

171 FERC ¶ 61,041
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

Duke Energy Progress, LLC

Docket No. ER09-1165-000

ORDER DENYING FORMAL CHALLENGE

(Issued April 16, 2020)

1. On September 30, 2019, pursuant to section 3.b of Attachment H.2 of the Duke Energy Progress (DEP) Formula Rate Implementation Protocol (Protocol) under the DEP Joint Open Access Transmission Tariff (Tariff), and section 306 of the Federal Power Act (FPA),¹ North Carolina Electric Membership Corporation (NCEMC) submitted a Formal Challenge to the 2018 Annual Update (Annual Update) to DEP's Formula Rate Template (Formula Rate) submitted by DEP to the Commission on May 15, 2018.² As discussed below, we deny the Formal Challenge.

I. Background

2. NCEMC is a generation and transmission cooperative responsible for the full or partial power supply requirements of its 25 members throughout the state of North Carolina. Those 25 distribution cooperatives, in turn, supply electricity to approximately one million homes, farms, and businesses in which more than 2.5 million North Carolinians live and work. NCEMC's distribution cooperative loads are located throughout the service areas of three investor-owned public utilities: DEP and Duke Energy Carolinas, LLC (DEC), both subsidiaries of Duke Energy Corporation, and Virginia Electric and Power Company. NCEMC purchases wholesale power and transmission services from both DEP and DEC to serve the loads of its member cooperatives located in the areas served by DEP's and DEC's transmission systems.

¹ 16 U.S.C. § 825e (2018).

² See DEP May 15, 2018 Informational Filing of 2018 Formula Rate Annual Update, Transmittal Letter at 1 (2018 Annual Update).

3. DEP is a wholly owned operating subsidiary of Duke Energy Corporation (Duke) and is a regulated public utility primarily engaged in the generation, transmission, distribution, and sale of electricity in portions of North Carolina and South Carolina.

4. On May 15, 2018, DEP submitted an informational filing with the Commission containing DEP's 2018 Annual Update of its transmission Formula Rate under its Tariff. The 2018 Annual Update established DEP's transmission rates for the 2018 Rate Year, which ran from June 1, 2018, to May 31, 2019, and was based on data from the 2017 calendar year (2017 Test Year). Pursuant to the DEP Protocol, NCEMC states that it submitted four sets of information requests to DEP, to which DEP responded, and then a timely Preliminary Challenge.³ DEP responded to NCEMC's Preliminary Challenge on October 26, 2018. Over the next several months, NCEMC and DEP exchanged settlement offers and counteroffers. NCEMC states that it received DEP's latest response on August 26, 2019. According to NCEMC, after a good faith effort to resolve the issues pursuant to the procedures in the DEP Protocol, the parties were able to narrow their disagreements, and only a few issues remain unresolved.⁴

II. Formal Challenge

5. NCEMC states that because of its outstanding objections to DEP's treatment of certain items in the 2018 Annual Update included in the 2018 Rate Year, it is filing a Formal Challenge pursuant to section 3.b of the DEP Protocol. As discussed in detail below, NCEMC asks the Commission to direct DEP to exclude from transmission rates for the 2018 Rate Year costs associated with: (1) the Greenville-Kinston Dupont 230 kV Line (GKD Line) because this line was not eligible for rate recovery in 2017; (2) Duke's acquisition of Piedmont Natural Gas, Inc. (Piedmont) because those costs are unrelated to DEP's provision of transmission service; and (3) certain Administrative and General (A&G) accounts, including legal fees and consulting expenses related to DEP's

³ See Duke Energy Carolinas, LLC, Tariffs, Rate Schedules and Service Agreements, Attach. H.2, DEP Formula Rate Implementation Protocol (2.0.0), § 2.e ("Any interested party shall have up to one hundred and twenty (120) days after the Publication Date (unless such period is extended with the written consent of the Transmission Provider) to review the calculations ('Review Period') and to notify the Transmission Provider in writing of any specific challenges, including challenges related to Material Accounting Changes, to the application of the Formula Rate ('Preliminary Challenge')."). Duke Energy Carolinas, LLC is the designated filer for the Tariff, which governs service from Duke Energy Carolinas, LLC; Duke Energy Florida, LLC; and DEP. See Duke Energy Progress, LLC, Tariffs, Rate Schedules and Service Agreements, Joint OATT, Concurrence for Joint OATT (3.0.0).

⁴ NCEMC Formal Challenge (Formal Challenge) at 3-4.

generating resources, Chamber of Commerce dues, public affairs related costs, and marketing and customer relations expenses.⁵

III. Responsive Pleadings

6. On December 2, 2019, DEP filed a response to NCEMC's Formal Challenge (DEP Response). On December 17, 2019, NCEMC filed a motion for leave to answer and answer (NCEMC Answer). On January 2, 2020, DEP filed a motion for leave to answer and answer (DEP Answer). On January 17, 2020, NCEMC filed a motion for leave to answer and answer (NCEMC Second Answer). On February 3, 2020, DEP filed a motion for leave to answer and answer (DEP Second Answer).

IV. Discussion

A. Procedural Matters

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority.⁶ We accept NCEMC's and DEP's answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

8. As discussed below, we deny the Formal Challenge. The applicable standard for NCEMC's Formal Challenge provides that "the Transmission Provider shall bear the burden of proving that it has reasonably applied the terms of the Formula Rate (including, but not limited to, consistency with the Fundamental Predicates) and the applicable procedures in these Protocols, in the Annual Update(s) at issue."⁷ We will discuss each of NCEMC's challenged costs in turn.

⁵ *Id.* at 4.

⁶ 18 C.F.R. § 385.213(a)(2) (2019).

⁷ Duke Energy Carolinas, LLC, Tariffs, Rate Schedules and Service Agreements, Attach. H.2 (2.0.0), § 3.d.

1. Costs Associated with the GKD Line

a. The GKD Line and the Duke-Progress Energy, Inc. Merger Proceeding

9. In 2011, Duke and Progress Energy, Inc. (Progress) filed, pursuant to section 203 of the FPA,⁸ an application for the approval of a transaction pursuant to which Progress would become a wholly owned subsidiary of Duke (Merger).⁹ The Commission conditionally authorized the Merger, subject to Applicants proposing mitigation to address the anticompetitive effects of the transaction.¹⁰ In the September 2011 Merger Order, the Commission also accepted a five-year Hold Harmless Commitment offered by Duke and Progress (referred to as the Applicants in the Merger Proceeding) to address the impact of the Merger on rates. The Applicants stated:

[T]he Applicants commit for a period of five years to hold harmless wholesale requirements and transmission customers from the costs of the Transaction. For that five-year period, the Applicants will not seek to include merger-related costs in their transmission revenue requirements or in their wholesale requirements rates, except to the extent they can demonstrate that merger-related savings are equal to or in excess of the transaction-related costs included in the rate filing.¹¹

⁸ 16 U.S.C. § 824b (2018).

⁹ Duke and Progress, Application for Authorization of Disposition of Jurisdictional Assets and Merger under Sections 203(a)(1) and 203(a)(2) of the Federal Power Act, Docket No. EC11-60-000 (filed Apr. 4, 2011) (Merger Application). Docket No. EC11-60-000, et al. are referred to as the Merger Proceeding.

¹⁰ *Duke Energy Corp.*, 136 FERC ¶ 61,245, at P 1 (2011) (September 2011 Merger Order), *order on compliance filing*, 139 FERC ¶ 61,194 (2012) (June 2012 Merger Order), *reh'g denied*, 149 FERC ¶ 61,078 (2014) (2014 Merger Rehearing Order), *reh'g denied*, 151 FERC ¶ 61,242 (2015), *vacated in part sub nom. Orangeburg v. FERC*, 862 F.3d 1071 (D.C. Cir. 2017), *order on remand, Duke Energy Corp.*, 166 FERC ¶ 61,112 (2019).

¹¹ Merger Application at 32-33.

10. In accepting the Applicants' Hold Harmless Commitment, the Commission stated: "[w]e interpret Applicants' [H]old [H]armless [C]ommitment to include all transaction-related costs, not only costs related to consummating the transaction."¹²

11. In June 2012, the Commission conditionally accepted the Applicants' proposed market power mitigation.¹³ The proposed market power mitigation consisted of interim and permanent mitigation measures. The interim mitigation measures, in the form of power purchase agreements, would mitigate the adverse effects on competition of the Merger until the permanent mitigation measures, seven transmission expansion projects (referred to as the Transmission Expansion Projects), were completed. The Applicants represented that the seven transmission expansion projects would increase transmission import capability into the Duke Energy Carolinas and Progress Energy Carolinas-East Balancing Authority Areas.¹⁴ At the time, the Applicants explained that, in order for four of the transmission expansion projects to increase the transmission import capability as proposed, the Applicants would have to accelerate the in-service date of the previously-planned GKD Line from 2017 to 2015.¹⁵ The Applicants stated that the GKD Line did not, by itself, provide any increase in the Duke Energy Carolinas or Progress Energy Carolinas-East simultaneous transmission import limits (SIL), but that it was "necessary for the line to be in service by 2015" in order for four of the transmission expansion projects to increase the SIL of the Progress Energy Carolinas-East Balancing Authority Area in the manner represented by the Applicants.¹⁶

12. The Commission accepted the interim and permanent mitigation measures proposed by the Applicants. In addition, the Commission extended the Applicants' Hold Harmless Commitment to the proposed mitigation, requiring the Applicants, "[c]onsistent with [their] representations in the settlement they have reached with North Carolina Commission Staff . . . to hold transmission and wholesale requirements customers harmless from the costs of the Transmission Expansion Projects in accordance with the [H]old [H]armless [C]ommitment, as set forth in the [September 2011] Merger Order."¹⁷

¹² September 2011 Merger Order, 136 FERC ¶ 61,245 at P 169.

