

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

Rate Recovery, Reporting and Accounting Treatment)
Of Industry Association Dues and Certain Civic,) **Docket No. RM22-5-000**
Political and Related Expenses)

**COMMENTS TO PROTECT CONSUMERS FROM FUNDING UTILITY
CHARGES FOR INDUSTRY ASSOCIATION DUES AND CERTAIN CIVIC,
POLITICAL AND RELATED EXPENSES
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

Consumers should not be charged on their utility bills for industry association dues and for civic, political and related expenses. All of these expenses should be booked in accounts that are not included for utility ratemaking. We appreciate this docket for consumer protection.

The Uniform System of Accounts of the Federal Energy Regulatory Commission (“FERC”) includes two basic types of accounts to record such expenses. One account is for “above-the-line” expenses meaning those that are includable in utility rates charged to consumers. The other account is for below-the-line expenses that are unregulated and are excluded from utility rates.

The Supreme Court of Ohio ruled forty years ago that certain expenses (institutional and promotional advertising) cannot be charged to consumers without Public Utilities Commission of Ohio (“PUCO”) approval. The Court stated in *Cleveland v. Pub. Util. Comm.*(“*Cleveland*”) that: “[un]less a utility can demonstrate that its institutional and promotional advertising expenditures and its charitable contributions *provide a direct, primary benefit to its customers*, such expense

items are not allowable as operating expenses for rate-making purposes.”¹ That is how OCC recommends FERC address the issue of utility dues (and certain other expenses). The presumption should be that these expenses are recorded below the line (not charged to consumers in rates). And only if the utility can demonstrate that such expenses provide a direct and primary benefit to consumers will FERC authorize the expenses to be collected from consumers in transmission rates.

A recent example of a utility’s improper booking of such expenses above the line (for charging to consumers) came to light in FERC’s February 4, 2022 audit regarding FirstEnergy. The audit scope included FirstEnergy’s Ohio House Bill (“H. B.”) 6 scandal and its non-compliances with corporate separation requirements. There, FERC Audit Staff noted:

The DOJ complaint and audit staff’s discussions on internal controls during onsite interviews of FESC employees raised audit staff’s concerns about the existence of significant shortcomings in FirstEnergy and its subsidiary companies’ controls over financial reporting, including controls over accounting for the costs of civic, political, and related activities, such as lobbying activities, performed by and on behalf of FirstEnergy and its subsidiaries. Moreover, these controls may have been circumvented in ways designed to conceal the nature and purpose of expenditures made and, as a result, that led to the improper inclusion of lobbying and other nonutility costs in wholesale rate determinations.²

Presently, FirstEnergy is charged by the U.S. Attorney with a federal crime. And, in a Deferred Prosecution Agreement (“DPA”), FirstEnergy has essentially acknowledged that it committed the underlying facts that would establish the crime of honest services wire fraud.³

¹ *Cleveland v. Pub. Util. Comm.* (1980), 63 Ohio St.2d 62, 65, 17 O.O.3d 37, 40, 406 N.E.2d 1370, 1374 at Para. 73 (emphasis added).

² *In re FERC Audit of FirstEnergy Corp. and its Subsidiaries*, Docket No. FA19-1-000, Audit of FirstEnergy Corporation, (Feb. 4, 2022), posted on E-Library as Accession # 20220204-3012, available at <https://elibrary.ferc.gov/eLibrary/filedownload?fileid=9DDE513A-470F-CAC6-97AD-7EC4D2800000> (“FirstEnergy Audit Report”).

³ FirstEnergy Audit Report at 21, citing *United States v. FirstEnergy Corp.*, Case No. 1:21-cr-00086, Deferred Prosecution Agreement at 1 (S.D. Ohio) (July 22, 2021).

Our preliminary assessment of FERC's audit of FirstEnergy is that it is an example of proper auditing for consumer protection, where facts are sought and obtained from the utility for regulating in the public interest. We would like to see FERC's rigorous approach to the audit of FirstEnergy's political and other expenditures emulated elsewhere on these FirstEnergy issues.

The FirstEnergy H. B. 6 scandal in Ohio is an example of how a utility increasingly included expenses associated with industry association dues, political lobbying and advertising activities and other civic and social activities in accounts that are included in consumer rates. This is despite the fact that the cost of these activities provided no direct or primary benefit to consumers. Unless FERC establishes a presumption that such expenses should be accounted for below the line, utilities could charge consumers for expenses from which they derive no direct or primary benefit. This is wrong. To protect consumers FERC should require increased transparency by requiring the utilities to disclose the true nature and purpose of the expenses, which otherwise could be bundled with a myriad of other miscellaneous expenses in non-descriptive cost categories.

