UNITED STATES OF AMERICA
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

Comment of the Harvard Electricity Law Initiative[1]

The Commission's inquiry into its Uniform System of Accounts (USA) is both timely and long overdue. The recent *Newman and Haverty* decision highlights a loophole in the Commission's approach to trade association dues.[2] In that case, the D.C. Circuit held that Account 426.4 encompasses utility expenditures aimed at directly or indirectly influencing public officials. Because Account 426.4 is a below-the-line account, these expenditures are generally not recoverable from ratepayers when incurred by utilities. Yet the USA allows utilities to recover from ratepayers expenditures aimed at influencing public officials when they are incurred by a utility trade association. This incongruence incentivizes utilities to avoid paying for political expenditures by funneling them through a trade association. Indeed, the record in Docket No. RM21-15 shows utility trade associations engage in numerous activities aimed at influencing public officials. At the very least, in a forthcoming rulemaking, the Commission should eliminate loopholes that treat utilities' political expenditures differently from their trade associations' political expenditures.

More broadly, the Commission should update the USA to reflect the competitive nature of today's energy sector. As Commissioner Danly notes in dissenting from this inquiry, "[t]here are scores of trade associations that represent every facet of our

[1] The Harvard Electricity Law Initiative is an independent organization based at Harvard Law School's Environmental & Energy Law Program. These comments do not represent the views of Harvard University or Harvard Law School.
[2] Keryn Newman and Alison Haverty v. FERC, 22 F.4th 189 (D.C. Cir. 2021).

industry and which advocate for every policy viewpoint."[3] While they "all have an equal privilege to speak,"[4] the USA currently discriminates in favor of speech by entities that file cost-of-service rates. Merchant developers, competitive retailers, and energy technology providers all compete with utilities in the policy arena, seeking legislative and regulatory changes that benefit their business models. It is impossible to divorce competition from political advocacy.

Trade associations are central players in this political space. They are designed to respond to the political landscape and shape political outcomes. While utilities do not seek cost recovery of their trade associations' "lobbying" expenses as defined by the federal tax code, that narrow definition fails to capture the scope of utility trade associations' political activities, and in particular their efforts to entrench traditional regulatory structures to the detriment of market-based competition and non-utility market participants.

The Commission's approach to utility trade association dues has not kept pace with the industry's evolution. Sixty years ago, the Commission concluded that "expenditures for political activities are generally incompatible with the objectives of utility regulation, and have a dubious relationship to the cost of rendering utility service."[5] But the Commission then left unchanged its rule allowing utilities to classify trade association dues as "miscellaneous expenses" that are presumptively recoverable.[6] Evidence in Docket RM21-15 shows that utility trade associations engage in activities that aim to enhance the political influence of monopolist utilities, potentially to the detriment of competition, consumers, and Commission policy favoring market-based approaches.

---

[3] *Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political and Related Expenses,* 177 FERC ¶ 61,180 (2021) (Comm'r Danly, dissenting, Feb. 1, 2022).
[4] *Id.*
[5] *Re Alabama Power Co.,* 22 FPC 72, 76 (1959); *see also Re Alabama Power Co.*, 24 FPC 278, 286 (1960), *aff'd*, Southwestern Elec. Power Co. v. FPC, 304 F.2d 29 (1962).
[6] *See Re Alabama Power, et al.*, 20 FPC 108, 110 (1958) (describing Account 801).

To remedy the discriminatory effects of the USA that benefit one class of market participants, the Commission should reverse its approach to trade association dues. Rather than presuming that trade association dues less the association's "lobbying" expenses are recoverable via Account 930.2, the Commission should require regulated companies to include trade association dues in a below-the-line account. 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,[7] should the Commission allow it to book that portion of its dues in an above-the-line account. Those expenses might relate to cybersecurity, storm restoration, technical trainings, and other activities squarely aimed at transmission and distribution operations. All trade association expenditures aimed at the utility industry's image, public policy with implications for competition, or other activities designed to influence the industry's positioning or otherwise serve shareholder interests ought to be paid for by utility shareholders.

We also suggest that the Commission modernize Account 426.4 to reflect twenty-first century utility regulation and corporate communications practices. In particular, we propose expanding Account 426.4 to include utility expenditures aimed at influencing public opinion on utility regulation and urge the Commission to adopt a broad understanding of utility efforts to influence public officials and the public. The Commission should explicitly reject any suggestion that only utility communications about specific legislative or regulatory proposals must be accounted for in 426.4.

Our comments respond to the Notice of Inquiry's Questions 12, 13, 17, 20, and 21, and Paragraph 19.

---

[7] Comments of the Indicated PJM Transmission Owners, Docket No. RM21-15 (Apr. 26, 2021) (claiming that "utilities leverage" information provided by trade associations to "enhance the quality of the service that they provide" and discussing mutual assistance programs and information sharing but failing to disclose what percentage of trade association dues recovered from ratepayers are spent on such programs).

In Part I, we argue that utility trade associations should separate expenditures that should be booked in Account 426.4 if incurred by a utility member (Q 12). We generally endorse the Commission's proposed approaches to enhancing transparency and urge the Commission to ensure that it chooses an enforceable option (Q 13). We also provide several examples of trade association activities that illustrate the gap between Account 426.4 and the tax code (Qs 17, 20). We provide additional examples in Parts II and III. In Part II, we suggest an alternative approach that would require utilities to put trade association dues in a below-the-line account. If a utility provides specific evidence that a portion of its trade association dues cover activities that enhance utility service, it should be allowed to book those expenses in an above-the-line account (Q 21). In Part III, we respond to Commission proposals for further guidance on Account 426.4 (P 19).

