

172 FERC ¶ 61,048
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Potomac-Appalachian Transmission Highline, LLC
PJM Interconnection, L.L.C.

Docket Nos. ER09-1256-006
ER12-2708-008

OPINION NO. 554-B
ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued July 16, 2020)

1. On January 19, 2017, the Commission issued Opinion No. 554¹ addressing an Initial Decision² ruling on disputes relating to a project, developed by Potomac-Appalachian Transmission Highline, LLC (PATH), that was ordered and later cancelled by PJM Interconnection, L.L.C. (PJM), known as the Potomac-Appalachian Transmission Highline Project (PATH Project). On January 24, 2020, the Commission issued Opinion No. 554-A,³ which denied in part and granted in part PATH's request for rehearing of Opinion No. 554.

2. In this order, we address a timely request for rehearing of Opinion No. 554-A filed on February 24, 2020 by two *pro se* petitioners who have been involved throughout the proceedings, Keryn Newman and Alison Haverty (Petitioners). Petitioners present several arguments as to why the Commission erred in Opinion No. 554-A by allowing PATH to recover the cost of certain expenditures made in promoting the PATH Project to

¹ *Potomac-Appalachian Transmission Highline, LLC*, Opinion No. 554, 158 FERC ¶ 61,050 (2017).

² *Potomac-Appalachian Transmission Highline, LLC*, Initial Decision, 152 FERC ¶ 63,025 (2015) (Initial Decision).

³ *Potomac-Appalachian Transmission Highline, LLC*, Opinion No. 554-A, 170 FERC ¶ 61,050 (2020).

local governments and stakeholders. Pursuant to *Allegheny Defense Project v. FERC*,⁴ the rehearing requests filed in this proceeding may be deemed denied by operation of law. As permitted by section 313(a) of the Federal Power Act (FPA),⁵ however, we are modifying the discussion in Opinion No. 554-A and continue to reach the same result in this proceeding, as discussed below.⁶

I. Background

3. The full history of the PATH Project is detailed in Opinion No. 554. The PATH Project was to be a 275-mile, 765 kV line from Amos Substation in West Virginia through Virginia to a new Kemptown Substation in Maryland. Before abandonment, PATH filed applications for certificates of public convenience and necessity (CPCN) in Maryland, Virginia, and West Virginia.⁷ To support these CPCN applications, PATH contracted with various companies to conduct advocacy activities to influence public officials, trade groups, and other stakeholders in support of PATH's licensing process. As explained below, PATH also spent funds to "[p]roactively communicate project benefits..., [s]olicit third party endorsements..., [m]itigate opposition by community officials,"⁸ and assist with "Government Relations."⁹ PATH collects funds from PJM members under two transmission formula rates (Formula Rates) that were developed and later revised through settlement negotiations.¹⁰ The Formula Rates are organized by the

⁴ *Allegheny Defense Project v. FERC*, No. 17-1098 (D.C. Cir. June 30, 2020).

⁵ 16 U.S.C. § 825l(a) (2018) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

⁶ *Allegheny Defense Project*, slip op. at 30. The Commission is not changing the outcome of Opinion No. 554-A. See *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁷ See, e.g., Opinion No. 554, 158 FERC ¶ 61,050 at PP 2-3, 102; PATH Rehearing Request at 10-13.

⁸ Ex. S-2 at 19.

⁹ *Id.* at 20-21.

¹⁰ See *Potomac-Appalachian Transmission Highline, LLC*, 122 FERC ¶ 61,188, at P 3 (2008), *on reh'g*, 133 FERC ¶ 61,152 (2010) (granting rehearing, setting the base ROE of 12.3% for hearing and settlement judge procedures, and approving the 2009 settlement agreement filed by PATH and several parties resolving Formula Rate issues,

Commission's Uniform System of Accounts (USofA). If a given expenditure fits into one of the USofA accounts that is listed in the Formula Rates, then it is eligible for recovery; if the expenditure instead fits into one of the USofA accounts that is not listed in the Formula Rates, then it is not eligible for recovery. Using the Formula Rate Protocols,¹¹ Petitioners had challenged PATH's proposal to recover these advocacy and advertising expenditures.

4. Opinion No. 554 found that PATH's Formula Rates did not permit recovery of the disputed expenditures for the purpose of influencing public opinion, because they are properly recorded in Account 426.4 (Expenditures for Certain Civic, Political and Related Activities).¹² Opinion No. 554 then found that PATH improperly shifted such expenditures to accounts that were in PATH's Formula Rates, namely, Account 101 (Electric Plant in Service), Account 105 (Electric Plant Held for Future Use), Account 107 (Construction Work in Progress), Account 923 (Outside Services Employed), Account 930.1 (General Advertising Expenses), and Account 930.2 (Miscellaneous General Expenses).¹³ Further, Opinion No. 554 ruled that a separate clause in the Formula Rates limits PATH's recovery of Account 930.1 (General Advertising) costs to only those that are "Safety Related Advertising, Education and Out Reach [sic] Cost Support."¹⁴

5. In a February 21, 2017 request for rehearing from Opinion No. 554, PATH argued that the Commission erred in re-classifying these expenditures into either Account 426.4, or into the unrecoverable subset of Account 930.1. In Opinion No. 554-A, the Commission reversed, and ruled that the disputed advocacy expenditures in Account 426.4 should be placed into Account 923, and are thus recoverable,¹⁵ and

as set forth in Attachments H-19, H-19-A, and H-19-B of the PJM Open Access Transmission Tariff).