¹³ June 2012 Merger Order, 139 FERC ¶ 61,194 at P 1.

¹⁴ *Id.* PP 25-35.

¹⁵ *Id.* P 26.

¹⁶ Revised Compliance Filing of Duke Energy Corporation and Progress Energy, Inc. at n.8, Docket No. EC11-60-004 (filed Mar. 26, 2012) (March 2012 Compliance Filing).

¹⁷ *Id.* P 91 (citing September 2011 Merger Order, 136 FERC ¶ 61,245 at P 147).

The June 2012 Merger Order stated that, in the settlement agreement with the North Carolina Commission Staff:

[The Applicants] committed not to assign costs associated with Permanent Transmission Mitigation projects into their wholesale transmission rates until the later of the expiration of the five-year FERC hold harmless period or such time as they have received regulatory approval to assign those costs to their retail native loads, effective on the date they are first permitted to begin recovering those costs.¹⁸

b. Formal Challenge

13. NCEMC argues that DEP has improperly included \$25,789,909 in costs associated with the GKD Line in the 2018 Annual Update. NCEMC asserts that removing the costs associated with the GKD Line would reduce NCEMC's rates by approximately \$408,000.¹⁹ According to NCEMC, the GKD Line was a merger mitigation project and, given that the merger was consummated in July 2012, the earliest DEP could have included the costs of the GKD Line in its wholesale transmission rates was July 2017. NCEMC contends that the date for inclusion of these costs in DEP's wholesale transmission rates could be later than July 2017 if the North Carolina Commission allowed cost recovery from retail customers after that date, per the North Carolina Commission Settlement Agreement. NCEMC notes that DEP confirmed that the North Carolina Commission approved the retail recovery of the costs associated with the GKD Line effective March 16, 2018.²⁰ NCEMC argues that the effective date of March 16, 2018, for retail recovery of these costs is beyond the end of the 2017 Test Year on which the 2018 Annual Update is based. Thus, NCEMC contends that the earliest that DEP could include these costs in its wholesale transmission rates under the Hold Harmless

¹⁸ June 2012 Merger Order, 139 FERC ¶ 61,194 at P 91 (citing Supplemental Agreement and Stipulation of Settlement, Docket Nos. E-2, Sub 998, and E-7, Sub 986, at 5 (N.C. Utils. Comm'n May 8, 2012) (North Carolina Commission Settlement Agreement)).

¹⁹ Formal Challenge at 8; *id.*, Attach. A, Myers Aff. ¶ 6 (Myers Aff.).

²⁰ Formal Challenge at 6-7 (citing Formal Challenge, Attach. B, at 2-4 (DEP Responses to NCEMC-DEP 2-50 and NCEMC-DEP 3-11); *In the Matter of Application of Duke Energy Progress, LLC For Adjustment of Rates and Charges Applicable to Electric Service in North Carolina*, Direct Testimony of Laura A. Bateman for Duke Energy Progress, LLC, Docket No. E-2, Sub 1142 (N.C. Utils. Comm'n Aug. 8, 2018)).

Commitment that the Commission accepted would be in the 2019 Annual Update, which is based on 2018 calendar year costs.²¹

14. NCEMC attempts to refute an argument DEP made in response to NCEMC's Preliminary Challenge that, because the retail rate effective date precedes the wholesale transmission rate effective date, it was proper for DEP to include the costs of the GKD Line in the 2018 Rate Year. NCEMC argues that DEP's position is inconsistent with DEP's recent position in a complaint proceeding in Docket No. EL18-168-000, in which DEP argued that because its wholesale transmission rates are based on a historical test year methodology, it would have been inappropriate for DEP to include in its 2018 Annual Update the reduction in the federal corporate income tax rate that took effect on January 1, 2018, after the end of the 2017 Test Year.²² According to NCEMC, the Commission sided with DEP.²³ NCEMC argues that, in this case, DEP's Hold Harmless Commitment in the Merger Proceeding permits DEP to recover the costs of the GKD Line only after such recovery is approved by the North Carolina Commission. Since this approval occurred in 2018, beyond the end of the 2017 Test Year on which the 2018 rates are based, consistent with the Commission's finding in the Tax Complaint Order excluding known post-test period events from the 2018 rates, the costs of the GKD Line cannot be included in DEP's wholesale transmission rates until the 2019 Annual Update.²⁴

c. DEP Response

15. DEP disagrees with NCEMC's argument that it should exclude the costs of the GKD Line from its 2018 Annual Update. According to DEP, for NCEMC to prevail on this issue, the costs of the GKD Line must be merger mitigation costs and the Hold Harmless Commitment had to have been modified by a North Carolina Commission Settlement Agreement, extending the Hold Harmless Commitment past 2017, neither of which is the case.²⁵

²¹ Formal Challenge at 7.

²² *Id.* (citing *N.C. Elec. Membership Corp. v. Duke Energy Progress, LLC*, 166 FERC ¶ 61,026, at P 20 (2019) (Tax Complaint Order) (citing DEP, Answer, Docket No. EL18-168-000, at 9-10 filed June 28, 2018)).

²³ *Id.* at 8 (citing Tax Complaint Order, 166 FERC ¶ 61,026 at P 43).

²⁴ *Id.*

²⁵ DEP Response at 6-7.

16. DEP argues that the GKD Line is not a merger mitigation project because it was not listed as a merger mitigation project in the June 2012 Merger Order.²⁶ Rather, DEP asserts that the Commission recognized in the June 2012 Merger Order that the GKD Line was planned prior to the merger and that DEP was merely “accelerating the in-service date” of the GKD Line from 2017 to 2015.²⁷ In addition, DEP points out that the GKD Line did not provide any increase in the relevant transmission import capabilities on its own.²⁸ DEP further contends that “[o]ther submissions to the Commission confirm that [the Line] was not a merger mitigation project, but rather an acceleration from its previously planned 2017 in-service date.”²⁹

17. DEP also disagrees with NCEMC that the North Carolina Commission Settlement Agreement modified the five-year Hold Harmless Commitment that the Commission accepted in the September 2011 Merger Order.³⁰ DEP asserts that the Commission’s reference to the North Carolina Commission Settlement Agreement in the June 2012 Merger Order has no bearing on the Hold Harmless Commitment that the Commission accepted; rather, the Commission mentioned the North Carolina Commission Settlement Agreement contextually to note the retail level Hold Harmless Commitment.³¹ Further, DEP points out that the Commission explicitly stated in the June 2012 Merger Order that the wholesale Hold Harmless Commitment lasted for a five-year period, as set forth in the September 2011 Merger Order.³²

d. NCEMC Answer

18. NCEMC argues that DEP’s actions and words acknowledge that the GKD Line is a merger mitigation project subject to the Hold Harmless Commitment. According to NCEMC, DEP accelerated the planned in-service date of the GKD Line as part of its merger mitigation proposal and, although DEP placed the GKD Line in service in 2014, it

²⁶ *Id.* at 9.

²⁷ *Id.* (citing June 2012 Merger Order, 139 FERC ¶ 61,194 at P 26).

²⁸ *Id.* at 10.

²⁹ *Id.* at 9-10 (citing Potomac Economics, Final Independent Monitoring Report, Docket No. EC11-60-004, at 4 (filed May 30, 2014); Duke & Progress, March 2012 Compliance Filing at 9).

³⁰ *Id.* at 11.

³¹ *Id.*

³² *Id.* (citing June 2012 Merger Order, 139 FERC ¶ 61,194 at P 91 & n.229).

did not include the line in its wholesale transmission rates until the 2018 Rate Year. NCEMC argues that, by waiting until the expiration of the five-year Hold Harmless Commitment before including the GKD Line in transmission rates, DEP's actions confirm that DEP itself considered this line part of the merger mitigation projects subject to the Hold Harmless Commitment.³³ Additionally, NCEMC argues that DEP confirmed its treatment of the GKD Line as a merger mitigation project in its response to NCEMC's Preliminary Challenge on this issue in which DEP referred to the GKD Line as "a merger mitigation asset related to market power" and stated that including its costs in the 2018 Annual Update met the timeline required by FERC.³⁴ Similarly, NCEMC claims that DEP has consistently referred to the GKD Line as a merger mitigation project in response to NCEMC's information requests concerning the 2018 Annual Update.³⁵

19. NCEMC also argues that DEP's current characterization of the GKD Line stands in contrast to the description of the line in the Merger Proceeding, in particular, that it was "necessary for [the GKD Line] to be in service by 2015 for the last four" transmission expansion projects to increase the relevant transmission import capability.³⁶ According to NCEMC, this description of the GKD Line makes clear that it is part of the merger mitigation proposal and, but for its acceleration, the Applicants' proposed merger mitigation proposal could not have satisfied the Commission's directives or the Commission's objective of resolving the market power concerns created by the merger.³⁷

20. NCEMC argues that the Hold Harmless Commitment that the Commission approved as part of the Merger Proceeding included the Hold Harmless Commitment for wholesale transmission customers made in the North Carolina Commission Settlement Agreement, which extended the Hold Harmless Commitment to the later of five years from the date the merger was consummated (July 2, 2017) or the date the North Carolina Commission authorized recovery of merger-related costs in retail rates (March 16, 2018). NCEMC argues that the Commission's reliance on the North Carolina Commission

³³ NCEMC Answer at 3.

