

**BEFORE
THE FEDERAL ENERGY REGULATORY COMMISSION**

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

**COMMENTS
SUBMITTED ON BEHALF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

On December 16, 2021, the Federal Energy Regulatory Commission (FERC or the Commission) issued a Notice of Inquiry (NOI) seeking comments on the rate recovery, reporting, and accounting treatment of industry association dues and certain civic, political, and related expenses. In addition, the Commission seeks comment on the ratemaking implications of potential accounting and reporting changes. The Commission also seeks comments on whether additional transparency or guidance is needed with respect to defining donations for charitable, social, or community welfare purposes.

The Commission seeks comment on whether or to what extent ratepayers should pay for industry association dues, whether increased transparency on utility spending on political, civic, charitable and industry associations is warranted and how and what changes might be needed to ensure that recoverability of such expenses is clearly defined, and that utility practices are just and reasonable. As noted in the NOI, “the Commission has not previously adopted a bright line rule or specific guidelines that delineate between above the line (recoverable) and below the line (nonrecoverable) expenses for informing

and influencing the public, including industry association dues for such activities, instead allowing utilities to determine the portion of their industry association dues to include in above the line and below the line accounts, respectively, based on information provided by the industry associations about their activities and associated costs.” On March 17, 2021, the Center for Biological Diversity filed a petition for rulemaking, requesting that the Commission amend its Uniform System of Accounts (USofA) requirements relating to public utility and gas company payments to industry associations engaged in lobbying or other influence-related expenses.

I. SUMMARY

The Public Utilities Commission of Ohio (PUCO or Ohio Commission) applauds the Commission’s decision to take up this matter and supports efforts to clearly delineate the recoverability of utility spending on political, civic, charitable and related activities, and to ensure just and reasonable recovery of those industry association dues that benefit customers. Consistent with precedent in rate cases over several decades, while the PUCO generally allows for recovery of industry association dues that benefit customers, it does not allow recovery of expenses classified as political, charitable, or lobbying. More recently, the PUCO has opened a proceeding to review the political and charitable spending of the FirstEnergy Utilities.¹

¹ *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*, PUCO Docket No. 20-1502-EL-UNC, available at <https://dis.puc.state.oh.us/CaseRecord.aspx?CaseNo=20-1502&x=0&y=0>.

The PUCO believes that costs of political, charitable, and lobbying activities, whether those are part of industry associations or otherwise, should be borne by shareholders and that it would not be just and reasonable to recover them from ratepayers. To this end, the PUCO urges the Commission to provide additional clarity within the USofA and update its rules to reflect current accounting practices of industry associations and other organizations that expense utilities for influential activities. Specific areas where clarity may be provided are discussed in more detail below.

II. COMMENTS

A. Background

In the State of Ohio, utility rates are subject to approval by the PUCO. Ohio's statutes governing electric ratemaking² do not require the PUCO to use FERC's USofA, nor do the statutes specifically address recovery of association dues, civic, political, or charitable expenses. However, the PUCO in 1961 adopted a rule generally requiring electric utilities to use FERC's USofA.³ Today, the rule specifies: "Electric utilities shall keep their books of accounts and records in accordance with the uniform system of accounts prescribed by the [FERC] except to the extent that the provisions of said uniform system of accounts are inconsistent in any way with the outstanding accounting orders of the [Ohio] commission."⁴ The Ohio Supreme Court has recognized this role of

² See Ohio Revised Code (O.R.C.) Chapters 4909. and 4928.

³ See *Off. of Consumers' Couns. v. Pub. Utilities Comm'n*, 67 Ohio St. 2d 153, 169, 423 N.E.2d 820, 830 (1981) (Brown, J., concurring in part and dissenting in part).