FERC should clarify that industry association dues and expenses associated with political lobbying and advertising activities and other civic and social activities are not to be included in transmission rates paid by utility consumers. The burden should be on the utility with FERC approval in order for these expenses to be charged to consumers. If FERC does not protect consumers from such charges by establishing a presumption against including such costs in rates, then FERC at a minimum should require greater transparency in transmission utility rate filings and annual updates of formula rates regarding the nature and purpose of such expenses. Such increased transparency should also include a demonstration by the utility as to how these expenses are reported on utility books and accounts. And the transmission utility should further

demonstrate how the charges provide a direct and primary benefit to utility consumers in order to be included in utility rates charged to consumers.

Under Ohio Revised Code Chapter 4911, OCC represents the interests of millions of Ohio residential utility customers in proceedings before state and federal administrative agencies and the courts. Ohio is a retail choice state that allows electric customers to choose their energy supplier. However, the transmission services consumers receive are regulated by FERC. Thus, Ohio consumers depend on FERC's oversight of the miscellaneous administrative and general ("A&G") expenses incurred by utilities, such as industry association dues, political lobbying and advertising expenses, and expenses associated with civic, charitable, and social activities, to protect them against unjust and unreasonable rates for the transmission of their electricity supplies.

To protect Ohio consumers from excessive rates and charges, this rulemaking should be expanded by FERC to ensure that industry association dues, political lobbying and advertising expenses, and expenses associated with civic, charitable, and social activities are excluded from rates charged to consumers. That means FERC should require the booking of all these expenses below the line. OCC recommends FERC address the issue of utility dues (and certain other expenses) by implementing a presumption that these expenses are to be recorded below the line (not charged to consumers in rates). And only if the utility can demonstrate that such expenses provide a direct and primary benefit to consumers should FERC authorize the expenses to be collected from consumers in transmission rates.

FERC issued a Notice of Inquiry (“NOI”) in this docket on December 16, 2021,⁴ seeking comment on the “rate recovery, reporting, and accounting treatment of industry association dues and certain civic, political, and related expenses.”⁵ FERC also seeks comments on the ratemaking implications of potential accounting and reporting changes, and on whether additional transparency or guidance is needed with respect to defining donations for charitable, social, or community welfare purposes.⁶ FERC should be commended for this inquiry into the important topic of how utilities account for the expenses associated with their political and lobbying activities and with their donations to industry associations and expenses for civic, charitable and social activities.

FERC’s Notice of Inquiry in this proceeding is particularly relevant to Ohioans. FirstEnergy funded the now infamous and unlawful \$60 million (or more) dark money lobbying campaign that has dominated the news in Ohio since 2020. FirstEnergy achieved this objective by funneling those funds through a nonprofit organization. That non-profit had been established to promote passage of Ohio H. B. 6 that would have allowed charging consumers over a billion dollars in subsidies for FirstEnergy’s deregulated Ohio nuclear power plants (since repealed).

These expenses for FirstEnergy’s political and lobbying efforts have unlawfully found their way into FERC-regulated transmission rates, due largely to improper FirstEnergy accounting. This abuse was documented in the Feb. 4, 2022 FERC audit.⁷ This occurred despite

⁴ *Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses*, Notice of Inquiry, 86 Fed. Reg. 72,958 (Dec. 23, 2021), 177 FERC ¶ 61,160 (Dec. 16, 2021) (“NOI”).

⁵ NOI at P 2.

⁶ *Id.*

⁷ FirstEnergy Audit Report at 46-52.

FERC having existing rules that require that such political and lobbying expenses be recorded in below-the-line accounts that are not charged to consumers.

II. EXECUTIVE SUMMARY

FERC should require utilities to exclude industry association dues from transmission rates by accounting for these expenses in below-the-line accounts. FERC should require utilities to demonstrate that any charge for industry dues directly and primarily benefit customers in order for FERC to authorize these expenses to be collected from consumers. The utility should have the burden of proof to demonstrate that any such proposed charges provide a direct and primary benefit to consumers. Only after this demonstration has been made should a utility be permitted to account for such costs above the line as a regulated activity charged to consumers.