¹¹ PJM Open Access Transmission Tariff, Attachment H-19 – Potomac-Appalachian Transmission Highline, LLC, 2.0.0 (Protocols).

¹² See Opinion No. 554, 158 FERC ¶ 61,050 at PP 48-49, 54-55.

¹³ See, e.g., *id.* PP 62, 75, 81-83.

¹⁴ *Id.* P 63 (citing PJM Open Access Transmission Tariff, Attachment H-19A at PATH-WV Attachment 4 and PATH-AYE Attachment 4).

¹⁵ Opinion No. 554-A, 170 FERC ¶ 61,050 at PP 79-88.

that the disputed advertising costs in the unrecoverable subset of Account 930.1 should be shifted to the recoverable subset of Account 930.1.¹⁶

II. Filing and Responsive Pleadings

6. Petitioners seek rehearing of the Commission's reversal on Account 426.4 and Account 930.1 expenditures. As detailed below, Petitioners raise numerous distinct arguments, which we organize into process arguments, accounting arguments, and policy arguments, and consider in turn below in the discussion sections.

7. On March 10, 2020, PATH submitted a limited answer, addressing what it considers to be factual inaccuracies in Petitioners' request for rehearing. PATH argues that in the past, the Commission has held that Rule 213 of the Commission's Rules of Practice and Procedure¹⁷ allows the Commission to accept answers to rehearing requests that assist the Commission's understanding and resolution of the issues raised or that ensure a complete record.¹⁸ Rule 713(d) of the Commission's Rules of Practice and Procedure¹⁹ prohibits an answer to a request for rehearing. Accordingly, we deny PATH's motion to answer and reject PATH's answer to Petitioners' rehearing request.

III. Process Arguments

A. Rehearing Request

8. Petitioners state that under Rule 713 of the Commission's Rules of Practice and Procedure, the Commission must act on a request for rehearing within 30 days after the request is filed, otherwise the request is denied by operation of law.²⁰ Petitioners assert that the Commission failed to timely act on PATH's request for rehearing of Opinion No. 554-A, and thus the request actually was automatically denied by operation of law.²¹

9. Petitioners further explain that on February 3, 2017, the Commission issued an Order Delegating Further Authority To Staff In Absence of Quorum (Delegation Order),

¹⁶ *Id.* PP 98-101.

¹⁷ 18 C.F.R. § 385.213 (2019).

¹⁸ PATH March 10, 2020 Answer at 2.

¹⁹ 18 C.F.R. § 385.713(d) (1) (2019).

²⁰ Petitioners Request for Rehearing at 11 (citing 18 C.F.R. § 385.713(f); 16 U.S.C. § 825l(a) (2018)).

²¹ *Id.* at 11-12.

which delegated the Commission's authority to toll time for action on requests for rehearing to the Secretary.²² On February 21, 2017, PATH filed a request for rehearing of Opinion No. 554. On March 22, 2017, the Secretary granted PATH's request for rehearing for further consideration. Subsequently, Petitioners state that on August 24, 2017, the Secretary terminated her authority upon restoration of the Commission's quorum.²³ Petitioners assert that the Secretary's authority to toll PATH's request for rehearing ended when the Commission established a quorum; accordingly, the Commission was obligated to act on PATH's request for rehearing in 30 days.²⁴ Petitioners state that the Commission took no action until it issued Opinion No. 554-A, three years after PATH filed a request for rehearing of Opinion No. 554.²⁵ Thus, they conclude, PATH's request for rehearing was denied by operation of law.²⁶

B. Commission Determination

10. We find moot Petitioners' assertion that PATH's February 21, 2017 request for rehearing was denied by operation of law. The Commission addressed PATH's request for rehearing by modifying Opinion No. 554.²⁷ We note that the Commission's action in Opinion No. 554-A is consistent with FPA section 313(a),²⁸ which permits the Commission to modify or set aside any finding or order until the record in a proceeding is filed in a court of appeals.

11. Petitioners also argue that the Commission's delay in acting on PATH's request for rehearing of Opinion No. 554-A financially harmed ratepayers.²⁹ The Commission's corrections date back to 2008 only because the instant proceeding dates back to a dispute over PATH's expenses in 2008. While Petitioners allege financial harm from the delay in the Commission's acting on PATH's request for hearing, the only harm asserted is the

²² *Agency Operations in the Absence of a Quorum*, 158 FERC ¶ 61,135 (2017) (Delegation Order).

²³ Petitioners Request for Rehearing at 12.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Opinion No. 554-A, 170 FERC ¶ 61,050.

²⁸ 16 U.S.C. § 825l(a) (2018).

²⁹ Petitioners Request for Rehearing at 12-13.

time and cost PATH expended in calculating and issuing refunds. That limited harm is inherent in any situation in which the Commission grants rehearing. The Commission has broad remedial authority to correct its own legal error,³⁰ including acting on rehearing. Similarly, to the extent that Petitioners argue that the Commission's actions here constitute retroactive ratemaking, we reject that argument as without merit.

IV. Accounting Arguments

A. Interpretation of Account 923 and Account 426.4

1. Rehearing Request

12. Petitioners argue that Opinion No. 554-A misinterprets and misapplies the plain language of Account 426.4. Account 426.4 (Expenditures for Certain Civic, Political and Related Activities) reads in its entirety:

This account shall include expenditures for the purpose of influencing public opinion with respect to the election or 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.³¹

Petitioners, adopting the framework used in Opinion No. 554-A, refer to the text before the semicolon as the first clause; the middle phrase "or for the purpose of influencing the decisions of public officials," as the second clause; and the closing "but shall" exception as the third clause.³²

³⁰ *PJM Interconnection, L.L.C.*, 168 FERC ¶ 61,133, at P 29 (2019) (citing *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 954-55 (D.C. Cir. 2016)).