⁴ Ohio Administrative Code (O.A.C.) 4901:1-9-05(A). See also O.A.C. 4901:1-37-04(B), prescribing: "Each electric utility and its affiliates shall maintain, in accordance with generally accepted accounting principles and an

FERC's USofA in PUCO proceedings.⁵ Finally, the burden is on the utility to justify that claimed expenses are just and reasonable.⁶

1. Industry Association Dues and Charitable Expenses

As mentioned above, while there is no statute in Ohio expressly governing political, charitable, or civic expenses, the PUCO has long-standing precedent of disallowing recovery of expenses classified as political, charitable, or lobbying.⁷ Since the early 1980s, the PUCO has disallowed recovery of charitable donations on the basis that they are not a cost to the utility for rendering public utility service.⁸ In 1982, the Ohio Supreme Court stated, "The decision to make charitable contributions, in terms of amounts and the recipients, is a matter of personal choice. When the utility makes this decision, the ratepayer has no choice. ... Charitable contributions assessed against the ratepayer as an operating expense disproportionately benefit the utility and its owners, not the ratepayers."⁹ This was a turn from prior PUCO precedent. As explained in a 1977 rate case order, the PUCO had "consistently found that to the extent [charitable] contributions do not exceed 0.10 percent of gross test year operating revenues such

applicable uniform system of accounts, books, records, and accounts that are separate from the books, records, and accounts of its affiliates."

⁵ *Centerior Fuel Corp. v. Zaino*, 90 Ohio St. 3d 540, 541, 740 N.E.2d 255, 257 (2001); *see also Off. of Consumers' Couns. v. Pub. Utilities Comm'n of Ohio*, 6 Ohio St. 3d 377, 380, 453 N.E.2d 673, 676 (1983) (Locher, J., dissenting).

⁶ *In re Application of Duke Energy Ohio, Inc.*, 131 Ohio St. 3d 487, 489, 967 N.E.2d 201, 203; O.R.C. 4909.18 and 4909.19.

⁷ *Consumers' Couns. v. Pub. Util. Comm.*, 64 Ohio St. 3d 123, 129, 592 N.E.2d 1370, 1375 (1992) (the Ohio Supreme Court upholding the PUCO's disallowance of "social/service club memberships, which provide for charitable functions").

⁸ *Cleveland Elec. Illuminating Co. v. Pub. Utilities Comm'n of Ohio*, 69 Ohio St. 2d 258, 260, 431 N.E.2d 683, 685 (1982).

⁹ *Id.*

deductions are properly includible as operating expenses, since charitable contributions are a recognized business expense which yield benefits to the communities in which they are made.”¹⁰ From another rate case involving charitable contributions from the same time period, the PUCO noted that the 110th General Assembly (1973-1974) had advised the PUCO in a House Concurrent Resolution that charitable contributions should be an allowable expense for utility rates.¹¹ Even within the 0.10 percent threshold of the late 1970s, however, some charitable donations were excluded. In a 1979 order, the PUCO upheld the PUCO’s Staff’s recommendation for exclusion for a \$3,332 donation to a Walt Disney World exhibit, on the basis that it would obviously not benefit the company’s service territory.¹²

2. Lobbying and Political Expenses

Lobbying or political expenses have been historically classified as below the line and therefore not recoverable. The PUCO also notes that the term “lobbying” is more often seen in PUCO cases than “political.” When expenses for public influence have been at issue, the context is typically recovery for advertising expenses, and the analysis has focused on the nature of the advertising, such as whether it is promotional – promoting

¹⁰ *In the Matter of the Application of the Dayton Power & Light Company for Authority to Modify and Increase its Rates for Electric Service to All Jurisdictional Customers*, PUCO Case No. 76-823-EL-AIR, Opinion and Order, July 22, 1977, pgs 10-11. *See also In the Matter of the Application of Toledo Edison Company for Authority to Change Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, PUCO Case No. 76-1174-EL-AIR, et al, Opinion and Order, June 9, 1978, pg. 16.

¹¹ *In the Matter of the Application of Ohio Edison Company for an increase in Rates and Charges for Electric Service*, PUCO Case No. 77-1249-EL-AIR, et al, Opinion and Order, Nov. 17, 1978, pg. 23.

