
Telephone: (804) 786-2071
Facsimile: (804) 371-2086
jfarmer@oag.state.va.us

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

INITIAL COMMENT OF THE VIRGINIA OFFICE OF THE ATTORNEY GENERAL, DIVISION OF CONSUMER COUNSEL

The Virginia Office of the Attorney General, Division of Consumer Counsel ("Virginia Consumer Counsel") submits this Initial Comment in response to the Notice of Inquiry issued in this docket on December 16, 2021.[1] Virginia Consumer Counsel is the statutory representative for millions of electric and natural gas utility ratepayers in Virginia who pay through rates for the costs of their utilities' industry association dues.[2]

BACKGROUND

On December 16, 2021, the Federal Energy Regulatory Commission ("FERC" or "Commission") issued the NOI, wherein it seeks comments on the rate-based recovery, reporting, and accounting treatment of industry association dues, certain civic and political expenses, and charitable donations.[3] The NOI raises questions related to how industry associations and their member utilities classify association costs, what transparency exists related

[1] *Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses*, Notice of Inquiry, 177 FERC ¶ 61,180 (Dec. 16, 2021) [hereinafter "NOI"].

[2] Va. Code § 2.2-517.

[3] NOI at P 10, P 10 n.18.

to such classification, and potential modifications to Commission regulations or guidance to ensure proper classification and sufficient transparency.[4]

As detailed in the NOI, the issue is a matter of accounting. The Commission's Uniform System of Accounts ("USofA") "gives instruction on the separation of the expenses paid by utilities that industry associations incur and bill to utilities into the appropriate above the line (operating) and below the line (nonoperating) accounts."[5] The particular accounts in question are Account 930.2 and Account 426.4. Account 930.2 is an above the line, operating account and "shall include the cost of . . . expenses incurred in connection with the general management of the utility not provided for elsewhere," including "[i]ndustry association dues for company memberships."[6] The latter is a below the line, nonoperating account and "shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, 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."[7]

The Commission operates with a presumption "that expenses recorded in above the line, operating accounts may be recovered through rates, unless a showing is made that the expense is nonoperating in nature and the utility fails to rebut this showing."[8] Conversely, "t]he

[4] NOI at PP 13-15.

[5] NOI at P 4.

[6] 18 CFR 101, Account 930.2; 18 CFR 201, Account 930.2.

[7] 18 CFR 101, Account 426.4; 18 CFR 201, Account 426.4.

[8] NOI at P 6.

Commission presumes that expenses recorded in below the line, nonoperating accounts may not be recovered in rates, without a further showing justifying such recovery for ratemaking purposes."[9] The utility therefore bears the initial burden of proof when it wishes to recover from ratepayers costs of expenses it records in Account 426.4, but not when it wishes to recover from ratepayers costs of expenses it records in Account 930.2. But the account in which a cost is recorded is "not necessarily dispositive," as "[t]he Commission employs the 'intended use' and 'reason behind' the payment standard to delineate costs incurred to inform or influence public opinion as either operating or nonoperating."[10] Generally, the utility may recover costs from ratepayers for expenses that "provide a benefit to ratepayers."[11]

While the account selected is not dispositive, the NOI notes that "[t]he Commission has not previously adopted a bright line rule or specific guidelines . . . , instead allowing utilities to determine the portion of their industry association dues to include in above the line and below the line accounts."[12] In other words, the utility may, by its selection of account for a particular expense, determine whether it or potential challengers will be bear the initial burden of proof.

COMMENT

A. Utilities Seeking Recovery of Costs of Trade Association Dues Should Bear the Burden of Proving That Such Costs are for the Benefit of Ratepayers.

The NOI seeks comment on many technical aspects of this issue related to how trade association dues are currently accounted for,[13] as well as on potential changes to Commission guidance that may be appropriate given ambiguity or "grey areas," exceptions with undefined

[9] *Id.*

[10] NOI at P 12 (citing *Alaskan Nw. Nat. Gas Transp. Co.*, 19 FERC at 61,429).

[11] *Id.* (citing Order No. 276, 30 FPC at 1540; *Alaskan Nw. Nat. Gas Transp. Co.*, 19 FERC at 61,428).

[12] NOI at P 5.

[13] NOI at P 16 (Q1-Q5), P 19 (Q16-Q17, Q20).

scope, or other open questions.[14] There is one policy change the Commission should consider regardless of the responses to these inquiries it may receive from commenters: utilities that seek to recover the costs of trade association dues from ratepayers should bear the burden of proving that such costs "provide a benefit to ratepayers."

