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**

JOINT REPLY COMMENTS OF RATEPAYERS

Keryn Newman, Alison Haverty and Martha Peine (collectively "Ratepayers") hereby submit their Reply Comments in the above referenced docket.

INTRODUCTION

In its initial comments, Edison Electric Institute ("EEI") "encourage[s] all stakeholders in Commission proceedings to provide similar levels of transparency regarding their sources of funding and the objectives of their funders."[1] We observe that EEI's request misses a key point, which is that ratepayers are not paying for all stakeholders to participate in Commission proceedings, but they are currently funding EEI's participation. However, stakeholder goals for participating in this proceeding can provide an important touchstone for the Commission's deliberations. Who is being served here? There can be but one answer to this question: Ratepayers. The Commission's accounting and ratemaking process must serve ratepayers.

In their comments, industry associations and utilities list all the things industry associations do that provide benefit to ratepayers. In contrast, the comments of special interest groups provide lists of the things industry associations do that do not provide benefit to ratepayers. The take away from this reads like a social media relationship status, "it's complicated." Industry trade associations have grown from the small, ratepayer beneficial

[1] Comments of Edison Electric Institute at 3.

collectives the Commission contemplated decades ago,[2] into today's well-funded influencers seeking primarily to benefit investor-owned utility profits.[3]

Perhaps the pivotal question here is: Would more easily-accessed public information about the activities of industry associations suddenly turn the 17,923 ratepayers who signed the Center for Biological Diversity's petition,[4] or even the special interest organizations themselves, into ratepayer advocates who will use the newly available information to examine and challenge the utility rates they pay? The short answer is no. Understanding utility rates is difficult and accessing information about the rates charged is merely the tip of the expertise and resource iceberg that must be navigated in order to successfully challenge such rates. Even governmental or other ratepayer advocates may not possess the necessary expertise and resources to use this information to ensure just and reasonable utility rates.[5] So how might this information be used? Would it be used to participate in rate proceedings, or would it be used in public relations campaigns or strategic planning against industry trade associations whose ideology does not agree with special interest groups? It may be telling that several commenters urge the Commission to require that utilities also publicly disclose detail about all expenditures recorded in accounts 426.1 and 426.4.[6] Does the public have a right to information about utility expenditures that are not included in the rates they pay? As the agency responsible for ensuring utility rates are just and reasonable, can the Commission compel utilities to publicly disclose

[2] Including in Account 426.4 "Membership fees in organizations engaged in lobbying on legislative matters." Expenditures for Political Purposes — Amendment of Account 426, *Other Income Deductions, Unif. Sys. of Accounts, and Report Forms Prescribed for Elec. Utils. and Licensees and Nat. Gas Cos. — FPC Forms Nos. 1 and 2, Order No. 276*, 30 FPC 1539 (1963) at 5.

[3] "The most important driver for utilities and their trade associations is to provide a reasonable return on shareholders' investments, not saving money for consumers." Comments of The Consumer Coalition for Electricity Rate Transparency at 4.

[4] Letter of Support for Protecting Ratepayers from Compelled Funding for Trade Association Advocacy of Center for Biological Diversity.

[5] "Ratepayers typically lack the resources, access to information, or both that are necessary to challenge the categorization of a cost. And while the challengers in *Newman* were individual ratepayers appearing *pro se*, such an outcome is by far the exception." Comment of Virginia Attorney General Division of Consumer Counsel at 7.

[6] Comments of The Office of Ohio Consumers' Counsel at 21; Comments of Public Citizen, Inc. at 2-3.

information regarding expenditures that are not included in rates? The utility must report to regulators how it spends ratepayer money, but it reports only to its shareholders on how it spends the utility's money.