³⁴ *Id.* at 4 (citing Formal Challenge, Attach. A, at 5-6 (DEP's Response to Preliminary Challenges Nos. 4, 19)).

³⁵ *Id.* at 6-7 (citing Formal Challenge, Attach. B, at 1, 3, 5-6 (DEP's Response to NCEMC-DEP 1-88 and NCEMC-DEP 2-50)).

³⁶ *Id.* at 5 (quoting June 2012 Merger Order, 139 FERC ¶ 61,194 at P 26).

³⁷ *Id.* at 5-6.

Settlement Agreement as a fundamental part of the wholesale Hold Harmless Commitment is evident from the language of the orders authorizing the merger.³⁸

e. **DEP Answer**

21. DEP characterizes the Formal Challenge about the costs of the GKD Line as a timing dispute about whether DEP must wait another year to include the costs of the GKD Line in its wholesale transmission rates.³⁹ DEP claims that both parties agree that the five-year Hold Harmless Commitment has expired and would not bar recovery of these costs in the 2018 Annual Update.⁴⁰ Although NCEMC argues that the five-year Hold Harmless Commitment for wholesale transmission rates was extended by the North Carolina Commission Settlement Agreement, DEP responds that the Commission need not discern the scope of the Hold Harmless Commitment because DEP has satisfied it even under NCEMC's interpretation. The North Carolina Commission Settlement Agreement states, in relevant part:

[Duke and Progress] have committed not to assign costs associated with Permanent Transmission Mitigation projects into their wholesale transmission rates until the later of the expiration of the five-year FERC hold harmless period or such time as they have received regulatory approval to assign those costs to their retail native loads, effective on the date they are first permitted to begin recovering those costs.⁴¹

DEP argues that it did not begin to "assign" the costs of the GKD Line into its wholesale transmission rates until its May 15, 2018 Annual Update, approximately two months after the North Carolina Commission approved the assignment of those costs in retail rates. Thus, DEP says that its assignment of the costs of the GKD Line complies with the language of the North Carolina Commission Settlement Agreement.⁴²

22. DEP asserts that the costs of the GKD Line are included in DEP's FERC Form No. 1 as 2017 costs, and the North Carolina Commission order approving retail rate

³⁸ *Id.* at 8-10.

³⁹ DEP Answer at 15.

⁴⁰ *Id.*

⁴¹ Supplemental Agreement and Stipulation of Settlement, Docket Nos. E-2, Sub 998, and E-7, Sub 986, at 5 (N.C. Utils. Comm'n May 8, 2012).

⁴² DEP Answer at 16.

recovery did not convert those costs into 2018 costs.⁴³ DEP contends that NCEMC conflates costs incurred during a test year with the regulatory authorization for rate recovery at the time they are included in rates. DEP argues that it incurred the costs of the GKD Line costs during the 2017 Test Year, and had received all requisite regulatory authorizations to include them in its 2018 Annual Update going forward.⁴⁴ With regard to NCEMC's argument about the Tax Complaint Order, DEP responds that, unlike in that proceeding, there is no synchronization issue here because DEP incurred the costs of the GKD Line during the relevant test year (2017).⁴⁵

f. NCEMC Second Answer

23. NCEMC disagrees with DEP's statement that both parties agree that the five-year Hold Harmless Commitment has expired and would not bar recovery of the costs of the GKD Line in the 2018 Annual Update. NCEMC reiterates its position that the costs of the GKD Line are not recoverable until the 2019 Annual Update because DEP was not entitled to recover those costs until 2018.⁴⁶ NCEMC argues that DEP's claim that "there is no synchronization issue here" ignores the Commission's ruling in the Tax Complaint Order and the significance of DEP's Hold Harmless Commitments. NCEMC contends that DEP's Formula Rate does not provide that costs may be recovered when incurred in a prior calendar year in which such costs were not yet permitted to be recovered, so there is, in fact, a synchronization issue.⁴⁷

g. Commission Determination

24. We deny NCEMC's Formal Challenge of the costs of the GKD Line and find that DEP has reasonably applied the terms of the Formula Rate and DEP Protocol by including in the 2018 Annual Update the costs of the GKD Line reflected in DEP's net plant balance as of December 31, 2017. In reaching this conclusion, we find that the costs of the GKD Line were subject to the Hold Harmless Commitment which expired on July 2, 2017. However, even if we were to accept NCEMC's argument that the Hold Harmless Commitment expired on March 16, 2018, inclusion of the GKD Line costs in the 2018 Annual Update would still be appropriate.

⁴³ *Id.* at 16-17.

⁴⁴ *Id.* at 17.

⁴⁵ *Id.* at 17-18.

⁴⁶ NCEMC Second Answer at 6.

⁴⁷ *Id.* at 6-7.

25. DEP's 2018 Rate Year commenced on June 1, 2018 and ended on May 31, 2019. DEP's 2018 Rate Year rates were based on FERC Form 1 data for the 2017 calendar year (2017 Test Year). The Hold Harmless Commitment required DEP to exclude merger related costs from its rates for five years, but the commitment did not require DEP to adjust the data DEP recorded in its Form 1. As a consequence of this five year Hold Harmless Commitment, the costs of the GKD Line were excluded from the 2013 through 2017 Rate Years. The June 1, 2018 commencement of the 2018 Rate Year occurred after the five year Hold Harmless Commitment expired and thus DEP may recover in rates the cost of service applicable to the GKD Line in its 2018 Annual Update using Form 1 data from the 2017 Test Year. Similarly, even if the March 16, 2018 termination of the Hold Harmless Commitment in the North Carolina Commission Settlement Agreement were to apply, the start of 2018 Rate Year occurred after such Hold Harmless Commitment has ended. We thus find that DEP may recover 2017 Form 1 costs applicable to the GKD Line in its 2018 Rate Year, which commenced after the Hold Harmless Commitment had expired.

2. Costs Associated with Duke's Acquisition of Piedmont

a. Formal Challenge

26. NCEMC challenges DEP's inclusion in the 2018 Annual Update of approximately \$13.49 million associated with the "costs to achieve" Duke's acquisition of Piedmont, a local gas distribution company, in October 2016 (Piedmont Merger).⁴⁸ NCEMC argues that removing these costs would result in a rate reduction of about \$57,000 for NCEMC.⁴⁹ NCEMC asserts that there is no basis for DEP to allocate "costs to achieve" expenses related to Duke's acquisition of Piedmont, including transition expenses, to DEP's transmission function for purposes of DEP's recovery of costs under its Formula Rate. NCEMC contends that these costs are wholly unrelated to DEP and DEP's provision of transmission service. Rather, NCEMC continues, these costs are predominantly associated with conversions of software systems such as security, accounting, and human resources systems as a result of the Piedmont Merger and are transition costs to bring a natural gas distribution system into the Duke corporate holdings.⁵⁰

⁴⁸ Formal Challenge at 8 (citing Formal Challenge, Attach. B, at 5-8 (DEP's Response to NCEMC-DEP 1-126)).

⁴⁹ *Id.* at 11.

⁵⁰ *Id.* at 9 (citing Formal Challenge, Attach. B, at 8 (DEP's Response to NCEMC-DEP 1-126.c, Attach.)).

27. Contrary to DEP's position that the Piedmont Merger transition costs are not covered by any hold harmless commitment and are therefore includable expenses, NCEMC asserts that the absence of a hold harmless commitment is irrelevant.⁵¹ Regardless of any hold harmless commitment, NCEMC argues that DEP's transmission customers should not be responsible for or subsidize the costs of the Piedmont Merger that they did not cause to be incurred and for which they received no benefits.⁵² Even if DEP's hold harmless commitment argument were valid, NCEMC asserts that it would not pass muster under Commission precedent for applying a customer benefits analysis similar to the electric merger hold harmless requirement when determining whether the costs of acquiring natural gas pipeline assets should be included in electric transmission rates. For example, NCEMC cites to a natural gas pipeline proceeding involving challenges to leased assets in pipeline rates.⁵³

28. Additionally, NCEMC contends that the prohibitions against undue discrimination in FPA sections 205 and 206 require DEP to treat wholesale customers and retail customers in a similar manner. NCEMC advises that when the North Carolina Commission approved the Piedmont Merger, the North Carolina Commission required DEP to hold retail customers harmless from the effects of the Piedmont Merger.⁵⁴ NCEMC contends that non-discriminatory treatment of wholesale customers requires that wholesale customers be held harmless from these costs too.⁵⁵

b. DEP Response

29. DEP states that no FERC-related Piedmont filing was necessary regarding the acquisition of Piedmont's retail natural gas distribution facilities, but the Piedmont Merger came with various natural gas-specific Piedmont Merger transaction costs that were incurred to effectuate the Piedmont Merger.⁵⁶ After the Piedmont Merger, Duke

⁵¹ *Id.* (citing Formal Challenge, Attach. B, at 5-10 (DEP's Responses to PA-FPWC 1-54, NCEMC-DEP 1-122, and NCEMC-DEP 1-126)).

