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

REPLY 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 reply 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]

The State Agencies filed their initial comments in this docket on February 22, 2022.[3] Those initial comments supported Commission action to further define the recoverability of industry

[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.

[3] The State Agencies' initial comments discussed at Section II of the comments the U.S. Court of Appeals for the District of Columbia Circuit's December 28, 2021 opinion in *Newman v. FERC*, 22 F. 4th 189 (D.C. Cir. 2021). On March 9, 2022, after the State Agencies filed their initial comments, the Court of Appeals amended and reissued that opinion. *See Newman v. FERC*, No. 20-1324, 2021 WL 7368732 (D.C. Cir. Mar. 9, 2022); *see also Newman v.*

association dues charged to utilities and the scope of nonrecoverable civic, political, and related expenses. They also supported Commission action to promote increased transparency on industry association activities and expenses.

The State Agencies file these reply comments in response to certain issues raised by commenters[4] for the limited purpose of reinforcing and supplementing the State Agencies initial recommendations in two respects. First, utilities seeking to recover the costs of industry association dues should bear the burden of proving that such expenditures pertain to the provision of utility service and benefit ratepayers. Second, the Commission should prohibit utilities from recovering otherwise nonrecoverable expenditures "for the purpose of influencing public opinion" or "for the purpose of influencing the decisions of public officials" that are paid through industry association dues.

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

FERC, No. 20-1324, 2022 WL 700148 (D.C. Cir. Mar. 9, 2022) (per curiam) (granting motion for clarification, amending December 28, 2021 opinion, and denying petition for panel rehearing). In accordance with the Court of Appeals' amended opinion, the State Agencies would amend p. 12, line 6 of their initial comments to delete "The Court of Appeals granted review of the Commission's opinions and *vacated them*," and instead state "The Court of Appeals granted review of the Commission's opinions and *vacated the challenged portions*." *See Newman v. FERC*, No. 20-1324, 2021 WL 7368732, at *4, *11 (D.C. Cir. Mar. 9, 2022).

[4] As in their initial comments, the State Agencies do not address all of the issues raised in the NOI, and they do not address all of the issues raised in the initial comments.

[5] Cal. Pub. Util. Code, § 307.

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 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 Connecticut Public Utilities Regulatory Authority (CT PURA) is the state commission charged with regulating utilities and setting retail utility rates within Connecticut. The CT PURA, like the Commission, must balance the interests of utilities providing services with those of ratepayers who must pay a fair price – but no more – for those services. The CT PURA is authorized by General Statutes of Connecticut § 16-6a to participate in proceedings before federal agencies and courts on matters affecting utility services rendered or to be rendered in Connecticut.

[6] Conn. Gen. Stat. §§ 22a-2d; 16a-3a.

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.

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

[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).

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 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.

[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).

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.

COMMENTS

I. Utilities Seeking to Recover the Costs of Industry Association Dues Should Bear the Burden of Proving that Such Expenditures Pertain to the Provision of Utility Service and Benefit Ratepayers.

The State Agencies agree with the numerous other commenters who have argued that utilities seeking to recover the costs of industry association dues should bear the burden of proving that such expenditures are appropriately recoverable from ratepayers.[13] To meet this burden, the

[11] Or. Rev. Stat. § 180.210.

[12] Or. Rev. Stat. § 180.220.

[13] *See, e.g.,* Comments of the Illinois Attorney General (RM22-5) at 3 (recommending that "FERC require industry association dues to be . . . limited to 'below-the-line' accounts," and noting that "this alteration would correctly shift the burden to utilities and associations to demonstrate that the costs they seek to collect from ratepayers are unrelated to political and policy advocacy"); Comments of the Louisiana Public Service Commission (RM22-5) at 2, 3 (recommending that "industry association dues and related costs should be presumptively non-recoverable in rates" and noting that this would "place the burden on the utility to show that the expenses are properly recoverable from ratepayers."); Comments of the Ohio Consumers Counsel (RM22-5) at 6 ("The utility should have the burden of proof to demonstrate that [proposed charges for industry association dues] provide a direct and primary benefit to

Commission should require utilities seeking recovery of industry association dues to show that such expenditures pertain to the provision of utility service[14] and benefit ratepayers.[15] As the State Agencies' initial comments recommended, this showing should include categorical breakdowns of industry associations' activities and clear connections between the items for which utilities seek recovery and ratepayer benefits. Requiring utilities to bear the burden of proving the recoverability of the costs of industry association dues will increase transparency on industry association activities and expenses and provide necessary protection to ratepayers.