¹² *In the Matter of the Application of the Dayton Power and Light Company for Authority to Modify and Increase its Rates for Electric Service to all Jurisdictional Customers*, PUCO Case No. 78-92-EL-AIR, Opinion and Order, March 9, 1979.

the increased use of electricity, educational, informational, safety related, etc., – and the PUCO has made disallowances on a case-by-case basis.¹³ Therefore, the PUCO precedent analyzing recoverability of lobbying expenses, when they have been at issue, has involved restating the rule that those expenses are below the line. For example, in a 1979 rate case order, the PUCO noted that the Ohio Consumers' Counsel (OCC) had proposed eliminating \$50,000 for lobbying expenses. The PUCO stated "Company witness Maugans testified that lobbying expenses are charged below the line ... and the Staff's investigation found no evidence to the contrary.... This adjustment must therefore be rejected as unsupported by the record."¹⁴

3. Association Dues

The PUCO has generally deemed industry association dues recoverable from ratepayers if they benefit customers. An example of those benefits would be the enhancement of research and development.¹⁵ In a 1979 case, the OCC and City of Cleveland objected to the inclusion of any contributions to the associations Edison

¹³ See *The Ohio Edison's Rate Case*, PUCO Case No. 89-1001-EL-AIR, Opinion and Order, August 16, 1990, pgs. 53-54, available at <https://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A07A26B04300I37287>, *In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, PUCO Case No. 78-1567-EL-AIR, Opinion and Order, January 30, 1980, pgs. 26-27, and *In the Matter of the Application of the Ohio Power Company to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, PUCO Case No. 81-782-EL-AIR, et al, Opinion and Order, July 14, 1982, pgs. 24-25, available at <https://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A16A05B61718F03814>.

¹⁴ *In the Matter of the Application of the Cleveland Electric Illuminating Company to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, PUCO Case No. 78-677-EL-AIR, Opinion and Order, June 27, 1979, pg. 27; see also *In the Matter of the Application of the Ohio Power Company to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, PUCO Case No. 81-782-EL-AIR, et al, Opinion and Order, July 14, 1982, pg. 26, available at <https://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A16A05B61718F03814>.

¹⁵ See *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 545-546, 620 N.E.2d 835, 844 (1993).

Electric Institute (EEI) and Ohio Electric Utility Institute (OEUI), on the basis that there was no evidence to justify the inclusion of those expenses. The PUCO explained that those expenditures had “consistently been recognized as appropriate,” and the Staff’s investigation had found no evidence that the expenses did not benefit ratepayers.¹⁶ However, in other cases, the PUCO has considered disallowances of portions of association dues.

At issue in a rate case from the early 1980s was whether EEI and OEUI advertising expense had been properly eliminated. The PUCO stated that the Staff had eliminated EEI and OEUI advertising costs but not the membership dues.¹⁷ Similarly, in 1990, PUCO considered whether the PUCO Staff’s adjustment for EEI expenses related to the Media Communication Fund should have been based on the 1988 National Association of Regulatory Utility Commissioners (NARUC) Report of the Committee on EEI Oversight, rather than the 1986 version of the NARUC committee report that the Staff used in the Staff Report. The differences in the reports resulted in a 70 percent increase in the exclusion for the EEI Media Communication Fund expense.¹⁸

¹⁶ *In the Matter of the Application of the Cleveland Electric Illuminating Company to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, PUCO Case No. 78-677-EL-AIR, Opinion and Order, June 27, 1979, pgs. 27-28. See also *In the Matter of the Application of Ohio Edison Company for an increase in Rates and Charges for Electric Service*, PUCO Case No. 77-1249-EL-AIR, et al, Opinion and Order, Nov. 17, 1978, pg. 20.

¹⁷ *In the Matter of the Application of the Ohio Power Company to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, PUCO Case No. 81-782-EL-AIR, et al, Opinion and Order, July 14, 1982, pgs. 24-25, available at <https://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A16A05B61718F03814>.