The Commission's inquiry is particularly important because the USA are so widely used. As NARUC explains in a publication for the United States Agency for International Development (USAID): The USA "is used by virtually every electric utility in the United States and is gaining widespread support throughout the world."[8] The Commission's rules will directly affect jurisdictional and retail rates.

I. The Commission Should Stop Allowing Utilities to Recover from Ratepayers Political Expenditures Incurred by Utility Trade Associations

A Uniform System of Accounts should provide regulators with "full knowledge" of the regulated utilities' activities "in order that [regulators] may ascertain whether forbidden practices and discriminations are concealed."[9] The Commission has long required that "political expenditures" be "accounted for 'below the line,' as non-operating expenses, thereby providing the basis in rate proceedings for such

---

[8] NARUC, Regulatory Accounting: A Primer for Utility Regulators (2019).
[9] Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194, 216 (1912).

expenses to be borne by shareholders and not consumers."[10] Evidence submitted in Docket No. RM21-15 shows that utility trade associations engage in political activities and that ratepayers pay for those political activities through utility rates. The Commission should close the loophole that requires ratepayers to fund utility trade associations' political activities that would be presumptively unrecoverable had utilities incurred those expenses directly. The Commission's current approach neglects the "compelling need for separate classification and disclosure of such controversial expenditures"[11] and burdens ratepayers with expenses that have a "dubious relationship to the cost of rendering utility service."[12]

Trade associations and their utility members are able to exploit a gap in the current rules. The D.C. Circuit recently held that USA Account 426.4 must "include expenditures for the purpose of *indirectly as well as directly* influencing the decisions of public officials."[13] Utility trade associations, however, separate un-recoverable political expenditures on their members' bills using a narrower definition from the federal tax code.[14] With regard to public officials, the tax code's definition includes only *direct communication about specific legislation* with

---

[10] *Re Alabama Power Co.*, 24 FPC 278, 284 (1960) ("Relatively early in the history of the System of Accounts, the Commission interpreted it to require that political expenditures be charged to an income deductions account."); *see also In the Matter of Northwestern Electric Co, et al.,* 2 FPC 369 (1941) (finding utilities charged political expenditures to ratepayers "in spite of the fact that the expenditures were obviously not made for the benefit of such consumers . . . [and that] many political expenditures were made indirectly to conceal the fact that they were being made by the utilities" and committing to issue rules to address these and other practices).

[11] *Re Alabama Power Co.*, 22 FPC 72, 76 (1959); *see also Re Alabama Power Co.*, 24 FPC 278, 286 (1960):

> Hence, the classification of such [political] expenditures routinely to operating expenses would not be consistent with the objectives of utility accounting regulation, which aims at the separate disclosure and classification of all such controversial items, so as enable a clear understanding and realistic appraisal of the nature thereof. Throwing all such controversial expenditures into a hotchpotch of operating expenses would tend to obscure their essential character, and make more difficult their informed analysis and proper ultimate disposition.

[12] *Id.*

[13] *Newman and Haverty*, 22 F.4th at 196.

[14] *See* Appendix A, which includes a letter from EEI's general counsel to a member company that requested information about EEI's expenditures for purposes of cost recovery in a state rate case. The letter shows that EEI discloses on the record only the percent of its total budget spent on "lobbying," as that term is defined by the federal tax code. It provided no additional information about its expenditures to support its member utility in a state rate case.

members and employees of a legislative body and government employees that write legislation, as well communication with very high-level federal Executive officials.[15] Importantly, the tax code's definition does not encompass expenditures aimed at directly or indirectly influencing state governors, state utility regulators, staff at other federal or state agencies, or this Commission, as well as expenditures aimed at influencing legislators, other than direct communication about specific legislation.

The enormous gap between Account 426.4 and the federal tax code's definition of "lobbying" allows utilities to recover from ratepayers the costs of political activities, so long as those activities are conducted on their behalf by their trade association. Had the associations' utility members engaged directly in those activities, the USA would require them to book the expenses in a below-the-line account. Utility trade associations do, in fact, engage in such activities. For instance, the Edison Electric Institute's (EEI) annual "Results in Review" from 2015 and 2016 (see Appendix B) boast of the following political activities:

- "Directly engaged with *state policymakers*, consumer advocates, and other key stakeholders" on state net metering policies;
- "Convened member companies, *state policymakers*, and consumer advocates . . . to develop consensus principles on the evolving distribution system;"
- "Deployed a team of EEI and third-party experts to engage in *state proceedings, forums, policy conversations, and earned media*;"
- "Established new strategic partnerships with key state- and community-based organizations to further educate stakeholders and *elected officials* on the value of the grid and other industry and consumer priorities;"

[15] 26 USC § 162(e)(3). The definition also covers "direct communication" with high-level Executive officials, including the President, Vice President, and certain White House Officials. The definition does not cover state utility regulators, governors, FERC Commissioners or staff, or staff at other state and federal agencies. *See also* 26 CFR § 56.4911-2 (further clarifying the definition in the US Code).