Commenters have made several recommendations to appropriately place the burden of demonstrating the recoverability of industry association dues on utilities. These recommendations

consumers."); Comments of the Nevada Attorney General, Bureau of Consumer Protection (RM22-5) at 4 ("[T]rade association costs should be included in an account – Account 426 – where the utility has to justify inclusions of these costs rather than the other way around."); Comments of the Virginia Office of the Attorney General Division of Consumer Counsel (RM22-5) at 5 ("[U]tilities 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.'"); Comments of the New England Consumer-Owned Systems (RM22-5) at 9-10 (making recommendations to "increase transparency and appropriately place the burden of persuasion for recovery of the cost of industry association dues on the proponent of recovery"); *see also* NOI, Christie, Comm'r, concurring at P 7 ("[U]nder section 205 of the Federal Power Act, the ultimate burden has always been on the regulated public utility to demonstrate the justness and reasonableness of its proposed rate."); 16 U.S.C. § 824d(e); 15 U.S.C. § 717c(e).

[14] *See* NOI, at P 4 n 6 ("For ratemaking purposes, the Commission has found that expenses above the line are usually chargeable to the ratepayer because they pertain solely to supplying a regulated utility service and are used in determining rates."); *Newman v. FERC*, No. 20-1324, 2021 WL 7368732, at *10 (D.C. Cir. Mar. 9, 2022) ("In establishing Account 426.4, Order 276 distinguished between expenditures appropriate for that Account and expenditures for 'above-the-line operating expenses' that are part of the ordinary costs of maintaining service for current ratepayers.") (citation omitted); 18 CFR pts 101, 201, Account 930.2 (Miscellaneous general expenses) (stating that the account "shall include the cost of labor and expenses incurred in connection with the general management of the utility not provided for elsewhere."); Comments of Michigan Attorney General Dana Nessel and the Citizens Utility Board of Michigan (RM22-5) at 2 ("Any expenditures that fail to meet FERC's well-established standard for operating activities that 'they pertain solely to supplying a regulated utility service and are used in determining rates' should not be recoverable."); Comments of the Harvard Electricity Law Initiative (RM22-5), at 10 ("[T]he Commission should amend the USA and require utilities to book trade association dues in a below-the-line account, less any portion of dues that the utility can prove aim at enhancing transmission and distribution service.").

[15] *See* NOI, at p 12 ("With regard to rate recovery, the Commission has required utilities to record costs for lobbying, civic engagement, public information campaigns, and the like to Account 426.4, except those costs that the utility demonstrates provide a benefit to ratepayers, thus determining whether the costs are recoverable or nonrecoverable."); *Alaskan Nw. Nat. Gas Transp. Co.,* 19 FERC ¶ 61,218 at 61,429 (1982) (disallowing recovery for certain expenditures where they had "little or no benefit to the ratepayers."); *supra* note 13 Comments of the Ohio Consumers Counsel, Comments of the Virginia Office of the Attorney General Division of Consumer Counsel.

include: requiring utilities to book industry association dues in below-the-line accounts, making them presumptively nonrecoverable;[16] modifying Account 930.2 to include only the portions of a utility's industry association dues that the industry association spends on activities that aim to enhance the quality of utility service;[17] creating a new above-the-line account for industry association dues, along with a new 426 subaccount for industry association dues that are nonoperating in nature;[18] and requiring utilities to regularly report which industry association dues are classified under Account 930.2 and which are recorded to Account 426.4 (or other accounts).[19] The State Agencies recommend that the Commission—taking into account the need for transparency, the ratemaking implications of any changes, and any potential burdens of compliance—further investigate the most effective mechanism to place the burden of demonstrating the recoverability of industry association dues on utilities and include such proposal in any proposed rulemaking.