⁵² *Id.* at 10 (citing *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009) and *Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254 (D.C. Cir. 2018)).

⁵³ *Id.* at 10-11 (citing *Transcontinental Gas Pipe Line Co., LLC*, 156 FERC ¶ 61,092, at PP 47-48 (2016)).

⁵⁴ *Id.* at 11 (citation omitted).

⁵⁵ *Id.*

⁵⁶ DEP Response at 15.

reassessed its enterprise-wide systems⁵⁷ for human resources, asset accounting, and general ledger accounting. Based on this assessment, Duke decided to change, upgrade, and/or optimize its enterprise-wide information technology (IT) systems.⁵⁸ DEP explains that these enterprise-wide optimizations support such general functions as human resources, accounting, and payroll, all of which impact the enterprise and the provision of transmission service.⁵⁹ Duke charged the costs associated with the enterprise-wide IT systems to A&G accounts and allocated portions of the costs to each of Duke's subsidiary utilities, including DEP. DEP explains that while the enterprise-wide systems costs were charged like any other A&G costs, they were tracked separately as "Piedmont Costs to Achieve" for purposes of reporting them as an earnings driver and disclosing the charges separately in Duke's annual and quarterly earnings reports.⁶⁰ According to DEP, Duke made separate disclosure in its financial statements because management believed that these costs were not indicative of Duke's ongoing performance.⁶¹

30. DEP contends that enterprise-wide systems costs are not appropriate to functionalize and therefore are appropriately accounted for in the 900 series FERC A&G accounts because this is the appropriate place to record expenses such as Administrative and General Salaries (Account 920), Office Supplies and Expenses (Account 921), and Outside Services Employed (Account 923).⁶² DEP argues that its internal tracking of Piedmont "costs to achieve" probably led to NCEMC's confusion that they were solely related to natural gas issues and not to the Duke enterprise, but DEP asserts that the label should not be dispositive as to the character of the expenses.⁶³

31. According to DEP, given that these costs are appropriately accounted for in its A&G accounts, the DEP Protocol states that these costs should be included in customer

⁵⁷ "Enterprise-wide" refers to all of Duke's seven operating companies: (1) Duke Energy Carolinas, LLC; (2) DEP; (3) Duke Energy Florida, LLC; (4) Duke Energy Ohio, Inc.; (5) Duke Energy Kentucky, Inc.; (6) Duke Energy Indiana, LLC; and (7) Piedmont.

⁵⁸ DEP Response at 15-16.

⁵⁹ *Id.* at 14, 18.

⁶⁰ *Id.* at 13.

⁶¹ *Id.* at 16.

⁶² DEP Response, Attach. A, Reilly Aff. ¶¶ 6-7 (citations omitted).

⁶³ DEP Response at 16-17.

rates, after a labor allocator is applied.⁶⁴ DEP contends that removing these proper A&G costs from the Formula Rate, as advocated by NCEMC, would require a change to the Formula Rate, given that the allocator is meant to efficiently determine the transmission customers' portion of A&G costs.⁶⁵ DEP claims that NCEMC is not disputing that these costs are A&G costs; rather, it is disputing that it should pay an allocated portion of the costs if they have any relationship to the Piedmont Merger.⁶⁶ DEP argues that under the filed rate doctrine, a utility must charge the rate on file and the Commission may not deviate from the filed rate for any reason.⁶⁷ DEP argues that, given that these are A&G costs properly flowed through the Formula Rate, NCEMC's attempts to remove these costs are attacks on the Formula Rate, which is prohibited by the DEP Protocol in the context of a formal challenge to an annual update.⁶⁸

32. DEP notes that NCEMC admits that the Piedmont Merger did not require Commission approval and no wholesale hold harmless commitment applies.⁶⁹ DEP also contends that NCEMC provides no support for its assertion that proper A&G costs should be excluded from the Formula Rate based on a nonexistent quasi-hold-harmless requirement.⁷⁰ DEP asserts that the *Transco* case to which NCEMC cites has no applicability in this case because that case dealt with a Commission-jurisdictional natural gas acquisition and a lease agreement, not a non-jurisdictional merger like is at issue here and a formal challenge to a wholesale transmission formula rate.⁷¹ With respect to NCEMC's statement that the Commission must apply the same treatment that the North Carolina Commission did for these costs, DEP argues that the Formula Rate does

⁶⁴ *Id.* (citation omitted).

⁶⁵ *Id.* at 20.

⁶⁶ *Id.*

⁶⁷ *Id.* (citation omitted).

⁶⁸ *Id.* at 14-15 (citing Duke Energy Carolinas, LLC, Tariffs, Rate Schedules and Service Agreements, Attach. H.2 (2.0.0), §§ 1.g, 2.c, 3.e).

⁶⁹ *Id.* at 13, 21.

⁷⁰ *Id.* at 22.

⁷¹ *Id.* at 22-23.

not incorporate retail rate parity requirements for the referenced North Carolina Commission stipulation.⁷²

c. NCEMC Answer

33. NCEMC disputes DEP's characterization of software costs and consultant costs incurred to accommodate the Piedmont Merger as enterprise-wide costs and asserts that these costs would not have been incurred but for the acquisition of that natural gas utility, and these costs are wholly unrelated to transmission.⁷³ NCEMC states that what is at issue in its Formal Challenge are not the transaction costs themselves but inclusion in the Formula Rate of what DEP characterizes as "costs to achieve" the Piedmont Merger. NCEMC points to DEP's statement in response to the Preliminary Challenge that "[t]he transition costs in question were incurred to integrate and optimize certain systems of Duke Energy and Piedmont."⁷⁴ NCEMC argues that it may have been a "business decision" to integrate the Duke systems, but without the Piedmont Merger, there would be no reason to expend the costs to implement this new software.⁷⁵

d. DEP Answer

34. DEP disputes NCEMC's continued attempt to apply a hold harmless commitment where one does not exist and disagrees with NCEMC that merger costs of any type are *per se* non-recoverable in rates.⁷⁶ DEP contends that NCEMC now walks back its claim that the enterprise-wide costs do not relate to transmission service—instead attempting to argue that these enterprise-wide costs are unrecoverable in A&G because they were incurred following the non-jurisdictional Piedmont Merger.⁷⁷ DEP asserts that NCEMC conflates two issues—whether a hold harmless commitment applies (which it does not),

⁷² *Id.* at 15, 23-24 (citing Formal Challenge at 11).

⁷³ NCEMC Answer at 11.

⁷⁴ *Id.* (citing Formal Challenge, Attach. A, at 2 (DEP's Response to Preliminary Challenge Item No. 3)).

⁷⁵ *Id.* at 11-12.

⁷⁶ DEP Answer at 7.

⁷⁷ *Id.* at 8.

and whether the challenged enterprise-wide costs are appropriate A&G costs (which they are).⁷⁸

e. NCEMC Second Answer

35. NCEMC disputes DEP's argument that it "admitted in its Formal Challenge that no hold harmless commitment applies," and that "NCEMC's December 17 Answer 'does not modify that admission.'"⁷⁹ NCEMC states that DEP ignores the footnote in NCEMC's Answer in which NCEMC stated that it was focusing "on correcting certain mischaracterizations, responding to arguments and facts provided for the first time in DEP's [Formal Challenge] Response, and otherwise clarifying the record" and that "NCEMC's silence on an issue should not be construed as to agreement with DEP."⁸⁰

f. Commission Determination

36. We disagree with NCEMC that DEP has failed to reasonably apply the terms of the Formula Rate and DEP Protocol by including in its 2018 Annual Update the enterprise-wide costs that DEP incurred after the Piedmont Merger to integrate Piedmont with Duke.⁸¹ These costs were incurred to integrate Duke and Piedmont's enterprise-wide systems that support such general functions as human resources, accounting, and payroll, which DEP notes impact the provision of transmission service and benefit transmission customers. DEP states that Duke reassessed its enterprise-wide systems for human resources, asset accounting, and general ledger accounting, and based on this assessment, Duke decided to change, upgrade, and/or optimize its enterprise-wide IT systems, which result in benefits to transmission customers.⁸² Duke charged the costs associated with the enterprise-wide IT systems to A&G accounts and allocated portions of the costs to each of Duke's subsidiary utilities, including DEP. While DEP has the burden to demonstrate the reasonableness of the rate resulting from the application of its Formula Rate,⁸³ we find that DEP has satisfied this burden by demonstrating that the

⁷⁸ *Id.* at 8-9.

⁷⁹ NCEMC Second Answer at 5 (quoting DEP Answer at 7).

⁸⁰ *Id.* (quoting NCEMC Answer at 1 n.2).

⁸¹ *See, e.g.,* Duke Energy Progress, LLC, 2017 FERC Form No. 1, at 123.17 (Apr. 12, 2018).

⁸² DEP Response at 15-16.

⁸³ *See Midcontinent Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,212, at P 106 (2014).

allocated \$13.49 million of enterprise-wide costs resulting from the upgrades to the enterprise-wide systems were just and reasonable and that it reasonably applied the terms of the Formula Rate and DEP Protocol. We find that the costs to upgrade these enterprise-wide systems are properly recorded as A&G costs and such costs are recoverable from transmission customers. We further note that, contrary to NCEMC's arguments, there is no applicable hold harmless commitment, as the Piedmont Merger was not subject to the Commission's jurisdiction, nor is it unduly discriminatory for DEP to treat wholesale customers and retail customers differently in this instance.