In Ohio, stakeholders have an opportunity to review requests for association dues in applications for inclusion in rate increase requests filed by a utility at the Public Utilities Commission of Ohio (“PUCO”). Only a small portion of the utility’s request for collection of association dues from consumers are excluded from retail rates. Because there is a lack of transparency regarding the detail and itemization of such cost, OCC has been recommending to the PUCO that association dues should be accounted for below-the-line as an unregulated activity that is not charged to consumers in retail rates.

FERC should also scrutinize utility payments to non-profits, social welfare organizations, charities, and civic organizations, prior to allowing such expenses to be collected from consumers in transmission rates. FERC’s recent Audit Report (FA19-1-000) made it clear that FERC’s existing accounting standards are not stringent enough on political spending by utilities. Consumers and FERC must have access to definitive information regarding the nature and purpose of the expenses included in these cost categories, as well as a description of any benefits received by consumers. Lessons learned from FirstEnergy’s illicit activities demonstrate it is too easy to

hide expenses that should not be collected from customers, such as political and lobbying expenses. FERC should require that before approving any request to bill consumers for these costs, the utility must support its request with detailed, itemized evidence that such expenses provide a direct and primary benefit to consumers.

III. COMMENTS

A. FERC should require utilities to exclude industry association dues from transmission rates by accounting for these expenses in below-the-line accounts. If FERC allows collection of any portion of these expenses in rates, it should only do so after the utilities demonstrate the expenses provide a direct and primary benefit to consumers [NOI Questions 7 - 9].

FERC seeks comment in Question 7 regarding “[w]hat mechanisms currently exist for stakeholders to examine the costs and activities of industry associations?” FERC also seeks comment in Question 7 on whether “industry associations disclose the nature of their costs and activities in any state regulatory proceedings?” In Question 8, FERC inquires as to whether any industry associations have “been the subject of audits by any regulatory bodies,” and if so, what are the purpose and results of such audits? Finally, in Question 9, FERC inquires as to “what, if any, additional transparency is needed for stakeholders to evaluate the reasonableness of industry association costs that are recovered through rates?”

OCC’s comments on these matters are informed by its extensive experience on such issues in Ohio utility regulatory proceedings. In Ohio, stakeholders have an opportunity to review cost recovery requests for association dues in applications for rate increases filed by a utility at the PUCO.

For Ohio electric utilities, the most significant request for cost collection of industry dues from consumers involves payments made to the Edison Electric Institute (“EEI”). In those electric rate cases, the Ohio electric utilities often provide only a copy of the invoice from EEI to

the local utility.⁸ Information presented at a recent distribution rate case in Ohio reveals that approximately 13% of the dues paid to EEI are related to legislative activities.⁹ Another 24% of the charges to the utility for specific industry issues likewise are related to legislative activities.¹⁰ The invoice also shows charges on those EEI invoices for the “Edison Foundation” are associated with activities related to an Internal Revenue Code Section 501(C)(3) educational and charitable organization.¹¹ Other than the legislative activity expenses identified above, the invoice provides no itemization of their payments to EEI that would allow an evaluation of whether there are other charges that are inappropriate for recovery from consumers.

There has been lack of transparency regarding the detail and itemization of expenses in utility rate case applications in Ohio for collection of association dues from consumers. And there has been a precipitous *increase* in those expenses in recent years. Consequently, OCC has been recommending to the PUCO that all utility expenses for association dues be accounted for below-the-line as an unregulated activity.¹² Only when the utility can demonstrate that the expenses provide a direct and primary benefit to consumers should the PUCO allow the utility to collect such costs from consumers.¹³

FERC’s presumption should be that these expenses are below the line, and not charged to consumers. If the utility seeks authority to collect these expenses from consumers, then the

⁸ Gas utilities’ largest association dues expenses are associated with their membership in the American Gas Association and the Ohio Gas Association.

⁹ *In the Matter of the Application of the Dayton Power and Light Company to Increase its Rates for Electric Distribution*, Public Utilities Commission of Ohio Case No. 20-1651-EL-AIR Hearing Transcript vol IV (January 27, 2022) Company Exhibit 63 (Edison Electric Institute Invoice)

¹⁰ *Id.*

¹¹ *Id.*

¹² *In the Matter of the Application of the Dayton Power and Light Company to Increase its Rates for Electric Distribution*, Public Utilities Commission of Ohio Case No. 20-1651-EL-AIR, Direct Testimony of WM. Ross Willis (August 25, 2021) at page 11.