³¹ 18 C.F.R. pt. 101, Account 426.4 (2020).

³² We consider Petitioners' arguments about the evidentiary record in a separate section below.

13. Regarding the first clause, Petitioners argue that PATH's CPCN applications fall under the rubric of "franchise." Petitioners note that the common definitions of CPCN and franchise strongly overlap. Petitioners argue that a CPCN is "a permit to operate a facility within a particular area," and that a franchise is a permit "to carry out specified commercial activities," and conclude that a CPCN is logically a "type of franchise."³³ Petitioners argue that Account 426.4 should be interpreted using the ordinary meanings of these words, and that since Account 426.4 "does not specify what types of franchises it covers," it should be read to cover all types of franchises, including PATH's CPCN applications.³⁴

14. Regarding the second clause, Petitioners argue that the Commission implicitly read in additional restrictions that the plain language does not contain. Petitioners note that Opinion No. 554-A stated that expenditures that "have an *indirect* effect of influencing the decisions of public officials," are not covered by the second clause.³⁵ Petitioners contrast this with the text of Account 426.4, which does not contain modifiers such as "direct" at all. Petitioners argue that courts consider an agency's interpretation of a regulation to be not entitled to deference when it is inconsistent with the plain language of the regulation, and erroneous when it imposes additional qualifiers that are not written in the regulations.³⁶ Petitioners conclude that Opinion No. 554-A erred in reading Account 426.4 so restrictively.

15. Also regarding the second clause, Petitioners argue that the Commission implicitly read a different, additional restriction into the plain language, when it held that "PATH's efforts [] in service of an RTO-approved project," would not fall under Account 426.4.³⁷ Petitioners argue that the plain language of the regulation does not support such an exclusion. Petitioners argue that government regulations are "useless and ineffective if they can be re-interpreted to invent new, unstated exclusions ... not within the plain

³³ Petitioners Request for Rehearing at 24.

³⁴ *Id.*

³⁵ *Id.* (emphasis added by Petitioners) (quoting Opinion No. 554-A, 170 FERC ¶ 61,050 at PP 85).

³⁶ *Id.* at 25 (citing *Univ. of Cincinnati v. Bowen*, 875 F.2d 1207 (6th Cir. 1989) and *Shalala v. St. Paul-Ramsey Med. Ctr.*, 50 F.3d 522 (8th Cir. 1995)).

³⁷ *Id.* (quoting Opinion No. 554-A, 170 FERC ¶ 61,050 at P 84).

language.”³⁸ Further, Petitioners argue that the Commission should distinguish between the project itself, which PJM and the Commission approved, and the advocacy expenditures on behalf of the project, which were not approved or reviewed by PJM or the Commission.

16. Relatedly, Petitioners argue that Opinion No. 554-A erred in its analysis of the order establishing Account 426.4, Order No. 276.³⁹ Petitioners argue that Order No. 276’s table listing examples of potential Account 426.4 expenses “exactly describe PATH’s ... activities at issue,” by listing advertising in mass media to influence either public opinion or officials, and by listing payments to law firms or advocacy organizations for the purpose of influencing the decisions of public officers.⁴⁰ Petitioners also argue that Order No. 276 does not allow for the exclusions that Opinion No. 554-A created for indirect influence or RTO-approved projects. Petitioners argue that these exceptions would render the entirety of Order No. 276 moot for projects that have secured RTO approval.

2. Commission Determination

17. In Opinion No. 554-A, the Commission found that under the Commission’s accounting system, PATH could legitimately book the expenses in question to Account 923. Account 923 covers “the fees and expenses of professional consultants and others for general services.” This description covers the expenses that PATH booked to this account. However, Account 923 also states amounts should only be included in this account if those amounts are “not applicable to a particular operating function or to other accounts.”⁴¹ The Commission agreed with PATH that under the circumstances of this case, Account 426.4 did not clearly apply to these amounts such that booking the cost to Account 923 did not violate the Commission’s accounting regulations.

³⁸ *Id.* at 28 & n.83 (citing *Chase Bank USA v. McCoy*, 131 S. Ct. 871, 882 (2011) (When the “regulation in question [is] unambiguous, ... adopting the agency’s contrary interpretation would permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.”))

³⁹ *Expenditures for Political Purposes — Amendment of Account 426, Other Income Deductions, Unif. Sys. of Accounts, & Report Forms Prescribed for Elec. Util’s & Licensees & Nat. Gas Companies — FPC Forms Nos. 1 & 2*, Order No. 276, 30 FPC 1539 (1963) (Order No. 276), *order on reh’g*, Order No. 276-A, 31 FPC 411 (1964).

⁴⁰ Petitioners Request for Rehearing at 30-31.

⁴¹ 18 C.F.R. pt. 101, Account 923.