3. Legal and Consulting Expenses

a. Formal Challenge

37. NCEMC challenges certain consulting expenses that NCEMC claims are related to litigation concerning DEP's Mayo and Roxboro generating facilities and that are therefore production function costs wholly unrelated to the transmission function that should not be recovered from DEP's transmission customers. NCEMC states that, in response to an information request, DEP explained that the costs totaling \$2,979,078, composed of \$526,269 related to Earth Forensics, Inc. and Exponent, Inc., which are trial experts working on Mayo and Roxboro matters, and \$2,452,809 in expenses for Hunton & Williams, which is a firm that acts as outside counsel on these Mayo and Roxboro matters, are recorded in Account 923, Outside Services Employed.⁸⁴ NCEMC requests that the Commission direct DEP to remove these production related fees from Account 923, and record them instead in the appropriate production account, and argues that doing so would result in a rate reduction to NCEMC of approximately \$12,300.⁸⁵

38. NCEMC argues that the instructions for Account 923 provide that consultant and legal costs should be recorded to the specific function to which they pertain. Thus, NCEMC asserts that any legal and regulatory expenses that are wholly production related do not belong in the A&G accounts, but rather should be recorded in the relevant production related accounts. Specifically, NCEMC contends that these costs should be recorded in Account 557, Other Expenses, and excluded from transmission rates. According to NCEMC, DEP's Formula Rate is premised on FERC's Uniform System of

⁸⁴ Formal Challenge at 12 (citing Formal Challenge, Attach. B, at 11 (DEP's Response to PA-FPWC 2-5.c, d & e) and Formal Challenge, Attach. C (DEP's Attachment Spreadsheet for NCEMPA-FPWC – second request.xlsx, Tab 2-5)).

⁸⁵ *Id.* at 12-13.

Accounts (USofA) and DEP's failure to abide by the instructions in the USofA amounts to a violation of the DEP Protocol, as well as the Commission's accounting regulations.⁸⁶

b. DEP Response

39. As an initial matter, DEP asserts that NCEMC's request that DEP remove the legal and consulting expenses at issue from the 2018 Annual Update is an attack on the Formula Rate itself, which is barred by law, because these are proper A&G expenses and DEP appropriately used a labor allocator to determine a reasonable level to put into its wholesale transmission rates.⁸⁷ DEP also asserts that NCEMC's request that the Commission require DEP to remove the legal and consulting expenses at issue from Account 923 is wrong on the merits because "accounting and legal guidance shows that the costs are correctly recorded" and that DEP properly employed the filed rate.⁸⁸ DEP explains that, because the A&G allocator is used to allocate A&G costs to different operating functions, the transmission allocator will pick up some A&G expenses that appear to be generation-related, but the converse is also true—A&G expenses that appear to be transmission-related will not always be 100 percent assigned to transmission.⁸⁹

40. According to DEP, the civil litigation expenses at issue were related to legal matters for the entire Duke enterprise, specifically civil litigation suits concerning the Mayo and Roxbury generating plants, as disclosed in DEP's FERC Form No. 1 and Duke's 2017 Form 10-K.⁹⁰ DEP asserts that both the USofA and Commission precedent show that the civil litigation costs are appropriately included in Account 923. DEP argues that NCEMC's contention that the costs should be included in Account 557 is misguided, as this is an operations account.⁹¹ DEP asserts that explicit instructions to include legal fees in the 500-level accounts are necessary to justify their inclusion in an operations account like Account 557,⁹² but legal fees and civil litigation costs are not

⁸⁶ *Id.* at 12.

⁸⁷ DEP Response at 24-25.

⁸⁸ *Id.* at 25.

⁸⁹ *Id.* at 26.

⁹⁰ *Id.* at 26-27 (citations omitted).

⁹¹ *Id.* at 27-28.

⁹² *Id.* at 28.

mentioned in Account 557.⁹³ DEP states that Account 923, on the other hand, expressly references attorneys and outside consultants as includable items in that account, and it does not limit outside services for legal and consultants to a particular function.⁹⁴ Further, DEP claims that the Commission has previously rejected NCEMC's position on this issue in *Indianapolis Power & Light Co.*,⁹⁵ in which the Commission required litigation fees to be properly charged to Account 923, refusing the public utility's attempt to include litigation costs related to some of its fuel contracts in its fuel adjustment clause accounts.⁹⁶ To accept NCEMC's position on these costs as true, DEP asserts that no production-related expenses could properly be included in Account 923, and, according to DEP, this simply cannot be true, based both on the plain language of Account 923 and Commission precedent on the costs.⁹⁷

41. Finally, DEP asserts that transmission-specific litigation costs included in Account 923 are not directly assigned to transmission under the Formula Rate.⁹⁸ In other similar formal challenges, DEP claims that the Commission has rejected the position that items recorded in FERC accounts that are referenced in the Formula Rate should be excluded for being unrelated to transmission because such arguments are "a challenge of the formula rate itself."⁹⁹ DEP asserts that, if NCEMC wishes to change how Account 923 is captured in DEP's Formula Rate, it must file a section 206 complaint to justify such a change.¹⁰⁰

⁹³ *Id.* (citing 18 C.F.R. Pt. 101, Account 557, Other Expenses (2019)) (Account 557 includes "expenses incurred directly in connection with the purchase of electricity.").

⁹⁴ *Id.* (citing 18 C.F.R. Pt. 101, Account 923, Outside Services Employed (2019)).

⁹⁵ 48 FERC ¶ 61,040 (1989).

⁹⁶ DEP Response at 28 (citing *Indianapolis Power & Light Co.*, 48 FERC at 61,202).

⁹⁷ *Id.* at 28-29 (citing *Minn. Power & Light Co.*, 39 FERC ¶ 61,192, at 61,708 (1987); *PPL Elec. Utils. Corp.*, 136 FERC ¶ 61,101, at P 58 (2011); and *Iroquois Gas Transmission Sys., L.P.*, 64 FERC ¶ 62,211, at 64,266 (1993)).

⁹⁸ *Id.* at 29-30.

⁹⁹ *Id.* at 30 (citing *Ameren Ill. Co.*, 156 FERC ¶ 61,209, at PP 33, 37 (2016) and *Ameren Ill. Co.*, 167 FERC ¶ 61,247, *order on reh'g*, 169 FERC ¶ 61,042, at P 31 (2019)).

¹⁰⁰ *Id.*

c. NCEMC Answer

42. NCEMC argues that DEP incorrectly interprets the instructions to Account 923, which state that this account shall include the “fees and expenses of professional consultants and others for general services *which are not applicable to a particular function or other accounts.*”¹⁰¹ NCEMC argues that the civil litigation costs at issue, which DEP admits are related to the Mayo and Roxboro matters, are in fact applicable to a particular operating function and that function is not transmission.¹⁰² While DEP focuses on the phrase in the instructions of Account 557 that states “expenses incurred directly in connection with the purchase of electricity,” NCEMC counters that this phrase is preceded by the word “including,” meaning that the phrase is just one example of the type of costs that should be recorded in Account 557.¹⁰³

43. As for DEP’s cites to Commission precedent, NCEMC argues that *Indianapolis Power & Light Co.* is not applicable here because Account 557, unlike the account at issue in that case, does not prohibit the recording of items that are not expressly permitted.¹⁰⁴ NCEMC similarly argues that *Iroquois Gas Transmission System, L.P.*, to which DEP cites, is inapposite and does not stand for the proposition that production related litigation costs should be recorded in Account 923 under a transmission formula rate.¹⁰⁵

d. DEP Answer

44. DEP claims that NCEMC does not offer adequate support for its new argument that because Account 557 does not expressly prohibit the inclusion of legal costs, it is the appropriate account for the Mayo and Roxboro civil litigation expenses in this proceeding. DEP asserts that the Commission has not provided public utilities this degree of flexibility.¹⁰⁶ DEP claims that NCEMC ignores that *Indianapolis Power & Light Co.* and *Iroquois Gas Transmission System, L.P.* did not decide to use Account 557 for the litigation costs at issue in those proceedings and the Commission’s conclusion in

¹⁰¹ NCEMC Answer at 13.

¹⁰² *Id.* at 13-14.

¹⁰³ *Id.* at 14.

¹⁰⁴ *Id.* at 14-15 (citing *Indianapolis Power & Light Co.*, 48 FERC at 61,199-200, 61,202).

¹⁰⁵ *Id.* at 15 (citing *Iroquois Gas Transmission Sys., L.P.*, 64 FERC at 64,266).