¹³ See *Cleveland v. Pub. Util. Comm.*, 406 N.E.2d 1370, 1374 at Para. 73.

utility should seek approval from FERC to do so. For consumers to have more confidence in the rate case process and to provide more transparency concerning utility association payments, utilities should be required to itemize association activities and corresponding fees, and identify the purpose of the expense. The utility also should be required to demonstrate how each individual association expense provided a direct and primary benefit its consumers prior to being allowed to collect these costs from consumers. FERC should include both requirements in any Notice of Proposed Rulemaking that stems from its inquiry in this docket.

FERC currently allows utilities to classify trade association dues in Account 930.2, an above-the-line account, creating a presumption that these costs are regulated and authorized for inclusion in rates charged to consumers. The amount of these costs is rapidly growing. For example, EEI membership dues grew from \$63 million in 2011 to \$90 million by 2015.¹⁴ Ohio Edison reported \$1,708 in industry association dues in its 2010 FERC Form 1 and by 2020 this number increased to \$280,898.¹⁵

In past years, consumers had some degree of protection because NARUC monitored these expenses and even performed annual audits of EEI. NARUC stopped doing these audits in the early 2000s, and the rapid increase in trade association dues during the past several years seems to be a direct result. A substantial portion of trade association dues are spent on political, charitable, and advertising activities. Consumer advocates can challenge the collection of these costs in individual utility rate cases, but this is an uphill battle that can lead to litigation challenges and inconsistent results.

¹⁴ Energy and Policy Institute, *Paying for Politics* at 8 (May 2017).

¹⁵ Ohio Edison *FERC Form No. 1* (2010 & 2020).

FERC should re-classify industry trade association dues, and utility payments on advertising to a 426 account. Utilities could still seek authority to include trade association dues in consumer rates. But the utility would have the burden of proof and would be required to single out these items from Account 426 and justify how the costs provide a direct and primary benefit to consumers in order to be included in rates to consumers (and not be the responsibility of shareholders to fund).

B. Ohio’s experience with FirstEnergy’s lobbying and cost recovery activities associated with the passage of H. B. 6 demonstrates the need for stringent regulatory oversight considering the ease with which utilities can hide traditionally unrecoverable expenses in rates collected from consumers. [NOI Question 15]

OCC recommends that FERC scrutinize all utility payments to non-profits, social welfare organizations, charities, and civic organizations, prior to allowing above-the-line accounting for these expenses. Only costs associated with providing a regulated service and only those costs that provide a direct and primary benefit to consumers should be included in regulated rates. Specifically, the presumption should be that such payments should be accounted for below-the-line as an unregulated activity unless and until the utility can demonstrate such costs provide a direct and primary benefit to consumers.¹⁶ More specifically, FERC should protect consumers from paying charges for illicit activities such as those that happened in Ohio involving FirstEnergy and its affiliates concerning H. B. 6.

In certain investigations at the PUCO that OCC asked to be opened, it has been discovered that FirstEnergy entities misallocated at least some of these political costs to its Ohio utility operating companies.¹⁷ The important lesson learned is that FERC’s accounting standards

¹⁶ See *Cleveland v. Pub. Util. Comm.* (1980).

¹⁷ *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 20-1502-EL-UNC Deposition of Mr. Santino Fanelli (Mar. 9, 2021) (See deposition excerpt at Attachment A to OCC Comments).

need to be more stringent for consumer protection. FERC can and should take the lead to remedy this flaw in accounting regulations by strengthening the reporting standards for these costs with a presumption that these costs are not collectable from consumers. The burden should be placed on the utilities to show that the costs provide a direct and primary benefit to consumers before FERC authorizes collection from utility customers.

The Ohio H. B. 6 scandal is an example why FERC (and state regulators) should not assume that all utility contributions to nonprofits, social services, and civic duty expenses or payments are appropriate (and lawful) for collection from utility consumers. Based on the Ohio's H. B. 6 experience, FERC should scrutinize utility expenses concerning any payments to nonprofits, charitable organizations, and civic associations to make certain that these costs directly benefit consumers. Even if these payments do not involve illicit activities such as those involved with the passage of Ohio's H. B. 6, these costs and payments often involve utility efforts to enhance their corporate public image. Utility expenses to enhance their public image should not be funded by captive monopoly customers that do not receive a direct and primary benefit. These costs and payments should be accounted for below the line as an unregulated activity funded by shareholders unless and until FERC authorizes their collection from consumers because the utility provides a detailed accounting of how the proposed charges provided a direct and primary benefit to consumers.