- "Sponsored dialogues and forum [that] brought together *FERC Commissioners, state policymakers*, consumers, Wall Street analysts, and industry leaders to discuss key issues facing the industry;"
- "Educated *NARUC* on key industry issues and conducted educational dialogues for *state regulators*;"
- "Launched a broad education and advocacy strategic initiative to highlight the industry's transformative leadership . . . and *secure positive policy outcomes*;"
- "Partnered with AGA and NEI . . . to drive the conversation about our nation's energy future *during the Republican and Democratic national conventions*."[16]

The EEI documents outlining these activities are a bit dated because EEI does not publicly distribute its annual reviews, and these documents were obtained either by a journalist or via discovery in a state proceeding. Regardless, there is no doubt that EEI continues to engage in similar political activities aimed at influencing policymakers. An EEI executive revealed at a February 2022 investor briefing that EEI has "a state practice that we formalized in 2018, and it includes people from external affairs, communications, people who are regulatory experts to help our member companies. We actually were involved in *41 states and D.C. last year helping our member companies deal with state regulators and the issues, and we spend a lot of time with state regulators* trying to educate them on the importance of these [rate case and other proceedings about utility investments] decisions and the impacts on the customers."[17]

Each of the initiatives listed above is aimed at indirectly or directly influencing the decisions of public officials. Because none appear to be about specific regulatory

---

[16] Appendix B consists of excerpts from EEI's 2015 and 2016 annual review documents that it distributes to its members.
[17] EEI Wall Street Briefing, Feb. 9, 2022, beginning at 51:38.

proceedings "in connection with [a] reporting utility's existing or proposed operations,"[18] a utility engaging in any of the above activities should report its expenditures below the line, in Account 426.4. However, none of the above activities seem to meet the definition of "lobbying" that EEI uses when it discloses to its members the portion of their dues that pay for unrecoverable lobbying expenses.[19] Therefore, ratepayers presumably pay for all of these political activities through their utility rates.

No law compels utilities or their associations to use the tax code's definition of "lobbying" for purposes of recovering dues from ratepayers. That provision of the tax code disallows a federal tax deduction for direct lobbying expenses.[20] A related tax code provision requires tax exempt organizations, such as trade associations, to report their lobbying expenses (as defined by the tax code) to their dues-paying members.[21] This disclosure allows for-profit trade association members to deduct from their taxable income only the portion of trade association dues not used for lobbying. As applied to Public Utilities, a utility may deduct from its taxes the dues it pays to EEI, less the portion of those dues that EEI uses for "lobbying."

Aligning the USA with the tax code may be convenient for utility trade associations, but it does not serve any reasonable public policy objective. It allows the utility industry to conceal and pay for its political expenditures by funneling them through a trade association. The Commission should not allow trade associations to be vehicles for cost recovery of utility industry political expenditures.

As the Commission suggests in its Notice of Inquiry, it could limit utility cost recovery of trade association dues only to trade associations that follow certain

---

[18] Account 426.4 excludes "expenditures which are directly related to appearances before regulatory or other governmental bodies *in connection with the reporting utility's existing or proposed operations*."
[19] *Supra* note 14.
[20] 26 USC § 162(e).
[21] 26 USC § 6033(e).

transparency or accounting guidelines.[22] The Commission could allow utilities to recover trade association dues less the utility's share of the association's expenditures that the utility itself would have to book in Account 426.4 (as clarified by *Newman and Haverty*). In the NOI, the Commission suggests three methods for operationalizing this approach to cost recovery of utilities dues (Q 13).[23] Regardless of the approach it takes, the Commission should ensure that either the trade association or the utility is accountable for any statements about the trade association's expenses. Trade associations are not Public Utilities and do not make rate filings, but they do file annual reports to the IRS and can be liable for misstatements about their "lobbying" expenses.[24] Deviating from that definition for purposes of cost recovery will mean that the Commission cannot rely on another federal agency to enforce inaccuracies. In addition to the Commission's proposed options (Q 13), the Commission could consider working with NARUC to revive its audits of trade associations. It might also encourage trade associations to make informational filings of audited financial statements and limit cost recovery only to those trade associations that make such filings.

Encouraging trade associations to remove expenditures that utilities themselves should book in Account 426.4 is not regulating or burdening speech under the First Amendment. When utilities challenged a Commission order that required them to book political advertising expenditures in a below-the-line account, the Fifth Circuit dismissed their First Amendment claims, explaining:

> [N]othing in the order prohibits or restrains the petitioners from publishing or republishing these or any other similar advertisements. Their freedom of speech or freedom of action in this area are not in any manner limited. All that has occurred in this proceeding relating to keeping of accounts is to exercise the Commission's discretion as to where these expenditures should be entered and to do so in such

---

[22] NOI at P 17.
[23] *Id.*
[24] *See* EEI, IRS Form 990, Schedule C, Part III-B (reporting the lobbying expenses disclosed its members).