18. Petitioners contend that these amounts must be booked to Account 426.4, and we reject that analysis. We first address Petitioners' arguments regarding the first clause of Account 426.4 relating to attempts to influence public opinion relating to approval of a franchise. We then address the second clause relating to attempts to influence public officials. Finally, we address arguments relating to both clauses.

a. Clause 1: Influencing Public Opinion for Approval of a Franchise

19. In Opinion No. 554-A, the Commission reconsidered its determination that seeking a certificate of public convenience and necessity for a transmission project is a “specific political action[]” that “fall[s] within the ambit of referenda, legislation, ordinances, the grant of franchise and the like.”⁴² The Commission concluded that the first clause should not be interpreted so broadly as to equate PATH's actions with efforts to enlist the public to support a franchise: unlike the obtaining of a franchise which entitles the franchisee to begin operations, “PATH's efforts ... do not ‘fall within the ambit of ... grant of franchise and the like,’ because PATH's efforts were in service of an RTO-approved project.”⁴³ In other words, the argument that a CPCN qualifies as a ‘franchise’ under Account 426.4 misses a key distinction between a ‘franchise’ and a non-franchise application. PATH's disputed expenditures sought to obtain a CPCN for a project already approved by PJM as being necessary for the reliability of the electricity grid. It is precisely that added step that distinguishes a franchise application – in which the utility competes for a potentially lucrative status for itself – from an application in service of an RTO-approved project – in which the utility represents not only its own interests but those of the RTO as a whole.⁴⁴

20. The distinction for RTO-approved projects does not ignore the regulatory text, but rather draws a line separating projects that have been independently found necessary for

⁴² Opinion No. 554, 158 FERC ¶ 61,050 at P 52.

⁴³ Opinion No. 554-A, 170 FERC ¶ 61,050 at P 84 (quoting Opinion No. 554, 158 FERC ¶ 61,050 at P 52). *See, e.g., Alaskan Nw. Nat. Gas Transportation Co.*, 19 FERC ¶ 6,1218, at 61,429 (1982) (“Expenditures incurred to influence the opinion of the public during the selection process have little or no benefit to the ratepayers, and therefore must be borne by stockholders. Just and reasonable expenditures incurred to keep the general public informed on the progress of the project and other public relations activities are proper expenses to be borne by ratepayers after operations commence.”).

⁴⁴ While PATH also had to secure a franchise in two states, those costs were in furtherance of the construction of a project approved by PJM as being necessary for the reliability of the grid. That is not similar to a situation in which the utility competes for a franchise.

reliability from applications for franchises that is in the utility's private, but not necessarily, the public interest.⁴⁵ RTO involvement is relevant because Account 426.4 is intended to include nonoperating expenditures that serve the utility's private interest in obtaining a franchise, rather than operating expenditures in the public interest. Because the RTO works in the interest of its market participants and the region as a whole, a CPCN application for an RTO-approved project such as the PATH Project is fundamentally different from a "franchise" application or any of the other defining terms in Account 426.4.

b. Clause 2: Influencing Public Officials

21. Regarding the second clause, the Commission found on the record in both Opinion Nos. 554 and 554-A that while PATH's expenditures may have sought indirectly to influence public officials ruling on its CPCN, these efforts were not directly related to influencing public officials.⁴⁶ Opinion No. 554-A determined that the Commission would not apply the second clause of Account 426.4 "to otherwise legitimate promotional expenditures for an RTO-approved project simply because such costs have an indirect effect of influencing the decisions of public officials."⁴⁷ Again, we find that the fact that the PATH Project has been approved by an RTO is a determinative factor because it motivates PATH's actions. In addition, however, the Commission interprets the individual accounts in the USofA not in isolation, but in relation to each other and in consideration of the definitions and instructions to the USofA. Where the Commission finds on the record that a certain expenditure is only indirectly related to a given USofA account, it may be the case that a different USofA account is more appropriate for the

⁴⁵ For example, in some cases multiple applicants may compete for a lucrative franchise whereas here only PATH is authorized to construct this project. While because of PATH's joint ownership, it did need to seek a franchise in certain states, obtaining the franchise was not PATH's objective; the franchise was incidental to PATH's primary objective of obtaining the public convenience and necessity determination necessary to construct this project. While we reversed the Presiding Judge for the reasons discussed above, we note that he too did not treat PATH's franchise applications as distinct from its primary objective of obtaining approvals for a project PJM determined was needed for reliability.

⁴⁶ Opinion No. 554-A, 170 FERC ¶ 61,050 at P 85.

⁴⁷ *Id.* P 85. As Opinion No. 554 noted, PATH admitted that "Access Point contacted public officials directly," and the record showed that PATH paid Larry Puccio to conduct direct lobbying. Opinion No. 554, 158 FERC ¶ 61,050 at PP 56, 52. However, on rehearing, PATH did not seek recovery for these direct efforts to influence public officials. PATH February 21, 2017 Request for Rehearing, Docket No. ER09-1256-004 (February 2017 PATH Rehearing Request), at n.7.

expenditures. In this case, we continue to uphold Opinion No. 554-A's conclusion that Account 923 is a more appropriate account, both for the expenditures that PATH originally placed in that account,⁴⁸ and also for the expenditures that the Commission found PATH had erroneously recorded as abandoned plant.⁴⁹

22. In Opinion No. 554-A, the Commission cited to *Northeast Utilities Service Co.*⁵⁰ for the proposition that: "With respect to expenses incurred for recovery of public education and outreach expenses, we generally allow recovery in wholesale transmission rates of expenses to educate the public on matters of reliability and quality of service resulting from the construction of grid upgrades."⁵¹ Petitioners argue that Opinion No. 554-A erroneously relied upon *Northeast Utilities Service Co.* Petitioners, while noting that neither Opinion No. 554 nor PATH's filings had previously referenced the case, argue that *Northeast Utilities Service Co.* is inapposite to PATH, as *Northeast Utilities Service Co.* involved whether certain expenses were recoverable, whereas PATH's proceeding involves which USofA account should be used for certain expenses, the recoverability of which is already determined by PATH's Formula Rate. Furthermore, Petitioners argue, the disputed expenditures in *Northeast Utilities Service Co.* were the sort of expenditures that the Petitioners expressly did not challenge in PATH, such as PATH's public open house meetings and informational brochures. Petitioners argue that, instead, they challenged expenses that went beyond anything discussed in *Northeast Utilities Service Co.*, such as private efforts to influence state government officials.⁵²