¹⁰⁶ DEP Answer at 9-10.

those cases was that legal costs go to Account 923, even if they were not transmission formula rate cases.¹⁰⁷ DEP further claims that NCEMC also ignores that precedent states that Account 923 is the appropriate account for civil litigation costs.¹⁰⁸

e. Commission Determination

45. We disagree with NCEMC that DEP has failed to reasonably apply the terms of the Formula Rate and DEP Protocol by including in its 2018 Annual Update the legal and consulting at issue and therefore deny the Formal Challenge. We find that the legal and consulting fees for civil litigation costs related to the Mayo and Roxboro matters are A&G costs properly includible in Account 923. We are not persuaded by NCEMC's argument that civil litigation costs should be included in production operating accounts just because they were incurred for matters related to generating facilities. We find that civil litigation expenses, as described by DEP, are general operating expenses and not of the type that should be recorded as a functionalized operating expense. Additionally, Account 923 specifically lists attorney fees while neither Account 557, nor other production accounts, lends itself to the recording of legal costs associated with civil litigation.¹⁰⁹ Therefore, we deny NCEMC's Formal Challenge as it relates to the legal and consulting expenses at issue.

4. Chamber of Commerce Dues

a. Formal Challenge

46. NCEMC argues that DEP should remove \$1,610 of Chamber of Commerce dues that DEP included in Account 921, Office Supplies and Expenses, in its 2018 Annual Update because Chamber of Commerce dues are not appropriately charged to transmission customers. NCEMC argues that the Commission has in the past required public utilities and natural gas companies to reclassify expenditures incurred for memberships to social clubs, service clubs, and memberships for community welfare purposes from Account 930.2, Miscellaneous General Expenses, to Account 426.5, Other Deductions.¹¹⁰ This is because, according to NCEMC, these expenditures are generally "unrelated to utility operations and proper administration of the USofA requires that

¹⁰⁷ *Id.* at 10 (citations omitted).

¹⁰⁸ *Id.* (citing DEP Response at 27-29).

¹⁰⁹ *See* 18 C.F.R. pt. 101 (2019).

¹¹⁰ Formal Challenge at 13 (citing PJM Interconnection, L.L.C., Direct and Answering Testimony of Commission Trial Staff Witness Jean M. Miller, Ex. S-0019, Docket No. ER17-1519-001, at 78-79 (filed Oct. 4, 2018)).

‘below the line’ accounting classification of such expenses be uniformly followed by all public utilities.”¹¹¹ NCEMC argues that the Commission should direct DEP to remove these production-related fees from Account 921 and instead record them in Account 426.5. NCEMC argues that DEP’s failure to abide by the USofA instructions amounts to a violation of the DEP Protocol, as well as the Commission’s accounting regulations and precedent.¹¹²

b. DEP Response

47. DEP contends that its inclusion of Chamber of Commerce dues in Account 921 is consistent with both the Formula Rate and Commission precedent. DEP asserts that NCEMC’s only support for its claim that Chamber of Commerce dues are akin to “social clubs and rotary organizations,” and should therefore be excluded from the Formula Rate, is the non-precedential testimony of a Commission Trial Staff witness.¹¹³ DEP claims that the Chamber of Commerce dues in the uncontested settlement filed in that docket were specifically listed as exclusions from the proposed formula rate, which is not the case here.¹¹⁴ DEP argues that if NCEMC wants these costs to be excluded from the Formula Rate, it must initiate a section 206 proceeding.¹¹⁵

48. DEP points to Commission precedent that it claims stands for the proposition that Chamber of Commerce dues are includable in A&G accounts where, as here, the membership is linked to utility operations, and is not for the purpose of influencing public officials.¹¹⁶ While DEP acknowledges that the Commission excluded Chamber of Commerce dues from A&G accounts in *Potomac-Appalachian Transmission Highline, LLC*, DEP argues that the case in Opinion No. 554 is inapplicable here because, in that case, the public utility joined 80 different civic associations so that it could influence the

¹¹¹ *Id.* at 13-14 (quoting *Pac. Power & Light Co.*, 11 FERC ¶ 61,073, at 61,104 (1980)).

¹¹² *Id.* at 14.

¹¹³ DEP Response at 31 (quoting Formal Challenge at 13).

¹¹⁴ *Id.* at 31-32.

¹¹⁵ *Id.* at 32.

¹¹⁶ *Id.* (citing *Pub. Serv. Co. of N.M.*, 26 FERC ¶ 61,343, at 61,758-59 (1983)).

outcome of its large project.¹¹⁷ Unlike in Opinion No. 554, DEP explains that the primary purpose of Chambers of Commerce is to promote business and economic development which in turn helps to retain and attract customers to DEP's service territory. DEP argues that it delineates between the types of payments made to Chambers of Commerce, excluding from its Formula Rate payments for donations, lobbying, or sponsorships for various events.¹¹⁸ According to DEP, the included Chamber of Commerce dues at issue here are not related to lobbying, but are instead linked to utility operations.¹¹⁹

c. NCEMC Answer

49. NCEMC argues in its answer that DEP fails to distinguish its situation from that in Opinion No. 554. NCEMC asserts that, while the Commission affirmed the Administrative Law Judge's (ALJ) finding that the public utility's numerous memberships were to influence public officials, DEP omits that the ALJ found that expenditures for dues and other payments to community social and service organizations should be classified to the appropriate 426 account and that these costs are unrelated to utility operations and proper administration of the USofA.¹²⁰

d. DEP Answer

50. DEP argues in its answer that, while NCEMC contends that the Commission does not permit charging Chamber of Commerce dues to transmission customers, its cited cases do not support this assertion.¹²¹ Instead, DEP asserts that NCEMC has not rebutted DEP's showing that its Chamber of Commerce dues are related to utility operations.¹²² DEP notes that NCEMC does not dispute that all lobbying dues are excluded from the Chamber of Commerce charges.¹²³ DEP argues that Commission precedent shows that

¹¹⁷ *Id.* at 32-33 (citing *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)).

¹¹⁸ *Id.* at 33.

¹¹⁹ *Id.*

¹²⁰ NCEMC Answer at 16 (citing Opinion No. 554, 158 FERC ¶ 61,050 at P 68).

¹²¹ DEP Answer at 11.

¹²² *Id.*

¹²³ *Id.*

Chamber of Commerce dues are only excluded when they have been shown to include inappropriate lobbying amounts.¹²⁴

e. NCEMC Second Answer

51. NCEMC reiterates its arguments that DEP has not shown that Chamber of Commerce dues generally, or those it pays specifically, are related to utility operations and that NCEMC is unable to confirm that DEP has removed such costs from its transmission rates.¹²⁵

f. Commission Determination

52. We disagree with NCEMC that DEP has failed to reasonably apply the terms of the Formula Rate and DEP Protocol by including in its 2018 Annual Update the Chamber of Commerce dues at issue and therefore deny the Formal Challenge. We find that DEP has demonstrated that Chamber of Commerce dues can be included in A&G accounts where membership is linked to utility operations. We disagree with NCEMC that DEP's Chamber of Commerce dues are similar to the civic associations at issue in Opinion No. 554. In Opinion No. 554, those expenses were intended to influence public officials for a project that was not operational, nor benefitting customers.¹²⁶ Here, DEP has demonstrated that the primary purpose of Chamber of Commerce memberships and dues are to promote business and economic development, which, in turn, helps to retain and attract customers to DEP's service territory.¹²⁷ As DEP has explained, customer growth benefits all customers as it provides a larger customer base over which to spread utility costs.¹²⁸ Further, DEP does delineate between the types of Chamber of Commerce payments and has demonstrated that the costs in the Formula Rate are not related to lobbying.¹²⁹ As such, we deny NCEMC's Formal Challenge as it relates to Chamber of Commerce dues recorded in A&G accounts.

¹²⁴ *Id.* at 12 (citing DEP Response at 32-33).

¹²⁵ NCEMC Second Answer at 5-6.

¹²⁶ Opinion No. 554, 158 FERC ¶ 61,050 at PP 30-31.

¹²⁷ DEP Response at 33.

¹²⁸ *Id.*

¹²⁹ *Id.*

5. Public Affairs Related Costs

a. Formal Challenge

53. NCEMC argues that the Commission should direct DEP to remove \$7,529,546 of public affairs expenses from Accounts 920, 921, 923, 926, and 928¹³⁰ and record them in Account 426.4, Expenditures for Certain Civic, Political and Related Activities, thereby removing them from the 2018 Annual Update. NCEMC argues that the removal of these costs would result in an approximate rate reduction of \$31,000 for NCEMC. NCEMC argues that DEP's failure to abide by the instructions in the USofA amounts to a violation of the DEP Protocol, as well the Commission's accounting regulations.¹³¹

54. NCEMC argues that the Commission has established clear accounting precedent requiring expenses for club membership dues and similar civic expenses to be classified to the appropriate section of Account 426. NCEMC argues that in Opinion No. 554, the Commission affirmed the ALJ's decision to require that the expenditures related to the memberships for corporate stewardships be recorded in the appropriate section of Account 426.¹³² NCEMC explains that in responding to the Preliminary Challenges, DEP indicated that the contested public affairs expenses were primarily for internal DEP labor and turnkey services and that these expenditures were not for certain civic, political, and related activities. However, NCEMC asserts that DEP provided no documentation for this claim; rather, DEP provided a detailed spreadsheet with numerous entries with no detailed journal entry description or with only numbers, which obscures what these items represent.¹³³ NCEMC argues that without additional information, many of the listed items appear to be inappropriate to include in transmission rates because they represent advertising, charitable contributions, civic memberships/dues/donations, and political activity that should be recorded Account 426, rather than in A&G accounts.¹³⁴

¹³⁰ The titles of the listed accounts are as follows: Account 920, Administrative and General Salaries; Account 921, Office Supplies and Expenses; Account 923, Outside Services Employed; Account 926, Employee Pensions and Benefits; and Account 928, Regulatory Commission Expenses.