> manner as to indicate the views of the Commission that such expenditures should not be subsidized by the consumers who purchase the power . . .
>
> Here it may be said that these petitioners are not being denied the right to charge the cost of this advertising as operating expenses because they engage in constitutionally protected activities; they are simply being required to keep their books in such manner as to indicate that presumptively those activities are to be paid for out of their own pockets rather than passed on to the consumer.[25]

II. To Protect Consumers and Competition, the Commission Should Find that Trade Association Dues Are Presumptively Non-Recoverable

Alternatively, the 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. Trade association dues should not generally be recoverable from ratepayers because, at best, they "obviously have a doubtful relationship to rendering utility service."[26] Ratepayers currently give as much as $100 million to utility trade associations,[27] providing utilities with an unfair advantage over other market participants in the competitive policymaking arena. Subsidizing utility trade associations is particularly misguided because the benefiting utilities are designed to thrive without the sort of market-based competition that the Commission and state regulators promote for the benefit of ratepayers. Utilities derive significant value from cost-of-service rates and barriers to entry that limit competition,[28] and therefore have have strong incentives to protect policies that reinforce their

[25] Southwestern Elec. Power Co. v. FPC, 304 F.2d 29 (1962).

[26] *Re Alabama Power Co.*, 24 FPC 278, 286 (1960), *aff'd*, Southwestern Elec. Power Co. v. FPC, 304 F.2d 29 (1962).

[27] In 2018, EEI collected $76.3 million from membership dues. EEI, IRS Form 990. The American Gas Association collected $27.3 million from membership dues. AGA, IRS Form 990. The record in Docket RM21-15 shows that ratepayers advocates have, on occasion, successfully challenged inclusion of those dues in utility's retail rates. Thus, it seems unlikely that utilities recovered all $103.6 million of those two trade associations' dues from ratepayers.

[28] The traditional barrier is the requirement that a company obtain a state or federally issued certificate of public convenience and necessity. More recently, state or federal rights of first refusal and or minimum offer price rules are barriers to entry in certain industry segments or markets.

structural advantages.[29] Indeed, utilities advocate for maintaining those advantages.[30]

Subsidizing utility speech is inconsistent with foundational Open Access principles. For nearly three decades, the Commission has "required comparable service in a variety of contexts"[31] in order to move the industry "to an environment in which truly comparable transmission services will be provided to all wholesale users."[32] To operationalize this comparability principle, the Commission has gone so far as to institute utility codes of conduct,[33] encourage utilities to cede control of their facilities to independent organizations, and impose transmission planning rules.[34] Requiring ratepayers to pay for utility advocacy while leaving other market participants to fund their advocacy out of their market-based earnings is not comparable treatment. The Commission grounded its Open Access regime in the truism that the "inherent characteristics of [utility] monopolists make it inevitable that they will act in their own self-interest to the detriment of others,"[35] and is premised on mitigating EEI members' incentives and opportunities to unduly discriminate against competitors and customers.[36] Yet, perversely, the Commission

---

[29] *See, e.g.,* Gordon Tullock, The Welfare Costs of Tariffs, Monopolies, and Theft, 5 WESTERN ECONOMIC J. Issue 3, p. 224–232 (Jun. 1967); Joseph J. Stigler, The Theory of Economic Regulation, 2 THE BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE, Issue 1, pp. 3–21 (Spring 1971).
[30] Just in the past two years, EEI itself has asked the Commission to end transmission competition (Docket No. RM21-17) and raise costs of new entry for generators in PJM and NYISO (Docket Nos. ER21-2282, ER21-1647), and has continued its longstanding crusades against PURPA and demand response (QF17-454, RM18-9; note that EEI was a respondent alongside EPSA and others in the FERC v. EPSA Supreme Court case about whether the Commission has jurisdiction over wholesale demand response). As we describe, EEI's filed comments in these proceedings are a relatively minor part of its role in attempting to limit the scope of competition and shape market rules to benefit its monopolist members.
[31] Order No. 888, 61 Fed. Reg. 21,540, at p. 21,548 (May 10, 1996).
[32] *Id.* at p. 21,615.
[33] *Id.* at p. 21,552 ("Adoption of this code of conduct. . . is needed to ensure that the transmission owner's wholesale marketing personnel and the transmission customer's marketing personnel have comparable access to information about the transmission system.").
[34] *See, e.g.,* Order No. 890 at P 494 (outlining the comparability transmission planning principle).
[35] Order No. 888, at p. 21,567.
[36] *See* Comment of the Harvard Electricity Law Initiative, Docket No. RM21-17, at pp. 6–30 (Oct. 12, 2021).

subsidizes utility efforts to advocate for policies that reinforce the status quo and utility control.

Classifying utilities' trade association dues as "miscellaneous general expenses . . . incurred in connection with the general management of the utility"[37] may have been appropriate in the days when there was "no market structure as we understand it in today's electric power industry."[38] Today, the scope of competition and the rules governing competition are, at least in part, subject to political decisions.[39] Advocacy, by trade associations and others, is a fundamental component of competition. The Commission has long recognized that politics and competition are intertwined,[40] and it should update the USA to reflect that understanding.