23. The Commission made a single reference to *Northeast Utilities Service Co.*, not to rely upon it as controlling, but because *Northeast Utilities Service Co.* provided a particularly apt summary of the Commission's policy on the recoverability of public outreach expenses. It is true that the fact pattern in *Northeast Utilities Service Co.* may not be identical to the fact pattern presented in the instant proceeding. However, even if we were to delete the reference to *Northeast Utilities Service Co.* from paragraph 85 of Opinion No. 554-A, the general point remains valid: the Commission considers the question of recoverability, not the question of accounting determinations, to be

⁴⁸ *Id.* P 82.

⁴⁹ *Id.* P 88.

⁵⁰ *Ne. Utils. Serv. Co.*, 105 FERC ¶ 61,089, *order on reh'g*, 111 FERC ¶ 61,333.

⁵¹ Opinion No. 554-A, 170 FERC ¶ 61,050 at P 85.

⁵² Petitioners Request for Rehearing at 34-35.

controlling.⁵³ It is not reasonable to read Account 426.4 to produce ratemaking results – such as restrictions on the ability to recover a utility’s costs to advocate for an RTO-approved project – that would run counter to Commission policy on transmission development, where the account in question does not clearly apply to the expenditure.

c. Arguments Concerning Both Clauses

24. Petitioners argue that the record evidence shows no need to make any distinction between the first and second clauses of Account 426.4, because “PATH did both” activities that fall under the first and the second clauses – that is, it sought to influence both public opinion and also public officials.⁵⁴ Petitioners argue that PATH paid both to induce public comments in support of its project, and also to make direct contact with decision-making officials.

25. Petitioners argue that the Commission ignored parts of the evidentiary record that did not support its determination. They state that the Commission drew from the same evidentiary record in Opinion No. 554 and Opinion No. 554-A to make two opposing determinations. They state that Opinion No. 554-A “ignored the bulk of the evidence in the record” to only focus on favorable phrases.⁵⁵ Petitioners state the latter opinion only quoted select phrases from Ex. NH-25, which records the minutes of a PATH staff meeting, while showing “willful blindness to certain portions” of the meeting minutes.⁵⁶ Petitioners do not specify what these certain portions are.

26. Petitioners argue that “PATH did both” direct and indirect lobbying. PATH has agreed not to seek recovery for direct contact with decision-making officials, and did not seek rehearing on that issue with respect to the expenses for Access Point and Larry Puccio.⁵⁷ Therefore, we need not rule on this aspect of the Petitioners’ rehearing request. However, for the expenditures that remain in dispute in Opinion No. 554-A and the

⁵³ The Commission has long found that “accounting does not drive ratemaking”. *ITC Holdings Corp.*, 139 FERC ¶ 61,112, at P 52 (2012). *See Kern River Gas Transmission Co.*, 123 FERC ¶ 61,056, at P 30 (2008) (“accounts do not drive ratemaking”).

⁵⁴ Petitioners Request for Rehearing at 28.

⁵⁵ *Id.* at 37.

⁵⁶ *Id.* at 38.

⁵⁷ February 2017 PATH Rehearing Request at n.7 (“The PATH Companies are not seeking rehearing with respect to the challenged expenditures for Larry Puccio and Access Point Public Affairs LLC.”).

instant order, the record does not show that these expenditures were for direct contact with public officials, as Petitioners allege, but merely show attempts to influence the public which may have indirect influence on public officials.

27. We find that the minutes of the PATH staff meeting in Ex. NH-25 show that PATH had been conducting public meetings,⁵⁸ surveying the general public,⁵⁹ and working with influential “businesses, unions, and industry trade groups.”⁶⁰ Petitioners quote a long portion of the minutes as allegedly showing direct contact with public officials. Reviewing the text that Petitioners quote, however, shows only references to indirect forms of influencing officials. We read “worked to recruit supportive speakers for the Virginia public hearings, and meet with Virginia’s Governor,” for example, as not referring to PATH employees or contractors meeting with an elected official, but rather as PATH finding private citizens, who supported PATH for their own interests, to meet with an elected official. Furthermore, there is no showing that an actual meeting took place between the governor and any person paid out of amounts that remain in dispute on rehearing. Petitioners fail to provide specific citations to other portions of Ex. NH-25 – or any other part of the voluminous record – that connect the expenditures that remain in dispute with PATH’s direct contact with public officials.

3. Regulatory Ambiguity and Uncertainty

28. Petitioners argue that, after focusing on the text, its structure, and its regulatory history, the Commission should also interpret Account 426.4 in light of the Commission’s mission statement.⁶¹ Petitioners aver that the Commission’s mission statement is to: “Assist consumers in obtaining economically efficient, safe, reliable, and secure energy services at a reasonable cost through appropriate regulatory and market means, and collaborative efforts.”⁶² Petitioners concede they “could find no on-point cases where the ‘tie goes to the ratepayer,’” but argue that by not siding with ratepayers, “the Commission is not ‘wholly impartial.’”⁶³ Petitioners conclude that under a pro-

⁵⁸ Ex. NH-25 at 2.