¹⁸ *The Ohio Edison’s Rate Case*, PUCO Case No. 89-1001-EL-AIR, Opinion and Order, August 16, 1990, pgs. 56-57, available at <https://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A07A26B04300I37287>.

4. Pending Proceedings

Given the role of the USofA and the NOI's focus on political, civic, and charitable spending, the PUCO finds it may inform the conversation to convey the status of the following pending cases, while emphasizing that they are pending cases and the PUCO's comments in this docket should not be presumed to prejudice any PUCO proceeding.

On September 15, 2020, the PUCO opened a proceeding to review the political and charitable spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the FirstEnergy Utilities or the Companies) in support of Amended Substitute House Bill 6 (133rd General Assembly) (H.B. 6) and the subsequent referendum effort. The case is currently pending.

Furthermore, the PUCO notes FERC's Division of Audits and Accounting (DAA) recently completed an audit of FirstEnergy Corporation (FirstEnergy) and its subsidiaries located in Ohio and other states. The audit evaluated FirstEnergy's compliance with various accounting components of the Code of Federal Regulations, including expenses in connection with H.B. 6. The DAA found that a FirstEnergy subsidiary, First Energy Service Corporation (FESC), "improperly accounted for and improperly reported lobbying expenses, donations, and other costs that lacked proper supporting documentation or were misclassified."¹⁹ FERC audit staff determined that portions of these expenses were "charged to the [franchised public utilities] and the Transmission Companies."²⁰

¹⁹ FERC Docket NO. FA19-1, pg. 46.

²⁰ *Id.* at 49.

B. Recommendations

1. Political, Charitable, and Civic Spending Should not be Recovered from Ratepayers

The PUCO's mission is to assure that Ohio ratepayers receive reliable service at a fair price. It is for that reason that we oppose burdening captive ratepayers with expenses related to utilities' political, charitable, and civic spending. Unless it can be clearly demonstrated that these expenditures benefit ratepayers, they should be considered non-recoverable. Furthermore, we believe that these costs should be presumed to be non-recoverable. If an electric utility believes that these expenses are to the benefit of ratepayers, the burden should be on them to prove that cost recovery is just and reasonable.

2. The Commission Should Take Steps to Clarify Which Expenditures are Recoverable, and Which are Non-Recoverable

We note that the FERC Commissioners, in their comments, have offered opinions advocating for clarity with regard to the Commission's regulations. Commissioner Mark Christie makes the point that there may be a lack of information available to stakeholders looking to verify whether these costs are being allocated to the appropriate accounts. He also poses that it may be time to "further codify what is now established primarily through Commission precedent, *i.e.*, not allowing a monopoly to recover from customers the costs of its contributions and grants to charitable and civic organizations."²¹ The

²¹ See *Commissioner Christie's Concurrence Regarding Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses*, available at <https://www.ferc.gov/news-events/news/item-e-2-commissioner-christies-concurrence-regarding-rate-recovery-reporting-and>

PUCO believes that codifying the Commission’s regulations would clarify them in the interest of the Commission’s goal of ensuring that customer rates are just and reasonable.

In addition, the PUCO concurs with Commissioner James Danly who stated that, in his dissent on the NOI, “it may be possible for the Commission to identify through this proceeding ways to reform the Commission’s accounting regulations that eliminate genuine ambiguity.”²² We agree that further clarification regarding what expenses may be considered political, charitable, civic and association spending, would help ensure that all expenditures are allocated to the proper accounts—and the ensure that association dues that do not benefit customers are not recoverable. Action to add transparency to the Commission’s accounting regulations and leave little room for interpretation would be a worthwhile endeavor and be supported by the PUCO.