Below, we examine the roles of trade associations in the competitive policymaking arena and fit EEI's activities within that context. Our analysis shows that trade association's political advocacy aims at competition and cannot be

---

[37] USA Account 930.2. This account dates back at least to the 1950s. *See Alabama Power, et al.*, 20 FPC 108, 110 (1958). At the time, Miscellaneous General Expenses was Account 801, which then included "such items of expense applicable to the electric department as . . . association dues; [and] contributions for conventions and meetings of the industry." These and other items are now booked in Account 930.2.
[38] *Grid Reliability and Resilience Pricing*, 162 FERC ¶ 61,012 at P 7 (2018).
[39] Consider just a few developments in January 2022. In Wisconsin, lawmakers introduced a transmission right-of-first refusal law that would inhibit Commission efforts to develop regional projects through competitive processes by preferring utility-developed transmission. *See* Chris Hubbuch, "With Billions at Stake, Wisconsin Lawmakers Seek to Block Power Line Competition," WISCONSIN STATE JOURNAL, Jan. 22, 2022. Lawmakers in Missouri also introduced right-of-first refusal bills HB 1811 and SB 1003. In Arizona, lawmakers introduced a bill that would reinforce utility monopolies by repealing provisions that enable electric retail competition. Courtney Holmes, "Bill to Eliminate Electric Competition Law Considered," Scripps Media, Jan. 21, 2022. In Kansas and West Virginia, lawmakers introduced bills that favor utility-owned coal-fired power plants. *See* KS SB 350; WV HB 2713 (2021 bill that was reintroduced on Jan. 12, 2022). State commissions are not immune from politics. In California, the Governor criticized a CPUC administrative law judge's recommended decision to revise the state's net metering laws, commenting that he "had a chance to review [the decision], and I'll say this about the plan: We still have some work to do. . . . Do I think changes need to be made? Yes I do." Rob Nikolewski, "Newsom: 'More Work to Be Done' on California Net Metering Solar Proposal," The San Diego Tribune, Jan. 11, 2022.
[40] In the 1950s, IOUs launched an advertising campaign that targeted their public power rivals. *Re Alabama Power Co.*, 20 FPC 108 (1959) (detailing one of the advertisements and including others as an appendix to the order). Claiming they had to respond to "government competition," IOUs sought cost recovery of their advertising expenditures. *Re Alabama Power Co.*, 22 FPC 72, 74 (1960). But the Commission disallowed cost recovery, holding that the ads "involved matters of political controversy" and that such "expenditures for political activities are generally incompatible with the objectives of utility regulation, and have a dubious relationship to the cost of rendering utility service." *Id.* at 76. The Fifth Circuit upheld the order. Southwestern Elec. Power Co. v. FPC, 304 F.2d 29 (1962). The next year, the Commission created Account 426.4, which is unchanged. Order No. 276, 30 FPC 1539 (1963).

confined to its "lobbying" expenditures. We use EEI as an example of a utility trade association because it is the largest utility trade association,[41] and the record in docket RM21-15 includes extensive information about the organization's activities.

In general, a trade association allows member companies to "pool their resources and coordinate their efforts so that they may speak with one voice on matters of shared interest."[42] A trade association can enhance its members' lobbying by creating a shared understanding among members of political issues, holding members accountable for lobbying activities, and directing members to engage in specific political activities.[43] By hosting conferences and other gatherings, trade associations foster relationships and promote information exchange among corporate executives, public officials, and government affairs professionals. These social ties can create pressure that leads to common political activities and strategies.[44]

EEI fits this general description. EEI states that its mission is to "provide public policy leadership, strategic business intelligence, and essential conferences and forums."[45] Each of these core functions is political. None are aimed at enhancing its members' utility service. As highlighted in the previous section, EEI organizes its members around political issues and seeks to influence policy outcomes by

---

[41] EEI spent $92 million in 2019. By comparison, the American Gas Association spent $35 million, the Nuclear Energy Institute spent $46 million, and the Interstate Natural Gas Association of America spent $8 million.

[42] Michael L. Barnett, One Voice, But Whose Voice? Exploring What Drives Trade Associations. 52 BUSINESS AND SOCIETY, Issue 2, pp. 213–244 (2012).

[43] Michael S. Kowal, Corporate Politicking, Together: Trade Association Ties, Lobbying, And Campaign Giving. 20 BUSINESS AND POLITICS, Issue 1, pp. 98-13 (2018) (citing Dennis R. Young, Neil Bania, and Darlyne Bailey, Structure and Accountability: A Study of National Nonprofit Associations. 6 NONPROFIT MANAGEMENT & LEADERSHIP Issue 4, pp. 347–65 (2006); Michael Lenox, Jennifer Nash, Industry Self-Regulation and Adverse Selection: A Comparison Across Four Trade Association Programs, 12 BUSINESS STRATEGY AND THE ENVIRONMENT Issue 6, pp. 343–56 (2003); Alison J. Kirby, Trade Associations as Information Exchange Mechanisms. 19 THE RAND JOURNAL OF ECONOMICS Issue 1, pp. 138–146 (1988); Leonard H. Lynn, Timothy J. McKeon, Organizing business: Trade associations in America and Japan. American Enterprise Institute for Public Policy Research (1988); Mancur Olson. THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOOD AND THE THEORY OF GROUPS (1965)).

[44] *Id.*

[45] EEI Mission, https://www.eei.org/about/Pages/about.aspx. EEI includes this mission statement in its filings at this Commission and in its annual IRS Form 990. *See* EEI Form 990 at pg. 2 (2018).

mobilizing its own resources, those of its members, and allied organizations. EEI builds political coalitions in part through its more than $3 million per year of "grants" to dozens of organizations, ranging from Americans for Prosperity to the Congressional Hispanic Caucus.[46] EEI's activities are designed to enhance the lobbying of its members and amplify the utility industry's messaging.