⁵⁹ *Id.* at 3.

⁶⁰ *Id.* at 81.

⁶¹ Petitioners Request for Rehearing at 14-15.

⁶² *See id.* at 15; *see also* <https://www.ferc.gov/about/what-ferc> and <https://www.ferc.gov/about/what-ferc/strategic-documents/strategic-plan> (updated to reflect new Commission website).

⁶³ Petitioners Request for Rehearing at 15 (quotation marks in original).

consumer policy, “Opinion No. 554 was the Commission’s actual fair and considered judgment,” and should lead “to reversal of Opinion No. 554-A.”⁶⁴

29. Petitioners note that one of the Commission’s guiding principles states: “In each of the thousands of orders, opinions and reports issued by the Commission each year, the Commission strives to provide regulatory certainty through consistent approaches and actions.”⁶⁵ Petitioners argue that the Commission has introduced a high degree of regulatory uncertainty by reversing its interpretation of Account 426.4.

30. The Commission’s mission statement and guiding principles, while expressing the general goals of the Commission’s regulations, do not substitute for case-by-case adjudication of each case based on the statutes and Commission regulations. In looking at the facts of PATH’s expenditures to obtain authorization to construct a project approved by PJM as necessary for reliability of the interstate electric transmission grid, we do not find that those are political expenditures required to be recorded in Account 426.4.

B. Advertising

1. Background

31. PATH’s Formula Rate contains various references to advertising. Under the Administrative and General Account (A&G), the Formula Rate provides that the amount of A&G is reduced by “EPRI & Reg. Comm. Exp. & Other Ad.” and references Note D. for the calculation of the reduction. Note D states “EPRI Annual Membership Dues listed in Form 1 at 353.f, all Regulatory Commission Expenses itemized at 351.h, except safety, education and out-reach related advertising included in Account 930.1.” The Formula Rate under “Attachment 4 – Cost Support” also includes as a heading “Safety Related Advertising, Education and Out Reach Cost Support” and then includes a column reading “Safety, Education, Siting & Outreach”:⁶⁶

⁶⁴ *Id.* at 16.

⁶⁵ *Id.*, see also <https://www.ferc.gov/about/what-ferc> (updated to reflect new Commission website).

⁶⁶ PJM Open Access Transmission Tariff, Attachment H-19A at PATH-WV Attachment 4 and PATH-AYE Attachment 4.

Attachment 4 - Cost Support
 PATH West Virginia Transmission Company, LLC

Safety Related Advertising, Education and Out Reach Cost Support

Attachment A Line #s, Descriptions, Notes, Form 1 Page #s and Instructions		Form 1 Amount	Safety, Education, Siting & Outreach Related	Other	Details
157	General Advertising Exp Account 930.1				None

32. Opinion No. 554, affirming the Initial Decision, found that PATH had improperly recovered advertising expenses. Opinion No. 554-A reversed that decision on three grounds. First, the Commission held that the disputed advertising expenditures should not have been reclassified into Account 426.4, but rather belonged in Account 930.1 as PATH had originally classified them. Second, the Commission held that the Formula Rate’s references to Account 930.1 should be read as allowing PATH to recover advertising expenses that are related to safety, education, siting, *or* outreach, rather than, as Opinion No. 554 had held, only expenses that are both safety-related and *also* education, siting, or outreach. Third, the Commission found, it was not necessary to rule on whether any of the disputed expenses were for educational purposes, because they all qualified as outreach, and are therefore recoverable.⁶⁷

2. Rehearing Requests

33. Petitioners argue that Opinion No. 554-A misinterpreted the Formula Rate provisions on General Advertising Account 930.1. Petitioners argue that all parties agree PATH’s Formula Rate contains language not found in the text of the Commission’s accounting regulations that permits PATH to recover only certain Account 930.1 expenditures.⁶⁸ Petitioners state that the Account 930.1 “restriction is expressed three slightly different ways in three separate places in PATH’s Formula Rate.”⁶⁹ First, they state, Note D on Page 6 requires PATH to subtract certain expenses, “except safety, education and out-reach related advertising included in Account 930.1.”⁷⁰ Second, they state, in Attachment 4 at Line 157, which refers back to Note D, there is a section heading

⁶⁷ Opinion No. 554-A, 170 FERC ¶ 61,050 at PP 98-101.

⁶⁸ Petitioners Request for Rehearing at 39.

⁶⁹ *Id.*38.

⁷⁰ *Id.* at 39 (quoting PJM Open Access Transmission Tariff, Attachment H-19A at Note D).

which reads, “Safety Related Advertising, Education and Out Reach Cost Support,” followed by text reading “General Advertising Exp Account 930.1.” Third, at the same location, there is a column heading which reads, “Safety, Education, Siting & Outreach Related.”⁷¹ Petitioners argue “Note D should be relied upon as superior to its abbreviation in the section/column headings when determining intent.”⁷² Petitioners note that even Note D “suffer[s] from improper grammar, spelling, and use of language, rendering their interpretation somewhat ambiguous,” as the Commission suggested in both prior orders.⁷³ Petitioners argue that the only reasonable interpretation of any version of this language, however, is that it is meant to restrict the type of Account 930.1 expenditures that are recoverable, and not describe or expand Account 930.1. Petitioners argue that the record shows, however, that PATH simply put the entire balance of Account 930.1 into the Safety, Education, Siting & Outreach column, without sorting its Account 930.1 activities to determine whether they appear in the descriptions provided in Note D, which Petitioners allege is required by Attachment 4.⁷⁴ Petitioners conclude that Opinion No. 554-A was in error for holding that the column heading controls.⁷⁵