C. FERC’s recent audit of FirstEnergy confirms the need to closely scrutinize utility spending on lobbying expenses for consumer protection. [NOI Question 15]

FERC’s Office of Enforcement, Division of Audits and Accounting, issued an Audit Report on FirstEnergy’s compliance with certain regulations, on February 4, 2022.¹⁸ The audit determined that:

- FirstEnergy charged consumers approximately \$419,000 lobbying expenses in utility operating expense accounts;¹⁹
- FirstEnergy charged consumers approximately \$1.5 million in donations to Generation Now in above-the-line A&G accounts;²⁰
- FirstEnergy partially charged consumers \$20.9 million in donations to other alleged civic entities to plant in service accounts;²¹
- FirstEnergy charged consumers \$28.8 million in donations to certain individuals in above-the-line accounts;²²
- FirstEnergy charged consumers the costs of its Governmental Affairs Department employees associated with lobbying in above-the-line accounts;²³ and
- FirstEnergy lacked formal procedures and oversight controls to adequately protect consumers for unwarranted charges to make certain that lobbying expenses were properly recorded in below-the-line accounts.²⁴

The FERC Audit Staff further noted that:

Even more concerning, several factual assertions agreed to by FirstEnergy in DPA [Deferred Prosecution Agreement] and the remedies FirstEnergy agreed to undertake, point towards internal controls having been possibly obfuscated or circumvented to conceal or mislead as to the actual amounts, nature, and purpose of the lobbying expenditures made, and as a result, the improper inclusion of lobbying and other nonutility costs in wholesale transmission billing rates.²⁵

¹⁸ FirstEnergy Audit Report at 46 - 52.

¹⁹ FirstEnergy Audit Report at 49.

²⁰ *Id.* at 50.

²¹ *Id.*

²² *Id.* at 51.

²³ *Id.* at 51-52.

²⁴ *Id.* at 52.

²⁵ *Id.* at 48.

The FERC Audit Staff recommended significant improvements in FirstEnergy's internal controls to identify, account for and track, report and review lobbying expenses, and establish procedures for training staff responsible for these controls.²⁶ The Report also recommended that FirstEnergy be required to submit periodic reports of the results of internal and external investigations of the H. B. 6 scandal.²⁷

The results of FERC's Audit Report make it clear that FERC's existing accounting standards are not stringent enough on political spending by utilities. And the lack of regulatory rigor has contributed to a lack of accountability and transparency on political spending by utilities and their holding companies. FERC's Audit Report, by itself, provides sufficient grounds for immediate FERC action to disallow reporting of such expenses in above-the-line accounts that are included in transmission rates paid by consumers. The Audit Report in conjunction with the Criminal Complaint against FirstEnergy officials and Ohio politicians corroborate the need for immediate reform of FERC's accounting regulations, as well as more stringent enforcement of FERC's policies requiring that these types of expenses be recorded in below-the-line accounts.

D. OCC's focus is on investor-owned utilities; and OCC makes no recommendations on the NOI's exemption for municipal utilities and rural electric cooperatives. [NOI Question 11]

OCC's focus is on investor-owned utilities. However, OCC notes that cooperatives and municipalities are non-profit entities that do not have shareholders, and thus lack corresponding motives to maximize profits. It would make sense that any revised rules adopted in this proceeding or proposed in a future Notice of Proposed Rulemaking should apply to neither.

²⁶ FirstEnergy Audit Report at 52.

²⁷ *Id.*

E. Greater transparency and much more detailed information regarding utility expenses related to advertising, political, civic, charitable and social activities are needed to protect consumers from unjust and unreasonable rates. [NOI Questions 13 and 15]

FERC inquires in Question 15 as to “what, if any, additional transparency is needed for stakeholders to evaluate whether donations for charitable, social, or community welfare purposes are treated appropriately for ratemaking purposes?” This question, starts a much-needed investigation into how utilities account for A&G expenses and whether such expenses should be collected from consumers. These charges should not be allowed for customers unless the utility can demonstrate the associated program costs provide a direct and primary benefit to the consumers being charged.

FERC should find lessons to learn in Ohio’s experience with accounting for FirstEnergy’s lobbying efforts concerning Ohio House Bill 6. FERC should also look at the results of its February 4, 2022 Audit Report of First Energy in Docket No. FA19-1-000. Finally, FERC should take note of FirstEnergy’s reporting of these expenses in accounts included in customer rates. Such a review should lead FERC to conclude that much more transparency is needed for the types of expenses under review in this docket.