Trade associations can also be part of an industry's strategy to signal to regulators that its members have the ability to contest new regulations and enforcement activities. Political scientists have found that "firms that can credibly signal their intention to fight an agency on decisions that affect them adversely"[47] can deter discretionary regulatory actions, such as enforcement or new rulemakings.[48] "Firms may flex their muscles in this manner by enhancing their political footprint,"[49] adopting a political strategy that is "akin to intimidation."[50] "Active lobbying . . . can convey to a regulator a credible prospect that the group would be able to block the regulator, such as by elevating a potential conflict with the agency to other arenas such as Congress, the White House, or the judiciary."[51] In

---

[46] *See* EEI Form 990, Part IX, Line 1 (specifying the amount of "Grants and other assistance to domestic organizations." For the four most recent years in which the full Form 990 is publicly available, grants averaged $3.3 million per year. In 2018, Americans for Prosperity and the Congressional Hispanic Caucus were among the dozens of organizations that received "grants" from EEI.

[47] Sanford C. Gordon and Catherine Hafer, Corporate Influence and the Regulatory Mandate, 69 JOURNAL OF POLITICS, Issue 2, pp. 300–319 (2007) (citing Sanford C. Gordon and Catherine Hafer, Flexing Muscle: Corporate Political Expenditures as a Signal to the Bureaucracy, 99 AMERICAN POLITICAL SCIENCE REVIEW, Issue 2, pp. 245–261 (May 2007).

[48] Alex Acs and Cary Coglianese, Influence Through Intimidation: Evidence from Business Lobbying and the Regulatory Process, *Faculty Scholarship at Penn Law* (2021) (presenting "empirical evidence consistent with expectations that intimidation can shape regulatory outcomes to the advantage of certain firms, both through a chilling effect, where lobbying derails nascent regulatory plans, as well as a retreating effect, where opposition
to published proposals leads to their withdrawal").

[49] *Id.*

[50] *Id.*

[51] Alex Acs and Cary Coglianese, Influence Through Intimidation: Evidence from Business Lobbying and the Regulatory Process, *Faculty Scholarship at Penn Law* (2021) (citing McGarity, Thomas. "Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age." 61 DUKE LAW JOURNAL, pp. 1671-1762 (Apr. 2012)).

general, “a broader regulatory mandate increases the value to firms of deterring regulatory scrutiny by signaling their willingness to contest the agency.”[52]

The power industry is heavily regulated, and each EEI member has similar incentives to oppose rules that expose them to competitive pressures or heightened regulatory scrutiny. With its nearly $100 million annual budget,[53] EEI is ubiquitous in policy arenas, ranging from its sponsorships of NARUC events to its “dialogues” with policymakers mentioned in Part I. EEI’s consistent presence is part of the utility industry’s “political footprint” that reminds policymakers of the industry’s capacity to marshal resources in service of the industry’s goals.

This signaling takes many forms. At this Commission, EEI’s filings can indicate a willingness to contest or support a future Commission order. Consider, for instance, EEI’s initial filing in response to the transmission ANOPR (Docket No. RM21-17). Although dozens of EEI members filed separately, either in joint comments with other members or individually, EEI filed its own comment. EEI opens by asking the Commission to align transmission development with its members’ state-granted distribution territories. The comment signals to the Commission the terms of a new rule that the utility industry as a whole is willing to accept. Other (non-utility) trade associations may file their own statements, but few have the “political footprint” to back up such statements. The issue here is not whether such filings are permissible or legitimate. Obviously they are. The only issue in this proceeding is whether the Commission will end ratepayer funding of the utility industry’s political footprint.

Trade associations also “manage the industry’s reputation with regards to stakeholders like regulators, industry financial analysts, employees, suppliers, and

---

[52] *Id.*

[53] In its annual IRS Form 990 filing, EEI discloses its annual expenditures. For the four most recent years when the data from those filings are publicly available, EEI’s average annual expenditures were $92 million (2016–2019).

the media."[54] EEI is active on this front as well. In its 2017 Wall Street briefing, an EEI executive explained the organization's initiatives:

> A year ago, EEI launched an industry Education and Advocacy Strategic Initiative with national communications, inside-the-Beltway, and beyond-the-Beltway components. The initiative is designed to tell the story of our industry's leadership, while also promoting the value of our industry overall — to our everyday lives, our economy, and our national security — and the innovation we are driving. With the new Administration, new Congress, and many new elected officials in the states, our job of telling our industry story and educating policymakers will be more important than ever as we work to achieve favorable policy outcomes. A critical component of our initiative is to establish a common language for the industry, ensuring that we speak in a common industry voice. We laid the foundation with the rollout of our lexicon project last March, and we continue to expand our work around messaging and language. We have many opportunities to advance this initiative this year — both in Washington and in the states — and I know my colleagues share my enthusiasm for what's to come for our industry.[55]

These efforts to promote the *utility industry* in D.C. and state capitals harm utility competitors. EEI's so-called lexicon project referenced in the previous paragraph aimed to help utilities "speak with a common voice" by standardizing industry terms based on expensive market research.[56] For instance, EEI recommended that its members call net-metered solar "private solar" that earns "private solar credits," in contrast to utility-scale "universal solar" that "benefits [ ] all American homes . . ."[57] As the EEI executive put it, the industry should "proceed with the terminology that is more favorable to us."[58] EEI's then-chairman and CEO of a major utility holding company explained that the lexicon project is about

---

[54] Andrew Tucker, Trade Associations as Industry Reputation Agents: A Model of Reputational Trust, 10 BUSINESS AND POLITICS, Issue 1 (2008).