¹³¹ Formal Challenge at 16.

¹³² *Id.* at 15 (citing Opinion No. 554, 158 FERC ¶ 61,050 at P 71).

¹³³ *Id.* (citing Formal Challenge, Attach. C, Tab 2-3 (DEP Attachment Spreadsheet for NCEMPA-FPWC-second-request.xlsx)).

¹³⁴ *Id.* at 15-16.

b. DEP Response

55. DEP argues that, although NCEMC is challenging all costs under the broad “Public Affairs” umbrella, DEP provided a detailed explanation for each of these expenses to NCEMC showing that these are appropriate A&G costs.¹³⁵ That said, DEP does note a small number of charges that it will correct upon settlement of the 2018 Annual Update that were incorrect.¹³⁶ DEP avers that, pursuant to the USofA and Commission precedent, costs should be recorded to Account 426.4 if they are “efforts to influence public opinion with respect to specific political actions.”¹³⁷ DEP asserts that the challenged costs here are not lobbying costs, but are costs associated with internal communications, support, and general company administration services. DEP contends that if NCEMC would like to change the way A&G costs are captured by the Formula Rate, it must file a section 206 complaint to justify a change in the rate.¹³⁸

56. DEP explains that Duke allocates costs based on a service function to each of the Duke affiliate companies including DEP pursuant to the 23 functions outlined in Duke’s Utility Service Agreement, including the “Public Affairs” function. According to DEP, the “Public Affairs” function includes the following services: “[p]repares and disseminates information to employees, customers, government officials, communities and the media” and “[p]rovides graphics, reproduction lithography, photography and video services.”¹³⁹ DEP claims that there are multiple organizations that make up the “Public Affairs” function: “Corporate Communications, Corporate Public Affairs, Federal Policy and Government Affairs, Foundation, Community Relations, Policies Sustainability & Stakeholder Strategies.”¹⁴⁰ DEP discerns that while these organizations incur lobbying related costs, they also incur A&G costs and that, to the extent the groups are supporting political, lobbying, or charitable functions, these groups use accounts that exclude them from rates. DEP states that it has in place a yearly charging guideline process which is reviewed in the course of internal audits to ensure that lobbying and

¹³⁵ DEP Response at 35.

¹³⁶ *Id.* at 34 n.131.

¹³⁷ *Id.* at 35 (citing 18 C.F.R. Pt. 101, Account 426.4, Expenditures for Certain Civic, Political and Related Activities (2019); *Potomac-Appalachian Transmission Highline, LLC*, 152 FERC ¶ 63,025, at P 53 (2015); and *Ameren Ill. Co.*, 169 FERC ¶ 61,147, at P 69 (2019)).

¹³⁸ *Id.* at 40-41.

¹³⁹ *Id.* at 36 (quoting DEP Response, Attach. C, Setser Aff. ¶ 6).

¹⁴⁰ *Id.* at 36-37.

advertising charges are correctly recorded so that they are excluded from customer rates.¹⁴¹ DEP argues that the “Public Affairs” function incurs costs for internal communications, support, and general company administration services, which are exactly the type of costs that are appropriate to include in A&G accounts.¹⁴²

c. NCEMC Answer

57. NCEMC reiterates in its answer that there is insufficient information to demonstrate that DEP has properly recorded public affairs expenses in the correct A&G accounts and that an evidentiary hearing is needed to determine whether the costs are properly included in rates.¹⁴³ For example, NCEMC points out that DEP refers to charging guidelines, but does not provide them nor can NCEMC or the Commission verify that DEP’s implementation of those guidelines is consistent with the USofA. NCEMC argues that DEP conceded that certain costs were improperly included in the 2018 Annual Update and that, at a minimum, the Commission should accept DEP’s agreement to remove these costs from the 2018 Annual Update.¹⁴⁴ NCEMC also argues that a Formal Challenge to the inclusion of items in A&G accounts is not a challenge to the Formula Rate and that NCEMC is objecting to the inclusion of certain blanket categories of costs that without further justification and support appear to be improperly booked to the A&G accounts.¹⁴⁵

d. DEP Answer

58. DEP avers that no factual issues exist regarding DEP’s booking “Public Affairs” expenses to justify an evidentiary hearing; rather, DEP contends that there is ample unrebutted evidence in the record that shows that these expenses are properly included in A&G accounts.¹⁴⁶ DEP argues that NCEMC’s only response was a statement that DEP did not provide the “charging guidelines” referenced in its brief. However, DEP points

¹⁴¹ *Id.* at 37.

¹⁴² *Id.* at 37-38.

¹⁴³ NCEMC Answer at 17.

¹⁴⁴ *Id.* at 18 (citing DEP Response at 34 & n.131).

¹⁴⁵ *Id.*

¹⁴⁶ DEP Answer at 12-13.

out that it included the charging guidelines as an exhibit to its Response to the Formal Challenge.¹⁴⁷

e. NCEMC Second Answer

59. NCEMC reiterates that the information DEP provided in discovery with respect to public affairs expenses is insufficient for NCEMC or the Commission to verify that these costs were properly recorded in accounts that are included in transmission rates and, therefore, a hearing is needed.¹⁴⁸

f. DEP Second Answer

60. DEP argues that Opinion 554-A, issued after this Formal Challenge proceeding began, shows that NCEMC's argument for the exclusion of the "Public Affairs" category has no basis. DEP asserts that Opinion 554-A limited what is includable in Account 426.4 to what is in the text of that account and that the Commission concluded that costs related to general promotional efforts and public outreach are not of the type specifically listed in Account 426.4, and thus do not belong in that Account.¹⁴⁹ DEP avers that the "Public Affairs" costs at issue do not fall into either Account 426.4 category and instead include costs to disseminate information to customers, employees, and government officials; real estate support and event management support; public information social media costs; news subscription costs; costs related to articles and museums; chamber of commerce dues; and research service costs.¹⁵⁰

g. Commission Determination

61. With the exception of those costs that DEP has identified as not being properly recorded in A&G accounts, we find that DEP reasonably applied the terms of the Formula Rate and DEP Protocol by including in its 2018 Annual Update the public affairs costs at issue and therefore deny the Formal Challenge for these costs. The description of Account 426.4 in the USofA is as follows:

This account shall include expenditures for the purpose of influencing public opinion with respect to the election or

¹⁴⁷ *Id.* at 13 (citing DEP Response, Attach. C, Ex. JS-2).

¹⁴⁸ NCEMC Second Answer at 3-4.

¹⁴⁹ DEP Second Answer at 3-4 (citing Opinion No. 554-A, 170 FERC ¶ 61,050 at PP 79, 84-86).

¹⁵⁰ *Id.* at 4.

appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.¹⁵¹

62. The Commission has provided limited guidance regarding what is and is not properly included in Account 426.4. Order No. 276 provides a non-exhaustive list as to which types of expenses should generally be placed in Account 426.4 or an operating expense account.¹⁵² For example, Order No. 276 states that “[a]dvertising in various mass communication media to influence the election or appointment of public officers or proposed legislation at Federal, state, and local levels,” “[l]etters or inserts in customers’ bills or in reports to stockholders to influence the opinion of recipients as to the election or appointments of public officers or pending legislation,” and “[p]ayments for lobbying or other fees to persons or organizations including law firms, service companies, or other affiliated interests, for influencing the passage or defeat of pending legislative proposals or influencing official decisions of public officers” are all categories of expenses that should be recorded to Account 426.4.¹⁵³ On the other hand, Order No. 276 states that “[r]easonable expenditures for promotional and ‘good will’ advertising,” “[c]osts of appearances before [the Commission] or other Federal and State regulatory agencies in various regulatory proceedings,” and “[c]osts of submitting comments on this proceeding or other regulatory proceedings” are categories of expenses that should be recorded in operating expense accounts.¹⁵⁴

63. We find that DEP’s expenses relating to news subscription services (to allow DEP to keep abreast of relevant developments), research services (to provide relevant research

¹⁵¹ 18 C.F.R. Pt. 101, Account 426.4, Expenditures for Certain Civic, Political and Related Activities (2019).

¹⁵² *Expenditures for Political Purposes - Amendment of Account 426, Other Income Deductions, Uniform System of Accounts, and Report Forms Prescribed for Electric Utilities and Licensees and Natural Gas Companies - FPC Forms Nos. 1 and 2*, Order No. 276, 30 FPC 1539 (1963), *order on reh'g*, 31 FPC 411 (1964).

¹⁵³ *Id.* at 1542.

¹⁵⁴ *Id.* at 1542-43.

on industry developments), costs for informing the public of relevant developments (e.g., storm issues and business announcements), and brand journalism article costs (to allow for the enterprise to communicate with stakeholders, both external and internal, in a similar manner that a media outlet would) are not of the kind that should be recorded in Account 426.4. While NCEMC cites Opinion No. 554, the Commission reversed its findings and allowed the public utility to include costs, such as consultant costs incurred to directly influence public officials on matters not contemplated in the text to Account 426.4, and costs to indirectly influence public officials in Account 923.¹⁵⁵ We find that DEP has demonstrated that the expenses DEP has recorded in Accounts 920, 921, 923, or others are not appropriately includible in Account 426.4, or other accounts of Account 426, and we thus deny the Formal Challenge with respect to this issue.