Detailed information regarding the nature and purpose of such activities is critical to a determination of the benefits, if any, consumers receive from these types of expenses. The typical A&G expense accounts essentially serve as regulatory “catch-all” accounts for expenses that may not fit neatly into other, more explicitly defined accounts. Examples are Account Nos. 923 (Outside Services Employed), 930.1 (General Advertising Expense) and 930.2 (Miscellaneous General Expenses). Also, Account 426.1 is supposed to include “all payments or donations for charitable, social or community welfare purposes,” and Account 426.4 is supposed to include expenses “for the purpose of influencing the decisions of public officials.” But

utilities have been known to record these types of expenses in Account 923, Account 930.1 and Account 930.2. The miscellaneous nature of these “catch-all” accounts provide an opportunity for recording A&G expenses in above-the-line accounts even though the expenses may be in the interest only of the utility’s shareholders (and do not provide a direct and primary benefit to consumers).

Any expenses that promote shareholder interests or that primarily benefit shareholders should be recorded in below-the-line accounts. Many of these expenses such as donations to civic organizations or social activities provide no direct or primary benefit to consumers. But instead, these matters serve the marketing and corporate image efforts of the utility. In the absence of information describing what these donations are for, or what the entities do, it is impossible to determine whether the expenses have been correctly recorded in Accounts 923, 930.1 and 930.2.

The utility controls access to its information. But regulators and stakeholders need to determine whether the A&G expenses on utility books, such as those for political advertising and lobbying activities, and for civic, charitable, social and community welfare activities, provide direct and primary benefit to consumers sufficient to justify inclusion of these costs in transmission rates. The utility’s control over access to this critical information warrants placing the burden on the utility to demonstrate a direct and primary benefit to consumers exists before FERC will authorize the utility to collect such expenses from consumers in rates.

This is especially true for utilities that employ formulaic transmission rates. FERC’s regulations in Part 35 of the Title 18 of the Code of Federal Regulations set forth strict requirements for the types of information that must be provided in an FPA section 205 filing to increase transmission rates. But in the context of formula rates, the formula itself determines the

costs that are to be included in rates – often by identifying the FERC accounts to be included in rates. In other words, any costs recorded in accounts included in the formula are by definition included in rates charged to consumers. Thus, it is critical that costs be properly recorded in each FERC account included in a formula rate.

In recent years, utility formula rate annual update review processes have increasingly resulted in litigation over whether the utility has properly recorded claimed A&G expenses in accounts that are included in the rate formulas. The information provided in or with the formula rate annual update is often inadequate. It often does not include an itemized description of the claimed expenses recorded in the miscellaneous A&G accounts, nor does it include a description of the purpose for such expenses. The informal discovery process built into formula rate protocols could serve as a mechanism for obtaining such information. Some utilities' responses in discovery have listed only categories of costs, or provided insufficient descriptions of the costs to allow for a determination as to whether the expenses are properly recorded to the above-the-line accounts.

FERC precedent provides clarity that only A&G expenses that benefit consumers should be included in rates, but provides little guidance as to the type of information needed satisfy that standard. For example, in *Duke Power Co.*, Opinion No. 641,²⁸ the Federal Power Commission ("FPC," predecessor to FERC) affirmed the Presiding Administrative Law Judge's ("ALJ") ruling regarding recovery of certain marketing expenses. The Presiding ALJ had determined that a utility must demonstrate that consumers benefit from such expenses, and must show a "real causal relationship" between its "advertising or other marketing activities" during the test year "and the

²⁸ *Duke Power Co.*, Initial Decision, 48 F.P.C. 1399 (1972). FERC affirmed the Initial Decision's treatment of marketing expenses, 48 F.P.C. 1348 at 1388, 1390 (1972). ("*Duke Power*").

steady increase in the volume of sales and the improvement in the load factors of its wholesale customers” in order to demonstrate a benefit to consumers.²⁹

The Presiding ALJ explained that: “[p]utting it differently, there is no indication that these changes would not have occurred by reason of population growth or other economic factors, without any of Duke's special marketing efforts.” In other words, the Federal Power Commission required an evidentiary showing of a direct nexus between the marketing expense and increased load on the system, rather than presuming that the marketing activities caused the increase in revenues.