34. Petitioners cite Opinion No. 554’s holding that the Formula Rate cannot be interpreted to find that all advertising is educational, or else there would be no purpose to Note D.⁷⁶ Petitioners argue that the same logic should apply to outreach advertising. Petitioners argue that a distinction should be made between factual advertising – giving the example of a notice of an open house event – and persuasive advertising, and that outreach advertising can only be the former. Petitioners argue that, after examining the evidentiary record, in the Initial Decision the Presiding Judge found that the advertising at issue was an effort not to inform but to persuade the public that the PATH was beneficial or needed.⁷⁷ By contrast, Petitioners claim that Opinion No. 554-A defined all of PATH’s advertising as outreach, without establishing a rational connection between that conclusion and the record evidence. Petitioners claim, “PATH never claimed that its

⁷¹ *Id.* (quoting PJM Open Access Transmission Tariff, Attachment H-19A at Attachment 4).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 40 (citing Opinion No. 554, 158 FERC ¶ 61,050 at PP 61, 64 and 68).

⁷⁵ *Id.* (citing Opinion No. 554-A, 170 FERC ¶ 61,050 at P 100).

⁷⁶ *Id.* at 40-41 (citing Opinion No. 554, 158 FERC ¶ 61,050 at P 66),

⁷⁷ *Id.* at 42 (citing Opinion No. 554-A, 170 FERC ¶ 61,050 at P 101).

advertising was of the ‘outreach’ variety, and the Commission makes no reference to the evidentiary record to support its determination that the advertising is now, a dozen years after it aired, suddenly considered ‘outreach.’”⁷⁸

35. Petitioners argue that, by failing to limit or analyze the term “outreach,” Opinion No. 554-A treats Note D as surplusage. Petitioners present evidence that formula rates for other PJM transmission owners contain similar clauses on Account 930.1, and that these other PJM transmission owners have not recovered their entire Account 930.1 advertising balance in their formula rates.⁷⁹ Petitioners argue that PATH, as the outlier, is the one whose formula rate has been erroneously interpreted. Petitioners’ list shows that out of \$104.3 million in expenditures PJM transmission owners incurred from 2008-2020, PJM transmission owners passed through collectively only \$88,574 during this time as safety, education, and outreach in rates.⁸⁰

3. Commission Determination

36. As we stated in Opinion No. 554-A, the issue is whether the restrictions on recovery of advertising should be read to allow recovery only of advertising that is safety-related, or whether they also allow recovery of advertising that involves education, siting, and/or outreach, but not safety. The ambiguity in determining recovery comes from the need to determine meaning from brief headings and clauses.

37. Petitioners rely on the language of Note D, which subtracts from A&G all Regulatory Commission Expenses itemized in FERC Form No. 1 at 351.h, *except safety, education and out-reach related advertising included in Account 930.1*.⁸¹ But this phraseology does not support Petitioners’ position, as it permits recovery of all advertising expenditures related to each of those items. Similarly, as we found in Opinion No. 554-A, the column heading in Attachment 4-Cost Support furthers this conclusion, as it applies to Safety, Education, Siting & Outreach Related costs. The fact that PATH did not proffer an argument about outreach separate from its argument about

⁷⁸ *Id.* at 42.

⁷⁹ *Id.* at Attachment A, Recovery of Advertising in PJM Formula Rates.

⁸⁰ *Id.* at 44 & Attachment A.

⁸¹ PJM Open Access Transmission Tariff, Attachment H-19A at PATH-WV Attachment 4 and PATH-AYE Attachment 4 (emphasis added).

safety or education is not relevant; the Commission is not limited to adopting only tariff interpretations that were proposed by the parties.⁸²

38. The Initial Decision found that much of PATH's advertising expenses were poorly documented, but that the materials that were documented were "clearly promotional in nature and ultimately intended to influence the action of public officials."⁸³ As such, the Initial Decision found these expenses should properly be booked in Account 426.4.⁸⁴ However, as discussed earlier⁸⁵, we find that this was not the correct reading of Account 426.4 when applied to efforts to obtain approval for a project that an independent RTO found necessary for ensuring grid reliability. We similarly find that education and outreach expenditures designed to help secure approval for an RTO-approved project are recoverable expenses that benefit ratepayers by ensuring reliable electric service.

39. Separate from the question of how the Formula Rate limits Account 930.1, Petitioners also argue that the Commission erred in finding that all of PATH's purported advertising costs belong in Account 930.1, and not in Account 426.4. Petitioners state that Note B of Account 930.1 instructs that advertising "designed to solicit public support or the support of public officials in matters of a political nature" belongs in Account 426.4.⁸⁶ Petitioners state that PATH admits that its advertising was for the purpose of soliciting public support and the support of public officials for the PATH project.⁸⁷ Thus, they conclude that under the USofA, the disputed outreach activities belong in Account 426.4, and thus should be excluded from the Formula Rate.

⁸² Similarly, we are neither limited nor persuaded by the actions of other utilities with similar clauses, as the Petitioners do not point us to any cases in which the Commission ruled on or even informed those utilities' actions.

⁸³ Initial Decision, 152 FERC ¶ 63,025 at P 66.

⁸⁴ *Id.*

⁸⁵ *See supra* at PP 19-20.