The Commission's ratemaking process has been thoughtfully developed to provide transparency to customers who must pay these rates. In order to encourage substantive review and challenge, the Commission has developed transparency requirements that require ratepayers to engage with utilities to access information, instead of making all information public from the outset. As well, the burden has always been on the utility to demonstrate that its rates are just and reasonable by providing supporting information. If the Commission wants to change that so full information is provided at each ratemaking or formula rate annual update, why stop at industry trade association dues? There are many other Uniform System of Accounts ("USoA") accounts where lack of transparency requires ratepayers to make inquiry to access information. For instance, Account 923, Outside Services, is by far a favorite dumping ground for non-operating expenses that have been incorrectly recorded, such as lobbying and influencing. Applying new transparency requirements to Account 923 in order to encourage more examination and challenge would most likely yield more refunds for ratepayers than public disclosure of trade association dues. And if the Commission also extends new transparency requirements to Account 923, why stop there? Why not make utilities disclose full information for each expense when filing ratemaking or formula rate annual update documents? The answer is that requiring enough information in each rate filing so that every ratepayer can understand each expense is cumbersome and expensive. The Commission's current transparency requirements are a compromise between too little information and too much information.

We disagree with EEI's contention that its participation in regulatory proceedings actually saves money for ratepayers by ameliorating the need for individual utilities to make regulatory filings.[7] It is rare for EEI to be the only "utility" in a regulatory proceeding. EEI's participation is usually *in addition to* the filings of individual utilities and only increases ratepayer costs to finance utility regulatory filings. An investor owned utility has a fiduciary duty to its shareholders to protect its own interests in regulatory proceedings and it would be rare indeed if the utility abrogated its responsibility to its shareholders by allowing EEI to handle its regulatory affairs. The regulatory expenses of industry trade associations do not provide benefit to ratepayers and should not be a recoverable expense.

We have often wondered why all the accounting errors that inappropriately record utility expenses are in the utility's favor. We believe it is because the utility takes a gamble that usually pays off. The Commission does not audit or review each formula rate annual update. Commission audits of utility rates are infrequent. Filing and pursuit of formal challenges are also infrequent. It may cost more to develop, file and pursue formal challenges than any ratepayer or ratepayer advocate would end up saving if the challenge is successful. The Commission may want to deter willful gaming of the Commission's accounting rules by requiring the utility to reimburse ratepayers for their costs to file and pursue challenges to formula rate annual updates that are found by the Commission to be in error. It costs the utility nothing to defend its actions because ratepayers pick up the tab for the utility's costs to refute the challenge. If the utility is audited and errors are found, the utility simply says, "oops, my bad" and refunds the amount in question. The Commission may want to institute a requirement that when errors are found in a utility's rate during an audit that the utility will be audited yearly for a

[7] Comments of EEI at 13.

period of 3-5 years following the errors to ensure future compliance. Under the current system, the full breadth of utility accounting mistakes is never uncovered or refunded, and the utility faces no penalties for gambling that its errors won't be detected and refunds ordered. Utilities pad their recovery by taking a gamble with little risk. The Commission must pull its head out of the sand to recognize that the utilities it regulates regularly game the rates it administers in order to increase their recovery.

I. THERE IS NO MECHANISM FOR THE COMMISSION TO EXAMINE AND APPROVE RECOVERY OF ACCOUNT 426.4 EXPENSES ON A YEARLY BASIS

The vast majority of commenters in this docket seem to believe there is a yearly process whereby the utility can make a showing to the Commission that expenses recorded in Account 426.4 should be recoverable, and that the Commission approves rates on a yearly basis.

> "By putting industry association dues below-the-line, the Commission can most efficiently ensure that to the extent a utility seeks to recover for expenses associated with any of these groups funded by the industry associations, those specific expenses are identified and therefore **subject to appropriate regulatory oversight**."[8]
>
> "…putting these expenses in a presumptively non-recoverable account will best serve ratepayers by not only putting the burdens where they properly belong, and best insuring that regulators have the most complete and accurate information in making their **regulatory decisions**…"[9]
>
> "…would allow regulators and intervenors to appropriately **probe those expenses within the context of regulatory proceedings**."[10]
>
> "Thus, as noted, Account 426 itself explains that "[t]he classification of expenses as nonoperating and their inclusion in these [Account 426] accounts is for accounting purposes [and] does not preclude **Commission consideration of proof to the contrary for ratemaking** or other purposes."[11]
>
> "For utilities with formula rates, that **showing would need to be made**, and supported

[8] Comments of Center for Biological Diversity at 22.
[9] *Id.* at 24.
[10] *Id.* at 33.
[11] *Id.* at 35, quoting USoA Instructions for Account 426.

with substantial evidence, in the annual informational filings that update the cost inputs to formula rates."[12]