[16] *See, e.g.,* Comments of the Center for Biological Diversity (RM22-5) at v (recommending that the "Commission initiate a rulemaking to remove the reference to 'industry association dues for company memberships' from Account 930.2, and add that reference to Account 426, thereby making these dues presumptively non-recoverable."); Comments of the Louisiana Public Service Commission (RM22-5) at 3 ("[I]ndustry association dues and related costs should be presumptively non-recoverable in rates."); Comments of the Ohio Consumers Counsel (RM22-5) at 6 ("FERC should require utilities to exclude industry association dues from transmission rates by accounting for these expenses in below-the-line accounts"); Comments of U.S. Senator Sheldon Whitehouse, *et al.* (RM22-5) at 3 ("FERC must . . . deem industry association dues as presumptively non-recoverable.").

[17] Comments of the Harvard Electricity Law Initiative (RM22-5) at 18.

[18] Petition to Intervene and Joint Comments of Ratepayers (RM22-5) at 13.

[19] Comments of Michigan Attorney General Dana Nessel and the Citizens Utility Board of Michigan (RM22-5) at 6.

II. The Commission Should Prohibit Utilities From Recovering Otherwise Nonrecoverable Expenditures "for the Purpose of Influencing Public Opinion" or "for the Purpose of Influencing the Decisions of Public Officials" That Are Paid Through Industry Association Dues.

The Commission should prohibit utilities from recovering costs expended "for the purpose of influencing public opinion" or "for the purpose of influencing the decisions of public officials"[20] whether they expend such costs directly or fund such expenditures in the form of industry association dues. In its initial comments, the Edison Electric Institute states that the "advocacy/lobbying portion" of its dues which are not recoverable in rates "is calculated using the Internal Revenue Code ("IRC") definition of 'lobbying and political activities' under section 162(e), in addition to the definitions in the Lobbying Disclosure Act, as amended ("LDA"), and as permitted by the LDA."[21] But commenters have identified types of activities and expenditures within the scope of Account 426.4 that are not captured by the IRC and LDA, and presumably are not excluded from utility claims for recovery from ratepayers.[22] Utilities should not be permitted to recover such otherwise nonrecoverable expenditures (costs considered nonoperating per the definition of Account 426.4) simply because they are made indirectly through industry association

[20] 18 CFR pts 101, 201, Account 426.4 (Expenditures for certain civic, political and related activities).

[21] Initial Comments of the Edison Electric Institute (RM22-5) at 6; *see also, e.g.,* Comments of the American Gas Association (RM22-5) at 10-11 (describing compliance with the IRC and LDA).

[22] *See, e.g.,* Comments of the Illinois Attorney General (RM22-5) at 4 (stating that, while "[o]rdinarily, the FERC Form 1 bars utilities from collecting from customers expenditures intended to influence public opinion," "current FERC rules allow for utilities to route expenditures intended to influence public opinion through industry association dues"); Comments of the Center for Biological Diversity (RM22-5) at 27-28 (discussing differences between Account 426.4 and federal lobbying law); Comments of the Harvard Electricity Law Initiative (RM22-5) at 5-6 (describing the "gap" between Account 426.4 and the federal tax code's definition of "lobbying"); *see also* Comments of the New England Consumer-Owned Systems (RM22-5) at 3 ("The Internal Revenue Code's provisions precluding the deductibility of lobbying expenses (e.g., 26 U.S.C. §§ 162(e), 501(h), and 4911) are generally a poor fit with the objectives of the Commission's Account 426.4 instructions."); Petition to Intervene and Joint Comments of Ratepayers (RM22-5) at 8 (describing the "mismatch" between the IRS definition of lobbying and the text of Account 426.4); *cf.* Comments of the American Gas Association (RM22-5) at 9 (describing the text of Account 426.4 as "generally consistent" with how the IRC and LDA define lobbying).

dues, rather than directly. The Commission should clarify this point in any proposed rulemaking.[23] As discussed above, placing the burden of demonstrating the recoverability of industry association dues on utilities, and requiring utilities to substantiate their requests for recovery, would provide transparency regarding the specific industry association expenditures for which utilities seek recovery.

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, in addition to the State Agencies' initial 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

[23] To be clear, the Commission should reject any proposal to modify Account 426.4 to align it with the IRC and LDA. Those authorities are not designed to identify nonrecoverable nonoperating utility expenses.

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/

STATE OF CONNECTICUT PUBLIC UTILITIES
REGULATORY AUTHORITY

By: */s/ Seth Hollander*
Seth Hollander
Assistant Attorney General
10 Franklin Square
New Britain, CT 06051
Tel: (860) 827-2681
Seth.Hollander@ct.gov

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 23rd day of March, 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

Document Content(s)