The D.C. Circuit's recent decision in *Newman v. FERC*[15] shows why utilities should bear the burden of proof from the outset. There, the D.C. Circuit was considering whether Potomac-Appalachian Transmission Highline, LLC ("PATH") properly characterized over $6 million in various public relations activities during its efforts to obtain Certificates of Public Convenience and Necessity to build a transmission line across Virginia, Maryland, and West Virginia.[16] PATH retained public relations professionals to "recruit individuals—often prominent business and labor leaders—to testify before the state utility commissions in support of PATH's certificate applications" and to "poll[] public opinion of the project, r[u]n promotional advertisements, and sen[d] lobbyists to persuade state officials that the Certificates should be granted."[17] PATH booked most of the costs to Accounts 923 and 930.1, both of which were passed to ratepayers through PATH's formula rate.[18]

In Opinion 554, the Commission sided with the ratepayers challenging PATH's accounting determinations, holding that "Account 426.4 is 'focused on expenses related to public activity, either influencing public opinion with respect to a variety of public activities or directly

[14] NOI at P 19 (Q18-Q19, Q21-Q22).

[15] *Newman v. Fed. Energy Regulatory Comm'n*, No. 20-1324, 2021 U.S. App. LEXIS 38373 (D.C. Cir. Dec. 28, 2021).

[16] *Id.* at *4-5.

[17] *Id.*

[18] *Id.*

influencing public officials.'"[19] The Commission held on rehearing, however, in Opinion 554-A, that Account 426.4 was not the appropriate account for any of the $6 million in expenses.[20] The Commission reaffirmed its Opinion 554-A holding in Opinion 554-B.[21] The question before the D.C. Circuit was whether the Commission appropriately interpreted the USofA when it agreed with PATH that the costs belonged in Accounts 923 and 930.1, rather than in Account 426.4.[22] The court held that it was clear error to "read[] Account 426.4's second clause as implicitly limited to expenditures for the purpose of directly influencing the decisions of public officials," vacating Opinions 554-A and 554-B and remanding for further proceedings.[23]

While *Newman* does not concern industry association dues, it nonetheless reveals the problem with the current practice of leaving cost classification to the discretion of utilities. Such practice results in customers being charged for expenses about which "[t]here is little question that [they were] made . . . to influence the decisions of public officials."[24] If utilities wish to recover costs of activities that are "persuasive rather than merely informational,"[25] it is appropriate that they be able to prove to the Commission's satisfaction that the expenses benefit the utility's ratepayers.

The hazard is perhaps even more pronounced in the context of industry association dues – as contrasted with a utility's own efforts at influencing public officials or public opinion – because how the utility's dollars are being spent is further removed, resting with an entity over

[19] *Id.* at *8 (quoting *Potomac-Appalachian Transmission Highline, LLC*, 158 FERC ¶ 61,050, at 12 (2017)).

[20] *Id.* at *9 (citing *Potomac-Appalachian Transmission Highline, LLC*, 170 FERC ¶ 61,050 (2020)).

[21] *Id.* at *10-11 (citing *Potomac-Appalachian Transmission Highline, LLC*, 172 FERC ¶ 61,048 (2020)).

[22] *Id.* at *9-12.

[23] *Id.* at *13, *35-36.

[24] *Id.* at *5.

[25] *Id.*

which the Commission does not have jurisdiction. That distance between the Commission's oversight and the spending decision creates cover for utilities to choose the account that will be presumptively charged to ratepayers over the account that will be presumptively charged to shareholders.

It may be, of course, that utilities and trade associations will say in their comments that all the expenses are accounted for appropriately, that utilities do not hesitate to book expenses to Account 426.4 whenever appropriate, and that ratepayers have nothing to worry about. Even if one were to assume these things to be true, the overarching question posed by the NOI is not whether utilities are playing fair as a matter of fact, but whether it is the utility or the ratepayer who should bear the initial burden of proving whether the utility is playing fair. Ratepayers typically lack the resources, access to information, or both that are necessary to challenge the categorization of a cost.[26] And while the challengers in *Newman* were individual ratepayers appearing *pro se*,[27] such an outcome is by far the exception.

Newman is instructive on another point as well. The court points out that the dollars spent on a public relations campaign to turn the tide of public opinion in favor of the PATH transmission project were spent in vain. The project was abandoned, leaving ratepayers on the hook for costs associated with a project from which they never received benefits.[28] It is more difficult to trace dollars spent on industry association dues to specific investments, as there typically will not be a direct nexus between those dollars and actual energy infrastructure investments. But the point remains that risk exists for all utility undertakings. Placing a more significant burden on utilities to show what their industry association dues are going towards,

[26] *See* NOI (Christie, Comm'r, concurring) at P 7.