"Only if the regulated company provides evidence that a portion of its association dues cover activities that "enhance the quality of the service" that the company provides, should **the Commission allow it** to book that portion of its dues in an above-the-line account."[13]

"Under this approach, if a utility maintains an industry association is providing a specific recoverable service, it can detail that service, and its associated cost, **seek appropriate rate recovery**."[14]

"Utilities seeking to recover dues from ratepayers should be required to provide a detailed justification with supporting documentation that such dues recovery is prudent and in the interest of customers. [ ]…so that **the Commission** and customers alike **can determine the reasonableness of such recovery.**"[15]

"…utilities should be required to **get authority to charge consumers from FERC** upon a demonstration that the expenses in question provide a direct and primary benefit to consumers."[16]

There is no such yearly process. Deciding which expenditures, or in the case of a formula rate which accounts, are recoverable is a part of the initial ratemaking process. Subsequent years of recovery of a stated rate are not a ratemaking process, and formula rate annual updates are also not a ratemaking process. As explained in our initial comments, formula rate annual update revenue requirements go into effect "…without notice to the Commission, provided those changes are consistent with the formula."[17] For stated rates, the Commission would only approve recoverability of specific expenses during a Section 205 ratemaking proceeding. Thereafter, rates are not examined on a yearly basis. A yearly showing to ratepayers and the public that industry association dues amounts recorded in Account 426.4 should be recoverable would accomplish nothing more than the current procedure. It would not

[12] Comments of The American Forest & Paper Association at 4.
[13] Comments of Harvard Electricity Law Initiative at 3.
[14] Comments of NC WARN at 12.
[15] Comments of The Consumer Coalition for Electricity Rate Transparency at 8.
[16] Comments of The Office of Ohio Consumers' Counsel at 19.
[17] *Ala. Power Co. v. FERC,* 993 F.2d 1557, 1567-68 (D.C. Cir. 1993) (quoting *San Diego Gas Elec. Co.,* 46 FERC ¶ 61,363, at 62,129-30 (1989)).

trigger the Commission's oversight unless challenged. The utility would still be making the determination of which expenses are recoverable in accordance with its filed rate, which seems to be what these commenters find objectionable in the first place.

If the Commission were to develop a yearly process to examine and approve industry trade association dues for recovery it may quickly find itself overwhelmed with yearly Section 205 ratemakings. The Commission has found that "cost components of formula rates … generally accorded separate Commission scrutiny must be filed with the Commission before the costs are passed through the formula rate."[18] Therefore, any changes to the accounts recovered in a formula rate that require Commission scrutiny would have to take place within the context of a Section 205 ratemaking. Likewise, changing a stated rate also requires a Section 205 filing. Yearly Section 205 filings defeat the purpose of formula rates, which is to streamline rate proceedings so that "… the utility's rates, then, can change repeatedly, without notice to the Commission, provided those changes are consistent with the formula."[19]

Without a Section 205 proceeding, the Commission has no authority to deviate from the filed rate, or to adjust a rate retroactively, in order to change the amount of industry association dues recovered on an annual basis. The Commission has no authority to circumvent the recoverability consequences of a formula rate by changing the accounting classification of expenses from an excluded account to an included account for the express purpose of recovering expenses that belong in accounts which the formula rate excludes.

[18] *Baltimore Gas and Electric Co.,* 122 FERC ¶ 61,034 at P. 11 (2008).
[19] *Ala. Power Co. v. FERC,* 993 F.2d 1557, 1567-68 (D.C. Cir. 1993) (quoting *San Diego Gas Elec. Co.*, 46 FERC ¶ 61,363, at 62,129-30 (1989)).

II. DETERMINING WHICH COMPANY MEMBERSHIP AMOUNTS ARE RECOVERABLE

Instead of requiring all industry association dues to be recorded in Account 426.4, we assert that providing more definition of which industry association dues are recoverable (and nonrecoverable) through the USoA is the reasonable solution. We continue to recommend that the Commission establish new operating and non-operating accounts for company memberships, which could include as much detail as necessary to ensure expenditures are properly recorded. If subsequent errors are detected by ratepayers, the rate or revenue requirement may be challenged through existing procedures.