In *Pub. Serv. Com. of N.Y. v. FERC*,³⁰ the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) affirmed the high evidentiary bar FERC requires utilities to meet to recover promotional advertising expenses from customers. In that case, the D.C. Circuit upheld FERC’s disallowance of expenses for advertising designed to enhance the company’s image explaining that FERC “requires no showing of a direct consumer benefit when the [advertising] costs are oriented toward information and conservation; however, when the costs are promotional (such as here), a showing of direct consumer benefit is required.”³¹ The D.C. Circuit summarized FERC’s policy as requiring that “to overcome the *presumption against compensation for institutional or promotional advertising*,” the utility must show “that its advertising directly benefits consumers.”³²

Just recently, the D.C. Circuit reversed and remanded a case in which FERC had approved a utility’s recording of certain political advertising expenses in above-the-line accounts. FERC had

²⁹ *Duke Power*, Initial Decision at 1415.

³⁰ *Pub. Serv. Com. of N.Y. v. FERC*, 813 F.2d 448 (D.C. Cir. 1987) (“*New York*”).

³¹ *New York* at 454, citing *Tenn. Gas Pipeline Co.*, Opinion No. 240, 32 FERC ¶ 61,086 at 61,234, *reh’g denied*, 33 FERC ¶ 61,005 (1985) (emphasis in original).

³² *Id.* at 455.

allowed the utility to collect from consumers in transmission rates advertising and consultant expenses associated with the utility's efforts to obtain regulatory approval from state commissions to construct a multi-state, 500 kV transmission line. FERC found that such expenses only indirectly influenced public officials – the defining criteria for including these costs in below-the-line accounts. FERC found that the costs thus could be included in Accounts 923 (Outside Services Employed) and 930.1 (General Advertising Expense) rather than in below-the-line Account No. 426.4.³³

In its December 2021 opinion reversing FERC's decision, the D.C. Circuit rejected FERC's distinction between direct and indirect activities, finding that the Uniform Systems of Accounts makes no such distinction. The Court found that Account 426.4 (Expenditures for Certain Civic, Political and Related Activities) requires that any expenses associated with influencing public opinion and public officials should be recorded to Account 426.4, regardless of the direct or indirect nature of the activity.³⁴ Because these types of expenses are explicitly required to be recorded in Account 426.4, and because Accounts 923 and 930.1 state that they include only general and miscellaneous expenses not included in other accounts, the Court found that FERC had inappropriately allowed the utility to record these expenses in those above-the-line accounts.

Ultimately, the decision regarding the proper accounting for specific expenses will be a case-by-case determination based on specific facts in each case. This NOI provides FERC an important opportunity to reaffirm the "*presumption against compensation for institutional or*

³³ *Potomac-Appalachian Transmission Highline, Inc.*, Opinion No. 554, 158 FERC ¶ 61,050, at P 75 (2017) (Opinion No. 554), *reh'g granted*, Opinion No. 554-A, 170 FERC ¶ 61,050 (2020) (Opinion No. 554-A); *reversed sub nom. Newman et al. v. FERC*, Case No. 20-1324 (D.C. Cir. Dec. 28, 2021) ("*Newman*").

³⁴ *Newman*, Slip Op. at 24.

promotional advertising,”³⁵ and to clarify the types of information that should be required to justify inclusion of expenses for political advertising and lobbying activities, and for civic, charitable, and social activities in transmission rates charged to consumers.

FERC should do so by establishing a rebuttable presumption. All costs associated with political advertising and lobbying activities, and for civic, charitable, social and community welfare activities must be recorded in below-the-line Accounts. The utility can then seek inclusion of the expenses for charging to consumers with evidence proving a direct and primary benefit of the expenses to consumers.

The burden to justify inclusion of these types of expenses in consumer rates should be on the utility. Consequently, 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.³⁶

For example, in Question 13(a), FERC inquires as to whether it should require that utilities that seek to recover industry association dues should provide detailed data that sufficiently explains such costs within their books and records, and whether they should be required to make such amounts subject to FERC audits. If the presumption is that these expenses are recorded below the line, and transparency will be implemented for the utility to demonstrate the direct and primary benefit of the expenses to consumers, then FERC’s proposal would significantly enhance transparency in the ratemaking process for consumer protection and should be adopted.

FERC’s proposal would ensure that the detailed data needed to be presented by the utilities to justify the inclusion of such costs (otherwise presumed to be below the line) from

³⁵ *New York*, 813 F.2d at 455.