[27] *Newman*, 2021 U.S. App. LEXIS 38373, at *1.

[28] *Newman*, 2021 U.S. App. LEXIS 38373, at *6.

and to prove that they will benefit ratepayers, will help ensure that utilities are more thoughtful about what association expenses they seek to recover from ratepayers.

Virginia Consumer Counsel agrees with the sentiment of Commissioner Christie – this inquiry is ultimately about "[w]ho pays" for a particular kind of expense.[29] Commissioner Christie is right to frame that question as a binary one, especially for states like Virginia with protected monopoly utilities – these costs will be borne by either "investors, who have voluntarily invested in the company" or "captive customers, who have no choice but to purchase an essential product . . . from it."[30] Placing the burden of proof upon utilities as to the recoverability of trade association dues – as is the case with other aspects of their rates – is a commonsense way to ensure that customers are only paying for expenses that are incurred for their benefit.

B. The Commission Should Consider Implementing Guidelines That Provide Greater Transparency

Virginia Consumer Counsel also agrees with the NOI that "increased transparency into association costs may improve public knowledge into industry association dues and therefore ensure the just and reasonable recovery of industry association dues."[31] Without taking a position as to any particular question in the NOI related to transparency, Virginia Consumer Counsel notes that placing the initial burden of proof on utilities as described above will have a necessary positive impact on transparency. As it stands now, once a utility books the costs of trade association dues to Account 930.2, the nature of that cost is often opaque to the Commission's Office of Enforcement and will not receive heightened scrutiny unless challenged

[29] NOI (Christie, Comm'r, concurring) at P 3.

[30] *Id.* at P 5.

[31] NOI at P 17.

by another party.[32] And any challenge would necessarily need to come from parties who "are not able to access the information necessary to determine whether the costs . . . are appropriately classified."[33] The information imbalance thus serves to keep potential challengers from knowing that they may have a basis on which to challenge a particular cost. While Virginia Consumer Counsel would support the adoption of additional mechanisms or guidance[34] to bolster transparency specifically, ensuring that the burden of proof is properly placed on utilities will establish a fairer baseline.

C. Virginia Consumer Counsel supports enshrining the Commission's precedent regarding utilities' charitable giving.

The NOI states, "[a]lthough the Commission has well-established precedent disallowing the cost recovery of donations for charitable, social, or community welfare purposes included in Account 426.1, we also seek comment on whether additional transparency or guidance is necessary to ensure such costs are appropriately treated for accounting and rate recovery purposes."[35] For the reasons noted above as to trade association dues, Virginia Consumer Counsel also supports the Commission's inquiry into this issue. In particular, as suggested by Commissioner Christie,[36] Virginia Consumer Counsel would support a codification of the Commission's well-established precedent in its regulations, which are far more accessible to the public than specific Commission decisions.

---

[32] NOI at P 7.

[33] NOI (Christie, Comm'r, concurring) at P 7.

[34] As noted by Commissioner Danly, for instance, the question may be plagued by a lack of clear continuity between certain federal statutes and the Commission's regulations. NOI (Danly, Comm'r, dissenting) at P 14 (Feb. 1, 2022).

[35] NOI at P 10 n.18.

[36] NOI (Christie, Comm'r, concurring) at P 9.

CONCLUSION

For the above stated reasons, Virginia Consumer Counsel (1) requests that the Commission place on regulated utilities the burden of proving that costs of trade association dues sought to be recovered from ratepayers are actually intended to provide a benefit to ratepayers; (2) supports additional guidelines to improve the transparency of the nature of trade associations' use of utility member dues; and (3) supports codifying in regulations the Commission's well-established precedent barring recovery from ratepayers of utilities' charitable giving.

Respectfully submitted,

VIRGINIA OFFICE OF THE ATTORNEY GENERAL
DIVISION OF CONSUMER COUNSEL

By: */s/ John E. Farmer Jr.*

Jason S. Miyares
Attorney General

Steven G. Popps
Deputy Attorney General

C. Meade Browder Jr.
Senior Assistant Attorney General

John E. Farmer Jr.
Assistant Attorney General

COMMONWEALTH OF VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
Telephone: (804) 786-2071
Facsimile: (804) 371-2086
mbrowder@oag.state.va.us
jfarmer@oag.state.va.us

Dated: February 22, 2022

Document Content(s)