It must be recognized that the amount recovered through a stated rate is static, however amounts recovered through formula rates may change yearly based on a utility's actual expenditures. For formula rates, we do agree with other commenters that company memberships in organizations that lobby and influence should be recovered through the process of *inclusion*, rather than *exclusion*. Instead of the current process of deducting non-recoverable expenses from the total dues paid and then recovering the remaining balance, the recoverable portions should be separated from the total and added together to arrive at the amount recoverable. This could be accomplished by separating membership dues by program, activity, or service, where programs that provide benefit to ratepayers, such as EEI's Grid Resilience and Power Restoration program, are added together to come up with the total amount recoverable. The residual balance would not be recoverable.

The Commission may also want to account for membership dues being paid on a prospective basis for the upcoming year by requiring a true up process at the end of the year that compares projected program expenses recovered versus actual recoverable program expenses.

Of course, both of these processes would be dependent upon the utility receiving a detailed invoice from the membership organization that breaks expenses down by individual program budget, to be followed by a year end statement that compares budgeted amounts to actual expenditures. While the Commission cannot dictate how membership organizations prepare their billing statements, it can require the utility to possess such information or forgo recovery of the membership dues.

III. TRANSPARENCY AND BURDEN

The Commission's ratemaking procedures already provide transparency. Both stated rates and formula rates place the burden on the utility to provide information to support its accounting choices. If a utility does not provide adequate support, it risks that the expense cannot be recovered.

However, current transparency provisions require ratepayers to take an active role by requesting information from the utility. This makes sense because each inquiry may be specific and detailed. No matter how much public information a utility is required to provide outside the inquiry process, it is highly unlikely that information would provide enough detail to determine whether the expense is recoverable. EEI confirmed this by filing its first ever Lobbying, Advocacy, and Other Expenditures Report which, by itself, is not enough information to determine which portion of utility dues payments to EEI are recoverable. More information would have to be gathered from the utility about specific programs and donations. A ratepayer would still have to request further information.

More information is always required to get enough detail to challenge a specific expense. Utilities are adept at failing to provide needed detail. This often requires multiple discovery

requests and sometimes motions to compel production of information. All efforts grind to a halt, however, when it comes to utility memberships. The utility cannot be compelled to provide information it does not have, such as the programs and finances of a third-party organization. But this does not mean that the expense is recoverable. The burden is still on the utility to support its accounting choice. Is a non-detailed invoice from the organization sufficient evidence to support placing the expense in a recoverable account? This is a decision that must be made by the Commission when setting a stated rate, or within the confines of a formal challenge to a formula rate annual update.

Many commenters find participation under current transparency requirements to be burdensome. In fact, many commenters don't even acknowledge the existence of formula rate annual updates,[20] and may not understand them enough to extract necessary information. They don't want to participate in discovery, or to expend time and resources gathering enough information to prove an expense is not recoverable. They assert that it is up to the utility to prove that it is recoverable, therefore placing the burden where it belongs. But who would be deciding if enough proof to support recoverability has been shown in formula rate annual update filings? It's not the Commission, who doesn't notice or approve yearly annual update filings. Therefore it would have to be the ratepayers and special interest groups who already claim it is too burdensome to participate in ratemaking proceedings or formula rate challenges.

Instead of requiring utilities to include full disclosure of their company membership expenses in annual formula rate update filings as suggested in the NOI, we propose that the information be provided on the company's annual Form No. 1 filing instead. Formula rate annual updates are populated with account totals from Form No. 1, and Administrative and General Expenses are grouped to be entered on one line of the formula rate. Form No. 1 includes

[20] See comments of Public Citizen at 2, 4. See also Comments of EEI at 9-10.

a page that is supposed to detail Account 930.2.[21] We propose that the Commission add a similar page to Form No. 1 to correspond with a new account number for recoverable company memberships. The detail on the new page should list amounts recovered by program, activity or service that clearly shows how ratepayers benefit from the expenditure. Since Form No. 1 would have to be updated to include new accounts for company memberships anyhow, adding this page would not be burdensome. This would provide the transparency of company memberships recovered from ratepayers that many commenters are asking for, without the burden of changing every existing formula rate to add new workpapers as suggested by the Commission in Question 13(c) of its Inquiry. It would also place the information in a familiar form and location known to and readily accessible by these commenters.