[55] EEI, 2017 Wall Street Briefing. *See* Appendix B.

[56] EEI and Maslanksy&Partners, The Future of Energy: A Working Communication for Discussion (Apr. 2016).

[57] *Id*.

[58] Kate Sheppard, This Messaging Guru Is Helping Utilities Clean Up Their Appearance," Huffington Post, Mar. 29, 2016 (quoting EEI executive Brian Wolff).

"do[ing] a better job talking about the aspirational attributes of what we could do with effective ***energy policy***."[59]

To be clear, there is nothing wrong with market research or a communications strategy aimed at influencing energy policy. Presumably, non-utility trade associations conduct their own research and develop their own strategies to advance their political and consumer messaging. The issue before the Commission in this proceeding is only whether utilities should recover the costs of that research and developing those strategies when those activities are conducted by a utility trade association. Why should the Commission require consumers to subsidize utilities' political campaigns when they are spearheaded by a trade association?

By making trade association dues presumptively non-recoverable, the Commission will not be prohibiting cost recovery of all trade association dues. Rather, the Commission should put the burden of proof on regulated companies to demonstrate that trade association dues are "ordinary and necessary in the operation of the companies' businesses."[60] Distinguishing between recoverable and unrecoverable trade association expenses does not create a novel line-drawing problem. That problem already exists. When it finalized Account 426.4, the Commission acknowledged that:

> No matter where the line be drawn with respect to either the general category of expenditures to be labeled as 'political' for purposes of accounting and reporting or assignment of particular costs, there will be many people who will believe that some expenditures so listed should not have been classified as political and others who will be equally convinced that certain operating expenses were in fact expenditures for political purposes. This does not mean, as some have suggested, that we should abandon our effort at separate classification and reporting of political expenditures, or even that we should limit

[59] Rod Kuckro, Southern's Fanning Sees His Industry Driving U.S. Economic Success, E&E News (Jul, 14, 2016) ("I never liked defensive messages," Fanning said. "This is an industry that historically has been run by lawyers and engineers, and we love them. However, I think we can do a better job talking about the aspirational attributes of what we could do with effective energy policy," he said.).
[60] *Re Alabama Power Co.*, 22 FPC 72, 77 (1960).

> our effort to those types of expenditures with respect to which all persons would agree in advance concerning the classification.[61]

The Commission then emphasized the importance of "defin[ing] a class of expenditures for political purposes in a way which can be applied with an appreciable degree of uniformity and comparability."[62] With that goal in mind, we propose that the Commission allow recovery of the portion of a utility's trade association dues that the trade association spends on activities that aim to enhance the quality of utility service. Includible expenses might address cybersecurity, storm hardening and recovery, and operations of transmission and distribution systems. The Commission could modify Account 930.2 to include only this portion of a utility's trade association dues. The remaining portion of a utility's trade associations dues should be booked in a below-the-line account, such as Account 426.4. As we suggested in Part I, the Commission should operationalize this approach through an enforceable mechanism that ensures either the utility or trade association is accountable for its representations about trade association expenditures.

III. The Commission Should Modernize Account 426.4

In addition to the two approaches proposed in the previous parts, the Commission should ensure that the scope of Account 426.4 reflects twenty-first century industry regulation and corporate communications practices. In *Newman and Haverty*, the D.C. Circuit demarcated Account 426.4 into the Public Opinion Clause and the Official Decisions Clause. The court held that the Officials Decisions Clause encompasses "expenditures for the purpose of indirectly as well as directly influencing the decisions of public officials."[63] As understood by the court, this clause is written broadly and should encompass *all* utility efforts to influence public officials. The Commission might clarify the breadth of the clause by illustrating the

[61] Order No. 276, 30 FPC 1539, 1540 (1963).
[62] *Id.*
[63] *Newman and Haverty*, 22 F.4th at 196.

types of communications that should be included. It might include actual EEI initiatives listed in Part I and in the record in Docket No. RM21-15.

The Public Opinion Clause is currently narrower. It includes utility spending on "direct popular decisions,"[64] such as elections of public officials and referenda, as well as utility spending "for the purpose of influencing public opinion" on "legislation or ordinances . . . [or] franchises."[65] The Commission should expand the Public Opinion Clause, either by adding additional items — including utility regulation and industry positioning — or removing the currently listed items and replacing them with a general phrase designed to capture all utility expenditures aimed at influencing public opinion.

Utility expenditures aimed at influencing public opinion on utility regulation can harm utility competitors and ratepayers. For instance, in Docket RM19-15, the Commission proposed new rules implementing PURPA. The record includes a letter filed by "We Stand for Energy" that appears to be from approximately 250 people across the United States who claim to "support the Commission's decision to revisit [PURPA] rules."[66] But the "document info" on the Commission's eLibrary system shows that We Stand for Energy is a "Project of the Edison Electric Institute." The letter is part of a broader campaign that publishes information about a range of regulatory issues under the We Stand for Energy banner. EEI's public outreach might plausibly serve several industry goals, but there is no doubt that its effort to gather signatures for its PURPA filing aimed to influence public opinion in service of the utility industry's regulatory agenda.[67] EEI's We Stand for Energy has also