6. Marketing and Customer Relations Expenses

a. Formal Challenge

64. NCEMC argues that DEP has inappropriately included \$2,227,920 of “Marketing and Customer Relations” related expenses in A&G expense accounts. NCEMC argues that the Commission should direct DEP to remove these expenses from Accounts 920, 921, 923, and 926,¹⁵⁶ record them instead in the proper FERC Accounts 907 through 916,¹⁵⁷ consistent with the USofA instructions, and remove them from transmission rates for the 2018 Rate Year. NCEMC claims that doing so would result in approximately a \$9,200 rate reduction for NCEMC.¹⁵⁸

65. NCEMC contends that these expenses should have been recorded in Accounts 907 through 916, as these are the proper accounts for customer relations and marketing (sales)

¹⁵⁵ Opinion No. 554-A, 170 FERC ¶ 61,050 at P 79.

¹⁵⁶ The titles of the listed accounts are as follows: Account 920, Administrative and General Salaries; Account 921, Office Supplies and Expenses; Account 923, Outside Services Employed; and Account 926, Employee Pensions and Benefits.

¹⁵⁷ The titles of the listed accounts are as follows: Account 907, Supervision (Major Only); Account 908, Customer Assistance Expenses (Major Only); Account 909, Informational and Instructional Advertising Expenses (Major Only); Account 910, Miscellaneous Customer Service and Informational Expenses (Major Only); Account 911, Supervision (Major Only); Account 912, Demonstrating and Selling Expenses (Major Only); Account 913, Advertising Expenses (Major Only); Account 916, Miscellaneous Sales Expenses (Major Only).

¹⁵⁸ Formal Challenge at 17.

related activities.¹⁵⁹ According to NCEMC, DEP's describes these expenses as including "approximately \$600[,000] of charges to Grid Solution projects," "\$45[,000] of Piedmont [Costs to Achieve] projects," "approximately \$200[,000] of miscellaneous I/T support charges, \$350[,000] of general staff charges and \$175[,000] of [Financial Planning & Analysis] Finance support charges."¹⁶⁰ NCEMC argues that DEP's failure to abide by the instructions in the USofA amounts to a violation of the DEP Protocol, as well as the Commission's accounting regulations.¹⁶¹

b. DEP Response

66. DEP counters NCEMC, arguing that the challenged costs are A&G costs that are appropriately included in the 2018 Annual Update. DEP acknowledges a small number of "general staff" charges that should have been put in a customer account and commits to correct those upon settlement of the 2018 Annual Update.¹⁶² Other than those, DEP contends that NCEMC argues that all costs titled "Marketing and Customer Relations" must be excluded from DEP's transmission rates. However, DEP responds, if this were true, there would be a stated exclusion for these costs in the Formula Rate, which there is not. DEP asserts that if NCEMC would like to change the way A&G costs are captured by the Formula Rate, it must file a section 206 complaint to justify a change in the rate.¹⁶³

67. DEP disputes NCEMC's statement that it has no "evidence" with which to assess whether these are appropriate A&G costs, pointing to the line-by-line journal entries that DEP provided to NCEMC.¹⁶⁴ DEP notes that NCEMC did not ask any discovery questions regarding the correctness of the "Marketing and Customer Relations" inputs, nor did it raise this issue in its Preliminary Challenge.¹⁶⁵ DEP explains that the "Marketing and Customer Relations" function includes many organizations, such as "Customer Contact Operations, Revenue Services, Large Account Management, Small and Medium Business and Meter Services," which have costs that are charged to both customer accounts (e.g., Accounts 907-916), as well as the 900-series of A&G

¹⁵⁹ *Id.* at 16.

¹⁶⁰ *Id.* at 16-17.

¹⁶¹ *Id.*

¹⁶² DEP Response at 46 & n.180.

¹⁶³ *Id.* at 47.

¹⁶⁴ *Id.* at 42, Attach. B.

¹⁶⁵ *Id.* at 42.

accounts.¹⁶⁶ According to DEP, where they are charged depends on what function is being performed. For example, DEP explains that “Marketing and Customer Relations” costs include costs for support from other groups, for items like A&G salaries, employee pensions and benefits, and even office expenses, which are appropriately included in A&G accounts.¹⁶⁷ Like for “Public Affairs,” DEP notes that it has a charging guideline process to ensure proper recording of costs and exclusion of lobbying and advertising charges.¹⁶⁸ According to DEP, the USofA and Commission precedent show that Accounts 907-916 are inapplicable because those accounts are for expenses that relate to a utility’s customer relations in the distribution of electric power, not to expenses such as these that are unrelated to sales functions.¹⁶⁹

68. With regard to the specific items NCEMC identifies, DEP contends that Duke’s workers use the Grid Solutions projects that NCEMC questions for salaries and other general expenses, which are appropriately included in A&G accounts. In addition, DEP asserts that the majority of the “general staff” charges that NCEMC questions are actually charges for support to the work that Grid Solutions performs that cannot be functionalized (such as training and safety costs).¹⁷⁰ Similarly, DEP explains that the Financial Planning & Analysis costs are related to costs for personnel who are responsible for enterprise financial forecasting and budgeting, and strategic and business support for operating units and corporate departments.¹⁷¹ Finally, DEP asserts that the IT and Piedmont Merger-related costs are not for customer-facing charges, but involve costs for IT support that impact the Duke enterprise, or relate to training for internal employees.¹⁷²

¹⁶⁶ *Id.* at 43.

¹⁶⁷ *Id.* at 43-44.

¹⁶⁸ *Id.* at 44.

¹⁶⁹ *Id.* at 44-45 (citing *Ameren Ill. Co.*, 169 FERC ¶ 61,147 at P 61; *Middle S. Energy*, 26 FERC ¶ 63,044, at 65,143 (1984); and *Mo. River Energy Servs.*, 130 FERC ¶ 63,014 (2020)).

¹⁷⁰ *Id.* at 45-46.

¹⁷¹ *Id.* at 46.

¹⁷² *Id.*

c. NCEMC Answer

69. NCEMC reiterates in its answer that there is insufficient information to demonstrate that DEP has properly recorded marketing and customer relations expenses in the correct A&G accounts and that an evidentiary hearing is needed to determine whether the costs are properly included in rates.¹⁷³ For example, NCEMC points out that DEP refers to charging guidelines, but does not provide them nor can NCEMC or the Commission verify that DEP's implementation of those guidelines is consistent with the USofA. NCEMC argues that DEP conceded that certain costs were improperly included in the 2018 Annual Update and that, at a minimum, the Commission should accept DEP's agreement to remove these costs from the 2018 Annual Update.¹⁷⁴ NCEMC also argues that a Formal Challenge to the inclusion of items in A&G accounts is not a challenge to the Formula Rate and that NCEMC is objecting to the inclusion of certain blanket categories of costs that without further justification and support appear to be improperly booked to the A&G accounts.¹⁷⁵

d. DEP Answer

70. DEP avers that no factual issues exist regarding DEP's booking "Marketing and Customer Relations" expenses to justify an evidentiary hearing; rather, DEP contends that there is ample unrebutted evidence in the record that shows that these expenses are properly included in A&G accounts.¹⁷⁶ DEP argues that NCEMC's only response was a statement that DEP did not provide the "charging guidelines" referenced in its brief. However, DEP points out that it included the charging guidelines as an exhibit to its Response to the Formal Challenge.¹⁷⁷

e. NCEMC Second Answer

71. NCEMC reiterates that the information DEP provided in discovery with respect to marketing and customer relations expenses is insufficient for NCEMC or the

¹⁷³ NCEMC Answer at 17.

¹⁷⁴ *Id.* at 18 (citing DEP Response at 34 & n.131).

¹⁷⁵ *Id.*

¹⁷⁶ DEP Answer at 12-13.

¹⁷⁷ *Id.* at 13 (citing DEP Response, Attach. C, Ex. JS-2).

Commission to verify that these costs were properly recorded in accounts that are included in transmission rates and, therefore, a hearing is needed.¹⁷⁸

f. DEP Second Answer

72. DEP argues that NCEMC pivots from its initial argument that *all* “Marketing and Customer Relations” costs should be excluded from A&G accounts in a blanket manner, and now says that the “heart of the dispute” is whether DEP’s charging instructions to its employees are “substantive” enough. DEP avers that first, the Commission should not entertain this new argument, raised for the first time in NCEMC’s third pleading in this proceeding and second, there is no basis for NCEMC’s claim that DEP’s internal charging guidelines are insufficient.¹⁷⁹

g. Commission Determination

73. Except for the amounts identified as “Customer Services Support Staff,” which DEP has committed to remove,¹⁸⁰ we find that DEP reasonably applied the terms of the Formula Rate and DEP Protocol by including in its 2018 Annual Update the “Marketing and Customer Relations” costs at issue and therefore deny the Formal Challenge for these costs. We find that DEP has provided sufficient detailed explanations for each expense category such that we can determine that these expenses are not of a type includible in Accounts 907-916 and are general in nature and appropriately recorded in general A&G accounts.

The Commission orders:

The Formal Challenge is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁷⁸ NCEMC Second Answer at 3-4.

¹⁷⁹ DEP Second Answer at 5.

¹⁸⁰ DEP Response, Attach. C, Setser Aff. ¶¶ 21, 25.