It must be acknowledged that producing and filing public information on an annual basis comes at a cost. Ratepayers would pick up the tab. Would any savings on company memberships outweigh the costs of new filings? Would public information filings truly deter utilities from collecting certain portions of membership dues? Or would utilities just get creative about how the information is presented? If, perchance, public information produced an "aha" moment for a ratepayer or advocate, they would still be required to file a Formal Challenge or Section 206 complaint before the Commission took notice, an action they claim is too burdensome. Just how easy should the Commission make it for the average ratepayer to acquire information and challenge rates? Should there be a limit to concessions made to encourage public participation in utility rates?

Talking about transparency checks all the right boxes, but ultimately it solves nothing. We urge the Commission to provide new guidance regarding the recoverability of company memberships, the amount of detail needed to support recoverability, and a statement that

[21] Page 335, FERC Form No. 1, Annual Report of Major Electric Utilities, Licensees and Others

company memberships that are not adequately supported shall not be recoverable. Requiring utilities to provide meaningless general reports and data on a yearly basis is a poor substitute for clear expectations and guidelines from the Commission.

IV. REMAND OF NEWMAN V. FERC IS BEYOND THE SCOPE OF THIS PROCEEDING

Several commenters[22] provided suggestions for how the Commission shall deal with the anticipated remand from the U.S. Court of Appeals for the District of Columbia Circuit in *Newman v. FERC.*[23] That remand is beyond the scope of this proceeding and such comments should be ignored. The Commission's action on remand shall be decided at the appropriate time and in the appropriate docket. The Court did not direct the Commission to change its regulations, nor even suggest that such a remedy would be appropriate. This proceeding was opened prior to the Court's opinion for the purpose of investigating the recoverability of industry association dues, an issue that was not before the Court in *Newman*.

[22] Comments of Harvard Electricity Law Initiative at 18-19; Comments of Center for Biological Diversity at vi; Comments of New England Consumer-Owned Systems at 13; Public Utilities Commission of Ohio at 11-12.
[23] *Keryn Newman and Alison Haverty v. FERC*, 22 F.4th 189 (D.C. Cir. 2021).

CONCLUSION

The Commission's existing regulations do not contemplate the Commission's current practice of attempting to separate membership dues in a single organization between operating and non-operating accounts. Account 930.2 includes "industry association dues for company memberships,"[24] while Account 426.4 includes "membership fees in organizations engaged in lobbying on legislative matters."[25] Importantly, Account 426.4 doesn't include only the *portion* of membership fees *used for* lobbying on legislative matters. It includes the entire fee. Therefore, under the current regulations, membership dues in industry associations that also engage in lobbying on legislative matters rightfully belong in Account 426.4, where their recoverability may be decided by the Commission only during a Section 205 ratemaking proceeding. Perhaps its time for the Commission to simply reiterate its existing regulations to place all membership dues in organizations that also lobby in Account 426.4 and let the chips fall where they may, instead of devising new policies and creating new reporting requirements in order to clarify an accounting dilemma of the industry's own making.

If, however, the Commission wishes to continue to attempt to separate membership dues between recoverable and non-recoverable accounts, we recommend that the Commission:

1. Provide greater clarity between recoverable and non-recoverable company membership expenses by creating two new accounts, one above the line, and one below the line.

2. Make corresponding changes to Form No.1 (and other applicable annual reporting forms) to include the new accounts.

3. Add a page to Form No.1, similar to current page 335, that requires the utility to list recoverable company membership amounts by specific program, service or activity in a manner that clearly demonstrates ratepayer benefit.

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[24] 18 CFR pt. 101, Account 930.2.

[25] *Expenditures for Political Purposes — Amendment of Account 426, Other Income Deductions, Unif. Sys. of Accounts, and Report Forms Prescribed for Elec. Utils. and Licensees and Nat. Gas Cos. — FPC Forms Nos. 1 and 2, Order No. 276*, 30 FPC 1539 (1963) at 5.

4. Issue a statement providing guidance regarding the recoverability of company memberships, the amount of detail needed to support recoverability, and a statement that company memberships that are not adequately supported shall not be recoverable.

5. Institute fines or penalties for repeated willful or negligent accounting errors that unduly increase consumer rates.

Respectfully submitted March 23, 2022,

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