3. Specific Areas in the USofA that May Benefit from Clarification

(a). Account 930.1

This account, presumptively recoverable, is for “expenses incurred in advertising and related activities, the cost of which by their content and purpose are not provided for elsewhere.” As has been discussed above, the PUCO often examines advertising expenses as to their nature and purpose, with many case-by-case determinations made as to whether those expenses are recoverable. While this practice will likely continue, additional clarity could be useful. As an example, the USofA’s Note A specifies

²² See *Commissioner James Danly Dissent Regarding Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses*, available at: <https://www.ferc.gov/news-events/news/commissioner-james-danly-dissent-regarding-rate-recovery-reporting-and-accounting>

includable expenses as involving “advertisements which inform the public concerning matters affecting the company’s operations, such as ... the company’s efforts to improve the quality of service.” But Note B states that “advertising activities, which are designed to solicit public support” are excludable.

(b). Account 930.2 and Association Dues

The USofA prescribes that this account, which is above the line, is to include “Industry association dues for company memberships.” This is a conflict, or at least there is an exception to this rule not stated here, with the description for account 426.4, which is presumptively unrecoverable for certain types of influential expenses. As FERC has stated recently, “...consistent with longstanding practice, while association membership organizations can conduct lobbying on behalf of their members, the portion of the membership fees associated with the costs of such lobbying activities should be recorded in Account 426.4.”²³ This conflict can be remedied or the exception more clearly pronounced. Also, the USofA could be updated to more appropriately reflect the accounting used by industry associations for their dues and activities.

(c). Account 426.4

FERC itself has acknowledged that it “has provided *limited* guidance regarding what is and is not properly included in Account 426.4.”²⁴ As evidenced by a recent case at the U.S. Court of Appeals for the D.C. Circuit, the wording of the guidance for this

²³ *Ameren Illinois Company*, FERC Docket. No. ER19-1276-000, Order on Formal Challenge, March 27, 2020, 170 FERC ¶ 61,267, ¶ 130.

²⁴ *Ameren* at ¶ 95 (emphasis added).

account can have significant implications.²⁵ The text therefore may benefit from a review of the specific language used, and an update of the language to more directly apply to current applicable precedent and practices of utilities, and to foster consistency of application going forward.

(d). Account 426.1

The USofA states, for Account 426.1, which is presumptively unrecoverable, “This account shall include all payments or donations for charitable, social or community welfare purposes.” However, Note A for Account 930.1, which is presumptively recoverable, includes “the cost of advertising activities on a local or national basis of a good will or institutional nature.” FERC could more clearly delineate the difference between these activities. Related to the question of clarity regarding social welfare and good-will activities, the PUCO notes that the DAA’s recent audit, mentioned above, discusses the identification of “lobbying payments” made to Internal Revenue Code 501(c)(4) entities.²⁶ The federal regulations for these organizations describe them as being for the promotion of social welfare.²⁷ The USofA currently contains no reference to 501(c)(4) organizations.

III. CONCLUSION

The PUCO agrees that further clarification regarding what expenses may be considered political, charitable, civic and association spending would help ensure that all

²⁵ *Newman v. FERC*, 22 F.4th 189, 197 (D.C. Cir. 2021).

²⁶ FERC Docket No. FA19-1-000, pgs. 17-18.

²⁷ 26 C.F.R. 1.501(c)(4)-1(a).

expenditures are allocated to the proper accounts. Action to add transparency to the Commission's accounting regulations and leave little room for interpretation would be a worthwhile endeavor and be supported by the PUCO. The PUCO looks forward to providing additional comment in future phases of this proceeding.

Respectfully submitted,

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**On Behalf of The Public Utilities
Commission of Ohio**

Dated: February 22, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have on this date caused a copy of the foregoing document to be served on each person included on the official service list maintained for this proceeding by the Commission's Secretary, by electronic mail or such other means as a party may have requested, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010. Dated this the 22nd day of February 2022, at Columbus, Ohio.

/s/ Thomas G. Lindgren

Thomas G. Lindgren

Assistant Attorney General

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Summary: Comments Comments Submitted on Behalf of the Public Utilities
Commission of Ohio in RM22-5-000 electronically filed by Mrs. Kimberly M. Naeder
on behalf of PUCO