⁸⁶ Petitioners Request for Rehearing at 44. Note B states: "Exclude from this account and include in account 426.4, Expenditures for Certain Civic, Political and Related Activities, expenses for advertising activities, which are designed to solicit public support or the support of public officials in matters of a political nature." 18 C.F.R. pt. 101, Account 930.1, Note B (2019).

⁸⁷ *Id.* at 45 (citing Tr. 1115:1-2).

40. We find that Note B of Account 930.1 does not expand the definition of Account 426.4, but rather clarifies the intent of Account 426.4. The phrase in Note B of Account 930.1 referring to “matters of a political nature” effectively summarizes Account 426.4; it does not instruct utilities to place additional expenditures in Account 426.4 that would not otherwise have been booked to Account 426.4. For the reasons discussed earlier, Account 426.4 does not require that these costs be placed in that account.

41. Finally, Petitioners argue that Opinion No. 554-A erroneously described PATH’s compliance obligations. Petitioners state that Opinion No. 554-A vacated PATH’s prior compliance filings as part of its reversal, but did so in a way that appears to let PATH “continue to recover the Account 930.1 General Advertising at issue in the Compliance Order without performing the Formula Rate Note D process specifically justifying each item as recoverable under the included portion of Account 930.1.”⁸⁸ Petitioners argue that PATH never sought to modify its Formula Rate to dispose of Note D, so the Commission on rehearing cannot waive that obligation without making “retroactive changes to PATH’s ... rate on file.”⁸⁹ Petitioners conclude that the Commission must clarify that PATH’s Formula Rate still only allows it to recover some, and not all, Account 930.1 expenditures.

42. We do not read Opinion No. 554-A as eliminating PATH’s obligation to ensure that it only recovers Account 930.1 expenditures that are also safety, education, siting, or outreach-related. The rate on file has not been changed, nor did Opinion No. 554-A invite PATH to introduce new expenditures beyond the ones for which it sought rehearing.

V. Policy Arguments

A. State Jurisdiction

43. Petitioners argue that Opinion No. 554-A unduly intrudes into state jurisdiction. They argue that the Commission, by permitting transmission owners to spend an unlimited amount of consumer funds to influence the decisions of state officials, is tainting the integrity of the state regulatory process. Petitioners argue that the record shows PATH sought “to overwhelm its opposition, ‘keep everyone else from joining the debate,’ and provide the ‘political cover’ public officials would need to approve the PATH project.”⁹⁰ Petitioners ask the Commission to contrast this laxity towards state proceedings with the Commission’s desire to conduct its own natural gas pipeline and

⁸⁸ *Id.* at 46.

⁸⁹ *Id.* at 47.

⁹⁰ *Id.* at 18 (quoting Ex. NH-21 at 4).

hydro permit hearings “in the above-board manner citizens expect, and [] not knowingly allow utility-funded poseurs to stack the deck in favor of a project.”⁹¹ Petitioners argue that the proper balance is to maintain a distinction between public information and education, which Opinion No. 554 allowed, and the purchase of advocate actors to influence the decisions of public officials, which Opinion No. 554-A allowed.⁹² Petitioners argue that such a balance would only harm unpopular projects. Petitioners conclude that RTO approval of a project should not give “utilities carte blanche to spend unlimited consumer funds to influence state CPCN decisions.”⁹³

44. We reject the implication that Opinion No. 554-A intrudes upon state jurisdiction. Nothing in the order restricts the ability of state governments to make the full use of their regulatory powers to review or reject proposals such as those that PATH filed. The order ensures that, when a utility engages in advocacy at the state level, it may seek recovery of its expenditures, provided that it meets the requirements of its formula rate.⁹⁴ Furthermore, nothing in Opinion No. 554-A allows utilities to spend without limit or imprudently.

B. Consequences of Opinion No. 554-A

45. Petitioners argue that the Commission erroneously ignored the consequences of Opinion No. 554-A on energy policy outside of the PATH Project. In the future, Petitioners claim, utilities will pass on to consumers hundreds of millions of dollars of new costs from outreach and political activity, now that the utilities are assured that these costs are deemed recoverable in the future. Petitioners also express concern that, if “Account 426.4 is slowly gutted by a series of thoughtless, unwritten exceptions erroneously implied by Commission order,” then perhaps soon will “the other 426 accounts begin their slide into uselessness.”⁹⁵ Petitioners urge the Commission to consider now how its opinion in this narrow proceeding would set other changes in

⁹¹ *Id.* at 19.

⁹² *Id.* at 20.

⁹³ *Id.* at 21.

⁹⁴ While this fact is not controlling, it is worth noting that several state government entities – the Maryland Office of People’s Counsel, Pennsylvania Office of Consumer Advocate, Virginia Office of the Attorney General’s Division of Consumer Counsel, Delaware Division of Public Advocate, Maryland Public Service Commission, and Delaware Public Service Commission – participated actively throughout these proceedings, and did not raise any objections based on state jurisdiction.

⁹⁵ Petitioners Request for Rehearing at 49.

motion, and in particular to consider that, during the three years between Opinion No. 554 and Opinion No. 554-A, not a single utility cancelled a project because of its inability to recover Account 426.4 expenditures.

46. We find this argument to be unfounded speculation, without factual support, that is not necessary to address here. Accordingly, we reject this argument. For the reasons stated above, we confirm the result of Opinion No. 554-A.

The Commission orders:

For the reasons discussed in the body of the order, Opinion No. 554-A is hereby modified and the result sustained.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.