---

[64] *Newman and Haverty*, 22 F.4th at 198.
[65] Account 426.4.
[66] Comment of We Stand for Energy, Docket No. RM19-15, Dec. 3, 2019.
[67] EEI says as much in its 2015 annual review: "Through We Stand for Energy, EEI continues to educate and unite more than 250,000 electricity consumers and stakeholders across the country *and to advocate* for smart energy solutions that ensure electricity remains safe, reliable, affordable, and increasingly clean." It is equally clear that EEI directly opposed qualifying facilities and their trade associations in Docket RM19-15. The Solar Energy Industries Association (SEIA) petitioned the Ninth Circuit to review the Commission's PURPA rules, and EEI (along with other utility trade associations)

opposed net metering rules or bills through social media campaigns that have targeted people in Maine, Iowa, New Hampshire, South Carolina, and Kentucky.[68]

Utilities have more directly funded campaigns against various net metering proposals or have primed the public to oppose policies favorable to rooftop solar. For instance, in Arizona, a utility funded two advocacy organizations to produce and run commercials that sought to tie rooftop solar policies to then-President Obama or portray existing policies as unfair.[69] In Michigan, two utility-funded organizations paid for ads on social media that claimed "out-of-state special interests" were either threatening reliability or were opposed to ratepayers "paying their fair share" to maintain the electric system.[70]

These examples illustrate how modernizing Account 426.4 in two respects will protect against ratepayers subsidizing utility speech in the policymaking arena. First, the Commission should include utility expenditures that aim to influence public opinion on regulations. Second, the examples highlight why the Commission must "make clear that the term 'political' in the title to subaccount 426.4 is used in its broadest meaning."[71] Many of the social media and video ads do not mention any specific state policy or urge viewers to take any specific action. While some of the ads

---

filed an amicus brief in support of the Commission. The case pits the ratepayer-funded trade associations against a privately funded trade association.

[68] A utility watchdog organization has documented these campaigns, including screenshots of social media ads. *See* https://www.energyandpolicy.org/midamerican-and-anti-solar-real-coalition/; https://www.energyandpolicy.org/what-the-public-learned-from-the-utility-industry-in-2018/.

[69] Kate Sheppard, Arizona Solar Policy Fight Heats Up as Utility Admits To Funding Nonprofits' Campaign Ads, Huffington Post, Oct. 25, 2013; Herman K. Trabish, Arizona Utility Funds Solar Smear Campaign, Saying It Is 'Obligated to Fight', GreenTechMedia, Oct. 22, 2013. The ads are available on Youtube - https://www.youtube.com/watch?v=zliNcfyu0eQ (stating rooftop solar policies are generally "unfair" to seniors but not mentioning any specific policy and instead tying rooftop solar companies to President Obama); https://www.youtube.com/watch?v=gZOi-_sPF6s (portraying rooftop solar companies as corrupt entities tied to President Obama); http://www.youtube.com/watch?v=Ewwx8GQx52Y (making specific claims about the "unfair" effects of solar policies but not naming any policy); https://www.youtube.com/watch?v=zJ8tToIeQ_U (asking whether "net metering is fair" and comparing net-metered ratepayers to a man who takes sprinkles and hot fudge toppings from an ice cream truck but does not buy anything).

[70] Interlochen Public Radio, Misleading Social Media Ads Bash a Rooftop Solar Bill. They're Backed By Big Utility Companies." Apr. 5, 2021.

[71] Order No. 276, 30 FPC 1539, 1545 (1963) (Comm'r Black, concurring).

coincided with pending bills in the state house, others did not. The Commission should explicitly reject a narrow reading of Account 426.4 that would require utilities to book expenditures in that account only if the relevant communications specify a law, regulation, or elected official. Just as television commercials can be atmospheric and obscure the product they're selling, political speech may not target specific regulatory proposals or political candidates.

As Commissioner David S. Black explained in concurring to the Commission's order that finalized Account 426.4:

> The utilities and the advertising agencies have displayed great ingenuity in conveying a 'message' which is not always political in the ordinary sense of the word, but which concerns itself with problems of broad national social or economic policy. These efforts are intended to influence fundamental attitudes or beliefs and bear no reasonable relationship to the necessary operations of a utility company or the furnishing of utility service. The industry is, of course, free to spend its money this way, but such costs should be reported as income deductions below the line. Unless we make this clear, I am fearful that too restrictive an interpretation may be put on the language of subaccount 426.4 and expenditures for these purposes may be lost in various above-the-line operating expense accounts.[72]

[72] Order No. 276, 30 FPC 1539, 1545 (1963) (Comm'r Black, concurring).

Conclusion

The Commission should update its approach to trade association dues. Because a primary purpose of utility trade associations is to shape competition through political advocacy, the Commission should require utilities to book trade association dues in a below-the-line account. Alternatively, the Commission should allow utilities to recover trade associations dues only when the trade association separates expenses that should be booked in Account 426.4 if incurred directly by a utility. Under that approach, a utility would be allowed to recover only the portion of its dues not used for Account 426.4 expenditures. The Commission should also modernize Account 426.4 by including expenditures aimed at influencing public opinion about regulation and explicitly adopting a broad understanding of political expenditures that should be booked in Account 426.4.

/s/ Ari Peskoe
Ari Peskoe
Harvard Electricity Law Initiative
6 Everett St., Suite 4133
Cambridge, MA 02138
617.495.4425
apeskoe@law.harvard.edu

February 22, 2022

Appendix included in the version filed in Docket RM22-5.