³⁶ See *Cleveland v. Pub. Util. Comm.*, 406 N.E.2d 1370, 1374 at Para. 73.

being charged to consumers in transmission rates is available for review by those paying the utility's rates. This requirement should be extended to expenses for political, lobbying, civic, charitable and social activities as well.

Also, FERC should implement its proposal in Question 13(b) to require that a utility's ability to seek and obtain collection of industry association dues from consumers is limited to those industry associations that publicly disclose detailed cost data. That requirement would ensure that consumers and FERC have access to the information needed to determine if the utility's participation in the association renders benefits to customers.

Further, FERC should implement its proposal in Question 13(c) to require utilities to include in their rate filings and in supporting workpapers to their formula rate annual updates, detailed information regarding:

- Legislative affairs expenses, including: (i) political contributions; (ii) following legislative events and informing members; (iii) preparation and research in connection with correspondence with legislators, their staff, or legislative committees; and (iv) correspondence with legislators, their staff, or legislative committees;
- Financial support of other organizations (including a list of such organizations and corresponding contributions);
- Public information or outreach expenses related to: (i) safety; (ii) promotion of utilities; (iii) existing or potential state or federal environmental regulations and/or laws; and (iv) proceedings at FERC or before other administrative agencies;
- Training expenses for: (i) employee safety; (ii) accounting; (iv) planning; (v); reliability/resilience; and (vi) market participation;
- Regulatory affairs expenses, including: (i) participation in regulatory proceedings including a listing each proceeding and its primary issue(s); (ii) research conducted for regulatory proceedings; (iii) expenses associated with monitoring regulatory proceedings; and (iv) informing members of regulatory proceedings;
- Meetings/conferences expenses to the extent such expenses are not covered in the other categories listed above; and
- Administrative costs including rents and other overhead.

Each of the cost categories is broadly defined. Access to detailed information regarding the expenses associated with each cost category is necessary to ensure that only those A&G costs that

benefit consumers are included in transmission rates. Customers and FERC must have access to definitive information regarding the nature and purpose of the expenses included in these cost categories, as well as a description of any benefits received by consumers. Lessons learned from FirstEnergy's accounting for H. B. 6 lobbying efforts in Ohio and the FERC Audit Report of FirstEnergy in Docket No. FA19-1-000 demonstrate it is too easy to hide expenses that should not be recoverable from customers, such as political and lobbying expenses.

FERC also should require every investor-owned utility to maintain and publicly provide certain criteria regarding how the utility determines whether such political, civic, community or social expenses are recoverable in rates. That should include a description of the process(es) used to determine whether the expenses are related to activities that actually, or are likely to, result in increased business development. Utilities also should describe the process(es) used to determine how the business development will, or is likely to, result in actual increases in electricity consumption. Such information also should include an explanation of whether the process(es) are the same for all cost categories, and a description of any differences.

Finally, FERC also should require utilities to separately set out the amount of civic, charitable, and social activity dues and expenses recorded in Account 426.1 (Donations) and Account 426.4 (Lobbying). And FERC should require the utilities to provide evidence of whether any such dues deemed collectable from consumers were directly or indirectly allocated to any of the utility's affiliates, and the associated amounts so allocated.

To the extent the alleged consumer benefit is an increase in revenues, the utility should be required to provide evidence demonstrating that increase in its monthly peak demand or revenues during the test year was the direct result of the claimed expense. FERC also should require the utility to provide evidence as to whether any increase in demand on the system resulted from

events unrelated to the civic, charitable or social activities. For example, these increases could be associated with wheeling transactions, Point-to-Point transmission transactions, or general taxpayer-funded business investments. FERC should also investigate whether any of these expenses were deductible for tax purposes, and if so, whether the utility records deferred tax amounts for such expenses. The utility also should be required to provide evidence regarding the percentage of annual dues spent on business development activities in the utility's service territory. Requiring investor-owned utilities to provide such detailed information as part of the annual update or rate case would keep the burden of proof on the utility where it belongs and provide for greater transparency into the nature and purpose of these miscellaneous A&G expenses.

IV. CONCLUSION

OCC requests that FERC protect utility consumers from bearing the cost of industry trade association dues and expenses for political, marketing, advertising, civic, social, and charitable activities. OCC also requests that FERC revise its Uniform System of Accounts to require that investor-owned public utilities record all such expenses to below-the-line accounts. The utilities could then seek to prove to FERC, by concrete evidence, that consumers received a direct and primary benefit from those expenses so as to permit charges to consumers. We appreciate FERC's interest in consumer protection from monopoly utilities.

Respectfully submitted,

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